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PREFACE.

During the last 25 years, the injunctive process has greatly increased both as a principal and as an ancillary remedy. Being the only judicial instrumentality for the prevention of wrong, it has in the growing complications of business and industry, been resorted to with increasing frequency. While there has been no change in the controlling principles, yet there has been a definite expansion of the jurisdiction to meet modern needs, which had never been experienced when the population was less dense in towns, when industrial establishments were less important and conflicts between rival interests were less frequent.

In this book, I have tried my best to present to the profession a complete treatise upon the law relating to injunctions, stating and applying the principles controlling the granting of such relief in all cases and covering all the modern phases of the subject.

Matters which are especially live subjects of the day, such as strikes, boycotts, conspiracies, contracts in restraint of trade, election disputes, etc., have been considered at length.

Bearing in mind the well known *dictum* of *Lord Mansfield* that "the law does not consist in particular instances and rules; but the law consists of principles, which govern specific and individual cases, as happen to arise," I have dealt very elaborately with the controlling principles which guide the Courts in granting or refusing injunctive relief. These principles I have stated whenever possible in the *ipsima verba* of the great Equity Judges who have shaped and moulded the law in its present form.

Injunction being an equitable relief, the history of its development in the Courts of Chancery in England should be studied with great care. For this purpose, I have traced the creation and growth of the old Court of Chancery in England till the passing of the Judicature Act, and have defined clearly

the extent of the equity jurisdiction of the three Presidency High Courts, which inherited by their respective charters the old equity jurisdiction of the late Supreme Courts.

The book has been divided into 33 chapters of which the first four chapters are introductory and the last one deals with practice and procedure. The remaining 28 chapters have been divided in accordance with the different classification of obligations arising out of trust, contracts and torts. At the beginning of each chapter the general principles on which the injunctive relief to prevent the breach of that particular obligation is based, has been elaborately disscused and stated. Then the substantive law regarding that particular obligation has been given. And the chapter is generally concluded by illustrative cases as regards injunctive relief and other incidental matters.

It is very difficult to remember isolated decisions specially now a days when three dozens of reports are vying with each other in reporting larger number of cases. But the necessity of remembering the majority of these cases will be obviated, if once the trouble is taken of mastering the principles thoroughly and this I offer as an apology for the large number of pages devoted in elucidating the root principle in the introductory chapters as well as at the beginning of each chapter.

In preparing this book, I have derived much help from English and American text-writers, such as Story, Pomeroy, Smith, Eden, Drewry, W. Joyce, H. C. Joyce, High, Spelling, Lewis & Spelling, Kerr, Kerley, Williams, Lewin, Gale, Holland, Salmond, Copinger, Fulton, Maxwell, Broom, Lindley, Pollock, Anson, Bigelow, Hillard, Byrne, Halsbury and various other English & American writers and my indebtedness to them I have acknowledged in the body of the book.

But I am chiefly indebted to Prof. Pomeroy, the well-known author of Equity Jurisprudence, 6 vols. In the words of Justice *Pitt Taylor* (1) some chapters of this book is founded on

(1) Vide the preface of the 1st Edition of his Law Evidence where he acknowledged his indebtedness to Dr. Greenleaf, the well-known author of the Law of Evidence, for taking verbatim from him in many portions of his book.

Prof. Promeroy's Equity Jurisprudence "and I have (in these chapters) availed very largely of his labours, having followed to a considerable extent his general arrangement, having followed to a considerable extent the course even of his sections, and having borrowed many pages of his terse and luminous writing. My object has been to afford to the profession really useful and accurate information ; and whether that information were conveyed in my own or in another's language, has been to me, as it will doubtless be to my readers, a matter of indifference." I have also drawn very largely from Spelling on Injunctions and other Extra-ordinary Remedies, High on Injunction and H. C. Joyce on Injunction. But in drawing from them I have taken every care not to quote statements of law which are different from the law of British India. It will not be out of place here to reiterate that the Specific Relief Act was originally drafted by Dr. W. Stokes who framed the Bill on the basis of the New York Civil Code of 1862. The chapter on Injunction was framed with the help of the chapter on Preventive Relief of the New York Civil Code, and Kerr's treatise on the subject. So the Indian law on the subject on the whole is based on English and American law.

Amongst the Indian authors I must acknowledge my great indebtedness to Sir John Woodroffe, Sir D. F. Mul laand late Dr. Satish Chandra Banerjee whose books, I have constantly consulted.

The book is replete with quotations from the judgments of great judges of India and elsewhere. The quotations from English and American cases are given purposely in as much as the majority of the Indian lawyers do not possess English and American Law Reports in their libraries. Even to the busy practitioners in the presidency and provincial towns, these excerpts will be of much help, as much time will be saved thereby.

I have included in this work all the reported Indian cases from the beginning up to January 1934, whether they appeared in the official or non-official reports. I have also included in the book a large number of relevent English cases and a few leading American cases, as by the help of these the principles

controlling the granting or refusing the relief can be thoroughly understood.

I am conscious of the various shortcomings which will be found in the book. But my only apology is that these are unavoidable in the first edition of a book of this size.

I shall deem my labour amply rewarded if the book be of any help to the members of the Bench and the Bar.

KONNAGAR
31st January, 1934.

N. D. Basu.

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Page 79—In order to entitle the plaintiff to a temporary injunction, it is necessary for him to make out a *prima facie* case. *Marvi* v. *Ahmadali*, A. I. R. 1933 Sind. 244.

Page 117—Where the demolition of the party wall is likely to seriously endanger the plaintiff's buildings and the lifes of its inmates and property the court ought to grant temporary injunction. *Marvi* v. *Ahmedali*. A. I. R. 1933 Sind. 244.

Page 761—Right to open appertures on wall is subject to invasion of right of privacy of neighbour. *Kashi Nath* v. *Ram Jivan*, A. I. R. 1933 Lah. 847.

Page 821—In a suit for temporary injunction restraining the infringement of copy right and damages the plaintiff sought for issue of a temporary injunction restraining the defendants from selling their books, pending the disposal of the suit. The injury with which the plaintiff's were threatened was not irreparable and the Judge had amply safeguarded their interests by directing to keep separate and regular accounts of the sale of these books which they were ordered to produce in Court, if and when called upon to do so. *Held* that the interests of Justice did not require the issue of a temporary injunction. *Prabhu Das* v. *The Law Reporter*, A. I. R. 1933 Lah. 448.

Page 906.—Though a Candidate for election to a Local Board like any one else has a right to pursue his legal remedies, whatever they may be, save in exceptional circumtances, it is an abuse for a candidate who for some reason is shut out, to make his pursuit of the remedies in the Civil Courts a weapon for dislocating the electoral machinery and stopping an election. In the absence of any special reasons an order for injunction for that purpose should not be granted. *T. Balaji Rao Naidu*, A. I. R. 1933 Mad. 103.

Page 919—The Municipal Committee are not entitled to keep open as a channel or a pit passing through another person's land something which is used by way of drainage or sewerage *Dewan Chand* v. *Municipal Committee*. A. I. R. 1933 Lah. 1003.

Page 919—Suit by a servant for injunction restraining master from dismissing him is maintanable in case of servant serving under District Board. *Sheo Narayan* v. *Dist. Judge of Sajahanpur*, A. I. R. 1933 All. 826.

Page 934—Under s. 185, Companies Act, the Court has summary power to take step to preserve *pendente lite* the property which *prima facie* appears to belong to the Company. And apart from the Companies Act, the Court has

ample *ex debito justitiae* to pass *interim* orders for protection and preservation of the subject-matter in litigation under ss. 94 and 151, Order 39 and order 40 C. P. Code. Where the managing agents of a company admitted to be in possession of money belonging to the company, but claimed a lien over it: *Held* that the court had ample powers to ask them to deposit the amount in Court until the adjudication of their claim as lien-holders. *Haribans Prosad* v. *The National Sugar Mills*, A. I. R. 1933 Lah. 437.

Page 936—Where the directors are being excluded from participation in the management of the affairs of the company by the defendants it is clear that there is a continuing invasion of the plaintiffs' rights, and the case is a fit one in which the Court should grant a temporary injunction to prevent what is undoubtedly an injury to the plaintiffs' rights. *Gur Prosad* v. *Rameswar*, A. I. R 1933 All. 344.

Page 1021—In the light of cl. 21 of Letters Patent Madras the High Court can apply only such law or equity and rule of good conscience as would be applied by the mofussil court and therefore has no power to grant an injunction in a case that comes in appeal or revision from a subordinate court in the mofussil other than in accordance with order 39. Hence it can not grant an injunction to stay execution in lower court pending revision in High Court. *Karuppa* v. *Ponnuswami*, A. I. R. 1933 Mad. 500.

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SUPPLEMENT OF CASE-LAWS
(FROM 1934 TO MARCH, 1937).

P. 28.—The Calcutta High Court can hold in a proper case in British India that person is not within the jurisdiction of the Court. *Herbert* v. *Clark*, A. I. R. 1937 Cal. 172.

P. 31.—Where the application does not come under Order 39, rules 1 and 2, but the equities are in favour of the parties praying for injunction, the Court should exercise its inherent power and issue interim injunction to prevent abuse of the process of Court. *District Local Board* v. *Kundan Mal*, A. I. R. 1934 Sind 179.

P. 36.—Where a Court accepts an undertaking given by a party, its order amounts in substance to an injunction restraining him from acting in breach thereof and the Court has jurisdiction to deal with the breach of such order. *Gurunurthi* v. *Sella Perumal*, A. I. R. 1936 Mad. 651=1936 M. W. N. 519.

P. 43.—The granting or refusing an injunction is essentially a matter for the judicial discretion of the Court. Hence in a suit brought on a contract comprising an affirmative and a negative agreement, the Court is not deprived of its discretion under s 52, the Specific Relief Act, in granting or refusing injunction merely because a negative agreement has been complied with an affirmative agreement. *National Talkies* v. *Imperial Talkies*, A. I. R. 1936 Sind 119.

P. 74.—Where no *prima facie* case is proved, injunction should not be issued. *Bagomal* v. *Dharambai*, 156 Ind. Cas. 698=A. I. R. 1935 Sind 128.

P. 74.—The fact that the Court ultimately discovers that the suit does not lie or that it should fail on someother ground does not oust its jurisdiction under that rule. *Mahomed* v. *Mirza*, 152 Ind. Cas. 817=A. I. R. 1935 All. 106=1935 A. L. J. 139.

P. 79.—If the Court is satisfied that injury is likely to be caused to the plaintiff he had jurisdiction under Order 39, rule 2, to issue a temporary injuction. *Muhammad Ekram Khan* v. *Mirza Muhammad*, A. I. R. 1935 All. 106=1935 A. L. J. 139=152 Ind. Cas. 817.

P. 79.—In matters of issuing injunctions the law cannot make over nice distinctions and refuse the relief merely because there is a bare possibility that the evil against which an injunction is sought might be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Law will go further, according to the same practical and rational view, and balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief; should it be done, would be vast and overwhelming. When the facts of any case clearly bring that case within the above observations an injunction asked for should be issued. *Shanmugavel* v. *Venkataswami*, A. I. R. 1936 Mad. 202=43 M. L. W. 197; *Earl of Reipon* v. *Hobort*, 3 My. & K. 169.

P. 80.—The object of an interim injunction is to preserve status *quo*. Generally it is applied for and granted where there is an apprehension that damage to property of the plaintiff or, at any rate or some definite injury to the plaintiff who or is likely to be caused if a certain order is not made. The right criterion which is applicable to the matter of this character is that the Judge should ask himself the question whether the plaintiff is likely to suffer any damage or any irreparable damage and if he comes to the conclusion that the plaintiff would

not suffer any serious damage injunction should not be refused. *Shamsuddin* v. *Charen Chandra*, 152 Ind. Cas. 562=A. I. R. 1934 Cal. 715.

P. 84.—It is essential that the plaintiff must make out a *prima facie* case before an injunction or an attachment before judgment can be granted. *Durga Das* v. *Nalin chandra*, 61 C. 814=38 C. W. N. 771=A. I. R. 1934 Cal. 694. The plaintiff must prove some overt act towards the alienation of the properties such for example as negotiations or offers for sale, and the property is in danger of alienation before any order can be made under the provisions. *Ibid.*

P. 87.—Waste of money is not an irreparable injury under s. 54 of the Specific Relief Act, and as such an injunction is not to be given when the injury, if any, can be compensated by damages. *Pochiram* v. *Municipal Corporation*, A. L. R. 1934 Sind 151=151 Ind. Cas. 862=A. I. R. 1934 Sind 1360.

P. 108.—Where a belated application for injunction is filed for injunction against the returning officer on the eve of the date fixed for the election and such application could have been filed long before, injunction should not be granted which could put a stop to the carrying out of the election. *Mohammad* v. *Mirza*, A. I. R. 1935 All. 106=152 Ind. Cas. 817=1935 A. L. J. 139.

P. 114.—Where there is no balance of advantage, the Court should certainly not issue an injunction pending decision of suit. *Gopichand* v. *Habib Gul*, A. I. R. 136 Pesh. 184.

P. 117.—Where the effect of granting a temporary injunction will be to deprive finally and for ever the defendants of the right which they claim (which in this case was to hold the election without delay) and would be tantamount to granting the plaintiff the relief sought in this suit and might deprive the defendants of a right to which they are really entitled the temporary injunction shall not be granted for it would be grave injustice to the defendants for which they could not be adequately compensated afterwards. Moreover a Court cannot be asked to give the relief which forms the cause of action in the suit under colour of a temporary injunction. *Rochiram* v. *Municipal Corporation*, A. I. R. 1934 Sind 136. Before a plaintiff can proceed in obtaining the temporary injunction he must satisfy the Court that the corporation mischief or inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it. *Rochiram* v. *Municipal Corporation*, A. I. R. 1934 Sind 136=151 Ind. Cas. 862=A. L. R. 1934 Sind 151.

P. 139.—The grant of an absolute injunction resulting in an invasion of the defendant's legitimate rights to use his own property and restrains him from enjoying his own land is wholly illegal. An act is not unlawful in itself does not become unlawful merely because it interfere with other people's business or because the motive of the act is bad. It would be actionable if the defendant in so doing employ unlawful means or used force violence, intimidation or threat. *Mahomed* v. *Satyendra*, 61 C. L. J. 543=151 Ind. Cas. 66=59 L. L. J. 383=A. I. R. 1934 Cal. 752.

P. 139.—A suit for perpetual injunction lies under s. 54 of the Specific Relief Act when the defendant builds in plaintiff's land. *Tara Chiran* v. *Mahasin*, 35 P. L. R. 729=A. I. R. 1934 Lah. 851. Before a person who is not the owner of land can prevent another person from using the land to the same extent as himself, he must establish a right by acts of exclusive possession of a very definite nature. *Mahabir* v. *Sheo Shanker*, A. I. R. 1934 All 883.

P. 153.—It is a statutory rule that an injunction should only be granted when pecuniary compensation would not afford adequate relief, but it does not follow therefrom that a Court has always the power to grant a pecuniary compensation for a wrong, whenever an injunction is asked for. The Courts have recognized that when the issue of a mandatory injunction would involve the removal of a completed structure which entails no inconvenience and only a slight invasion of the plaintiff's rights, not committed wantonly or after protest, pecuniary compensation is the more appropriate remedy. But where considerable area of land including trees is affected by the structures and where the plaintiff proves his title to land and asks for possession as well as injunction for the removal of the structure, and there is nothing except expense and inconvenience to the defendant, monetary compensation in lieu of mandatory injunction should not be granted. *Nidar marti* v. *Ladooram*, A. I. R. 1936 Mad. 687=43 M. L. W. 512=162 Ind. Cas. 288.

P. 160.—Want of diligence or lack of prompt action on the part of the plaintiff is fatal to the relief of injunction claimed by him against an alleged encroachment. *Jai Narain* v. *Municipal Committee*, 157 Ind. Cas. 966=A. L. R. 1935 Lah. 157=37 P. L. R. 160.

P. 161.—The grant of mandatory injunction is an equitable relief which is discretionary with the Court to grant or to refuse. Ordinarily a great deal of delay in the institution of the suit would disentitle the plaintiff to the grant of mandatory injunction. However the question as to whether there has been unreasonable delay in the institution of the suit depends on the circumstances of each particular case. *Bhagwanti* v. *Mohan*, A. I. R. 1934 Lah. 847.

P. 164.—Where an encroachment has been made by one of the proprietors into the common land, and another proprietor files a suit for mandatory injunction the plaintiff should prove special damages and should take action within reasonable time; further he should show that the defendant had appropriated more area than would be allotted to him in case of partition. *Abdul Rahman Khan* v. *Daulat Khan* A. I. R. 1935 Lah. 250.

P. 165.—A suit for mandatory injunction is maintanable for removing *Kothas* on exemption ground by defendants who are proprietors of the land even without proof of special damage. *Nand Ram* v. *Jaichand*, 36 P. L. R. 253=A. I. R. 1934 Lah. 1009.

P. 165.—Where there is reasonable apprehension of damage to crops by overhanging trees on neighbouring land, the owner of the crops is entitled to an injunction to compel the owner of the trees to cut the overhanging branches. *Putraya* v. *Krishna Gota*, 40 L. W. 639=152 Ind. Cas. 579=1934 M. W. N. 1188=67 M. L. J. 442.

P. 165.—Where the defendant builds on the wall which is the exclusive property of the plaintiff and which is known to the defendant to be the plaintiff's exclusive property, the defendant by his action commit trespass on the wall of the plaintiff and the trespass continues and will continue to be committed as long as the wall of the defendant is not removed. Therefore the plaintiff is entitled to the issue of a mandatory injunction ordering the defendant demolish the portion built on the wall and it cannot be held that the plaintiff has lost his right to get the wall of the defendant which has been built on the top of his wall demolished, simply by delaying the institution of the suit for a few months. *Bhagwanti* v. *Mohan Singh*, A. I. R. 1934 Lah. 847.

P. 176.—Section 156 of the Specific Relief Act relates to permanent injunction and cannot be made directly applicable to temporary injunction which is governed by the provision of order 39, C. P. Code. *Raghubar Dayal* v. *Shanker Lal*, 152 Ind. Cas 98=A. I. R. 1934 All. 876.

P. 176.—No suit for injunction can lie except under s. 54 of the Specific Relief Act. *Balaraam* v. *Kesho*, A. I. R. 1935 Nag. 44=18 N. L. J. 123.

P. 176.—Where the plaintiffs property to which his rights have been established, is attempted to be wrongfully sold in execution, he has a right to restrain it by an injunction, since the result of allowing the sale to go on would be a multiplicity of proceedings in future between him and the would be purchaser. The principle enunciated in clause (*i*) of s. 56 of the Specific Relief Act cannot be applied to such a case, because there is no principle or precedent which compels a person whose interests are not at all affected by a decree and against whom that decree is not binding to satisfy that decree. *Prativa Nath* v. *Benode Behari*, 61 C. L. J. 75.

P. 176.—S. 56 (b) of the Specific Relief Act forces a suit for an injunction seeking to stay proceedings in a Court not subordinate to that from which injunction is sought. *Eshans Beg.* v. *Rahmat Ali*, 100 W. N. 1376.

P. 278.—Where a plaintiff in a mortgage suit has no right to a personal decree he cannot apply for enforcement of personal decree. His remedy is limited to bringing the mortgaged property to sale and he can only obtain a remedy from the date of the auction sale until that auction sale he has no right to take possession of the property or any income of the property and as such there is no jurisdiction for a Court to appoint a Receiver under Order 40 or to grant a temporary injunction under Order 39. *Ram Prassad* v. *Bishambhar Nath*, 150 Ind. Cas. 1025=A. L. R. 1934 All. 564=1934 A. L. J. 561=A. I. R. 1934 All. 772.

P. 525.—Where the allegation of the plaintiff is that he is in lawful possession of the properties and that his possession is threatened to be interfered with by the defendants, he is entitled to sue for a mere injunction without adding prayer for declaration of his rights. *Muthayyan* v. *Narayanaswami*, A. I. R. 1936 Mad. 936.

P. 578.—An owner cannot be restrained from enjoying his own property when it is not impossible for him and others to enjoy their rights. A person is entitled to enjoy his own property in any way he pleases provided that he does not create a nuisance or interfere with the rights of others. No injunction can be granted when there is no nuisance or interference with rights or apprehension thereof. *Syed Pitchai* v. *Deraj*, A. I. R. 1937 Mad. 21.

P. 592.—Where in a suit for injunction restraining the defendant from working the brick kiln on the ground that the smoke and soot emitted by the Chimney of the Kiln caused damage to the plaintiff's trees, the lower Court issued a perpetual injunction restraining defendant from "so working the brick kiln as not to cause any nuisance to the plaintiff: *Held* that that was the usual form in which injunctions were issued in England and in India. *Elahi Buksh* v. *Taraknath*, A. I. R. 1934 Pat. 306=148 Ind. Cas. 671.

P. 697.—Where a person institutes a suit for declaration that a particular street is a public street and that the defendants have obstructed it, praying for a perpetual injunction that the defendants should not obstruct the street, the plaintiff must establish that he is entitled to use a public highway which has been obstructed by the defendant and that he is inconvenienced by the obstruction. It is not necessary for him to prove that he has been inconvenienced in excess of any other

member of the public who may have right to use the public highway or that he has suffered some special damage of a kind not common to the public. So long as he can establish an injury to him or in common with the other members of the public who are entitled to use the highway, he is entitled to maintain his suit for removal of the obstruction. *Ghulam Rasul* v. *Ali Baksh*, A. I. R. 1936 Lah. 132 ; see also *Mandakinee* v. *Basanta*, 60 C. 1003=A. I. R. 1933 Cal. 884 ; *Municipal Committee* v. *Mahomed*, A. I. R. 1935 Lah. 196=16 Lah. 517 ; *Manzur Hosan* v. *Mahomed*, A. I. R. 1925 P. C. 36=52 I. A. 61=47 A. 151 (P. C.) ; A I. R. 1934 Lah. 701=35 P. L. R. 472.

P. 742.—In case of easement a plaintiff is not entitled to relief unless he is able to show that he is prevented from getting the quantity of light or air which is required for the ordinary purposes of inhabitancy or business as the case may be, according to the ordinary notions of mankind. If a room is sufficiently lighted no damage can be awarded. The Court is entitled in cases of easement to take into consideration other sources of light. The fact that there is some diminution of light is not sufficient to justify an award of damages or relief by injunction. *Ratan Chand* v. *Lal Chand*, 15 Lah. 320=147 Ind. Cas. 640=35 P. L. R. 292=A. I. R. 1934 Lah. 240. Damages and injunction are two remedies alternative in character given in respect of the same wrong, *viz*, an infraction of the legal right by way of easement ; and such an infraction takes place only when the defination is such as to amount to a nuisance. *Bhusanam* v. *Umapathi*, A. I. R. 1935 Mad. 870.

P. 749.—Where plaintiff sues for an injunction for removal of defendant's building on the ground that his right of case of light and air has been infringed by the defendant's building, it is the amount of the light and air that is left which matters, and not the amount of the light and air of which the plaintiff has been, deprived by the wrongful acts of the defendants. And if notwithstanding the erection of the defendant's building, the plaintiff's building remains substantially useful to him as business premises but has not been rendered useless the injury is one of a nature that can (without taking away the plaintiff's property from him) he compensated by money. *Pa Tundaung* v. *Eltermam's Rice Trading*, A. I. R. 1934 Rang. 144=12 Rang. 200=A. I. R. 1934 Rang. 146=151 Ind. Cas. 193.

P. 763.—In a suit for injunction for closing the drain from a latrine belonging to the defendant the Court should look at everything from a reasonable point of view. The law does not regard trifling and small inconveniences but only regards sensible inconveniences, injuries which sensibly diminish the contract, enjoyment or value of the property which is affected. *Riyasat* v. *Zamia*, A. I. R. 1935 Oudh 211.

P. 860.—In a suit the plaintiff charged the defendant of imitating his trade mark and applied for an injunction against the defendant under Order 39, rules 1 and 2. A comparison of the get-up of the parcels containing the products of the plaintiff and defendant respectively displayed a remarkable similarity which scarcely be said to be accidental. The plaintiff took immediate action by way of criminal prosecution as soon as he became aware of the alleged infringement. And it also appeared that if an injunction did not issue the balance of inconvenience would be against the plaintiff : *Held* on these considerations that the plaintiff was entitled to an injunction against the defendant under Order 39, rules 1 and 2. *Woodward Ltd.*, v. *Young Friends*, A. I. R. 1934 Sind 194.

P. 877.—Where in a suit by a company dealing with cloth against another company, also dealing in cloth, for an injunction restraining the latter from using a parti-

cular figure or mark on the goods on the ground that it would be calculated to cause any goods belonging to the defendant company from being taken as plaintiff's goods, no evidence is adduced to prove that any person has been deceived in the manner suggested by the plaintiffs, it being a *quia timet* action; the burden lies on the plaintiffs to satisfy the Court that an injunction should be granted to him at that stage upon the ground that unwary purchasers of goods who had not seen the figure marked on the plaintiff's goods might be reasonably led to think when offered goods of the defendants with their figure on it, that he was obtaining the plaintiff's goods. *Mohamed* v. *Abdulla*, A. I. R. 1936 Rang. 193.

P. 877.—If the relief which the plaintiff seeks can not be granted, no temporary injunction can be issued to the Court. *Raghubar* v. *Shanker*, A I. R. 1934 All. 876=152 Ind. Cas. 98.

P. 899.—The right conferred on people residing in a ward is merely to object to the preparation of an electoral roll within the prescribed time and to submit their grievances before the revising committee. The only other authority who can revise the order of revising committee is the District Magistrate. Subject to any order passed by the District Magistrate, the order made by the revising committee is final. Hence a Civil Court *prima facie*, have no jurisdiction to question the order of the District Magistrate, which under the rules, is declared to be final. *Mahammad Ekram* v. *Mirza Mohammad*, A. I. R. 1935 All. 106=1935 A. L. J. 139=152 Ind. Cas. 817. In the above case Court observed: "In some cases arising under the Cantonments Act, and the District Boards Act this Court has recently expressed the opinion that Civil suits are not maintainable. We may briefly refer to cases of 1933 All. 1603; 1933 All. 358=55A. 406 and 1933 All. 764=55 A. 1008. In the second mentioned case the Bench expressly dissented from the view expressed in 1923 Mad. 475=47 M. 585; and in the last mentioned case it was emphasised that where a special tribunal is created by an Act of the Legislature which states that the decision of that tribunal is final the High Court cannot interfere with the decision of that tribunal by way of appeal or revision." See also *Municipal Board* v. *Abdul Aziz*, A. I. R. 1934 All. 795.

P. 900.—Where plaintiffs filed a suit for a declaration that they were the only elected members and that the defendants were not the members, and applied for an *interim* injunction restraining them from attending the meetings: *Held* that the likelihood of injury and inconvenience was much greater if the defendants are not allowed to function as members and that the injunction should not be granted. *Shamsuddin* v. *Charu Chandra Biswas*, A. I. R. 1934 Cal. 621=60 L. L. J. 1=151 Ind. Cas. 675.

P. 954.—Where defendants are the members of the old executive committee of a certain society and carry on the management of the society's affairs pending valid election of new office bearers and the plaintiffs are new office bearers the validity of whole election is the matter in dispute in a suit, greater inconvenience and mischief will be caused by the issue of an adinterim injunction restraining the old committee from acting pending the disposal of the suit and injunction should be refused. *Diay* v. *Alfonso*, A. I. R. 1934 Sind. 180=28 S. L. R. 161.

P. 969.—Where the decree which the defendant was trying to execute was obtained by collusion and did not in any way affect the interest of the plaintiff. *Held* that order granting injunction was proper. *Prativa* v. *Benode*, A. I. R. 1936 Cal. 181.

P. 969.—Rule 5, Order 41, C. P. Code, applies to stay of execution in suit which are themselves under appeal and cannot be applied to a decree in a suit which is not under appeal, and an injunction cannot be granted becasue when a decree has been passed against a party who is himself seeking to obtain an injunction, the Court has no jurisdiction. Whatever, merely because an appeal is pending in another suit to grant an injunction on the ground that the property is in danger of being wrongfully sold in execution. *Sankara Iyer* v. *Muhammad*, A. I. R. 1936 Mad. 276=1936 M. W. N. 51=70 M. L. J 257=43 M. L. W. 383.

Where the injunction issued is one directed to the executing Court, it cannot be so issued by one Court to another which is not subordinate to it. *Gopi Chand* v. *Habib Gul*, A. I. R. 1936 Pesh. 184.

P. 970.—In a suit for recovery of money due on settled accounts, an application was filed for appointing of Receiver and for an order directing the defendant to produce certain account books not connected with the suit, in order that the plaintiff, if he gets a decree, may be in a better position to realise his decree-debt. The Court ordered the production; but the defendant refused, whereupon the Court passed an order compelling him to produce them failing which a complaint was to be laid for disobediance of Court's order: *Held*, that Order 39, Rule 1 (b) did not apply and that even if it applied, it was overridden by the special provision, *viz*, Order 21, rule 41, which comes into effect only after the passing of the decree, and that the order should be set aside. *Krishna Iyer* v. *Balkrishna Iyer*, A. I R. 1934 Mad. 199=66 M. L J. 498=39 L. W. 179=57 M. 635=148 Ind. Cas. 79.

P. 971.—A *hat* is a useful institution runs for the benefit of all the villagers, and unless a proper case is made out satisfactorily favouring an injunction against holding or continuing a *hat*, it ought not to be granted. *Jagadish Chandra* v. *Srinath Chandra*, 62 C. L. J. 123.

P. 973.—An interim injunction order was passed in a dispute between two competing cinemas regarding the right to exhibit a certain film first in the city: *Held* that this was a quarrel between business men about a business matter involving question of rupees, annas and pies and damages and not an injunction would be the ordinary and adequate remedy. *National Talkies* v. *Imperial Talkies*, A. I. R. 1936 Sind 119.

P. 1010.—The penalty prescribed in Order 39, rule 2 (3), Civil Procedure Code by way of detention in Civil prison of person committing a breach of an injunction applies to cases of injunctions issued under Order 39, rule 1, also though there is no specific provision to that effect in that rule. Drafting of Order 39 is not lucid and it is desirable to replace Rule 2 (3) by a new rule with such modifications as may be required. *Jang Bahadur* v. *Chhatila Koeri*, A. I. R. 1936 Pat. 23.

P. 1010.—The words 'in case of disobidience' in clause 3 of Rule 2 are wide enough to cover breaches of injunctions issued under Order 39, rule 1, for which breaches no penalty is elsewhere provided and they are not limited to breaches of injunction issued under rule 2 alone. *Hakim Muhammed* v. *Raja Ram*, A. I. R. 1935 Pat. 274=16 Pat. L. T. 309=155 Ind. Cas. 619. (*Ram Prasad* v. *Benares Bank*, 42A 98=58 Ind. Cas. 600; *Adaikhale* v. *Imperial Bank*, 95 Ind. Cas. 196= A. I. R. 1926 Mad. 574; *Kelon and Balbhaddar* v. *Bala*, A I. R. 1930 All. 387=127 Ind. Cas. 577 diss).

P. 1010.—An appeal was pending in which there was a *bona fide* contention between the parties as to title to the lands in dispute. Decree-holders are one of the parties to the appeal, had got an order to sell the property in execution of his

decree : *Held* that the sale of the land should be stayed till disposal of the appeal and the *status quo ante* should not be disturbed. *Badruddin* v. *Munni Lal*, A. I. R. 1934 Lah. 26=A. L. R. 1934 Lah. 554.

P. 1012.—S. 150, C. P. Code refers to the change of the territorial limits of a Court is jurisdiction by notification or by special order and not to a mere distribution of work among Courts exercising the same jurisdiction. Where therefore, a temporary injunction 'in a suit is filed in the Court of the Central Munsif is granted by that Court, and subsequently in the usual course of practice, the suit is allocated to the Court of the third Munsif, the latter Court has no jurisdiction to punish for breach of the injunction, as that is not the Court granting the injunction" or this the meaning of Order 39, rule 2 (3), C. P. Code : The Central Munsif's Court alone has jurisdiction to deal with the breach. *Dagunath* v. *Biswambor*, 61 C. L J. 543.

P. 1013.—The High Court in its originaly jurisdiction has power to make an order of injunction and also to order the arrest of a person disobeying it, though he be not beyond the limits of its ordinary original jurisdiction, and to transfer the same for execution to the District Judge within whose jurisdiction such person resides. Such orders are not *ultra vires* or without jurisdiction. And the District Judge acts in the lawful exercise of his powers in arresting the party in execution of the writ sent to him. *Bhagbat Prosanna* v. *Rai Rehai Mohan Das*, 61 C. 971=59 C. L. J. 463=38 C. W. N. 799=A. I. R. 1934 Cal. 818.

P. 1015.—A security bond furnished in pursuance of an order of the trial Court under Order 39, rule 1, C. P. Code, becomes ineffectual as soon as the disposal of the suit by it, and it does not enure to the benefit of the decree-holder so as to enable him to enforce the decree of the Appellate Court against the surety. *Kushi Ram* v. *Muket* ; 156 Ind. Cas. 912=37 P. L. R. 489=A. I. R. 1935 Lah. 718.

P. 1015.—In a case falling under Order 39, rule 1, it is necessary that the Court should order the petitioner to furnish security to compensate the decree-holder for any loss that may be caused by a temporary injunction against being sealed. *Badruddin* v. *Munilal*, A. I. R. 1934 Lah 26=A L. R 1934 Lah. 554.

P. 1017.—The fact that the question of title also may have to be individually gone into in deciding whether an injunction can be given or not is not any justification for holding that the suit is for a declaration of title and for injunction. There can be no objection to the maintainability of a suit for only an injunction. *Veerappa Chettiar* v. *Aruna Chalam*, A. I. R. 1936 Mad. 200=1936 M. W. N. 113.

P. 1021.—An appeal lies from the refusal of a Judge of the original side of the High Court to grant an interim injunction, but what the Court of appeal has to consider is simply whether or not the Judge who dealt with matter properly exercised the discretion which he undoubtedly possess. *Shamsuddin Ahmed* v. *Charu Chandra*, A. I. R. 1934 Cal. 713=152 Ind. Cas. 563.

P. 1021.—An order refusing to grant temporary injunction restraining the decree-holder purchases from obtaining possession of property purchased is one passed under s. 151 and not under Order 39, r. 1, and as such no appeal lies from such order. *Hari Chand* v. *Durga Devi*, 150 Ind Cas. 15=36 P. L. R. 142=A. L. R. 1934 Lah 55=A. I. R. 1934 Lah. 79.

THE PRINCIPLES AND PRACTICE OF INJUNCTIONS

CHAPTER I.

INTRODUCTION.

General Nature and Object.—The remedy of injunction was undoubtedly borrowed by the Chancellors from the "interdicts" of the Roman Law. An injunction may be either a final remedy obtained by a suit, or a preliminary and interlocutory relief granted while the suit is pending. In the first case it is a decree, in the second an order or writ (1). Whatever be its form, decree or order, the remedy by ordinary injunction is wholly preventive, prohibitory or protective. The same is true in theory and in form of a mandatory injunction, which always by its language prohibits the continuance of an act or of a structure, although in effect and in its essential nature it is wholly restorative, and compels the defendant to restore the thing to its original situation (2). While injunctions may thus be final, or preliminary and ancillary to other relief, they all depend upon the same general principles, doctrines and rules which determine and regulate the exercise of the jurisdiction to award them. In British India, the Specific Relief Act (3) and the Civil Procedure Code (4) contain the general provisions describing the cases in which an injunction may be issued, but these provisions do not materially alter the settled equitable principles obtained in the Court of Chancery in England prior to the passing of the Judicature Act of 1873, except in reference to injunctions against actions or judgments at law (5).

Old Anglo-Saxon Law.—The old Anglo-Saxon Courts were open-air meetings of the free men (6). There were no professional lawyers, there were no judges, as we understand them, nor learned persons specially appointed to preside. The judgments of the Courts proceeded from the meeting itself, not from the presiding officers, and were regularly preserved only in the memory

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(1) Vide s. 53 of the Specific Relief Act and Order 39 of the Civil Procedure Code.
(2) Vide s. 55 of the Specific Relief Act.
(3) Act I of 1877.
(4) Act V of 1908.
(5) Pomeroy's Equity Jurisprudence § 1337.
(6) Expansion of the Common Law, Pollock. p. 40.

of the suitors. This Anglo-Saxon Court was bound to declare what was the law covering the questions involved, rather than in equity, honesty and good conscience to do full justice to the litigants (1). During the Anglo-Saxon and early Norman periods, the law of England was, like that of all peoples in the first stages of their development, to a large extent consuetudinary. The Primitive Saxon Codes, except so far as they re-enacted certain precepts taken from the Holy Scriptures, or borrowed a few provisions from the then known remains of the Roman law, were chiefly redactions of prior existing customs. The Saxon local folk courts, and even the supreme tribunal of the Witanagemote, not being composed of professional judges, were certainly guided in their decisions of particular controversies by customs which, when established and certain, were considered as having the same obligatory character which we give to positive law (2).

Primitive condition of the law and the Courts.—In the reign of William the Conqueror the local folk courts of the Saxon polity were left in existence; and they, together with the manor courts of the Norman barons, continued to be the tribunals of first resort (to use a modern term) for the trial of ordinary disputes, through several succeeding reigns; but they gradually lost their functions and sunk into disuse as the more strictly professional tribunals grew in importance and extended their jurisdiction, until they were finally superseded by the itinerant justices appointed by the Crown or by the King's Court as representative of the Crown. William, however, made some most important innovations. In the *Curia Regis*, King's Court, which then, and for a considerable time afterwards, was a body composed of barons and high Ecclesiastics with legislative, judicial, and administrative functions as yet unseparated, he appointed a Chief Justiciary to preside over the hearing of suits. This creation of a permanent judicial officer was the germ of the professional Common-law tribunals having a supreme jurisdiction throughout England, which subsequently became established as a part of the government, distinct from the legislative and the executive. He also appointed, from time to time, as occasion required, itinerant justices to travel about and hold "pleas" or preside over the Shire Courts in the different counties. These officers were temporary, and ceased when their special duties had been performed, but they were the beginning of a judicial system which still prevails in England. The organization thus made or permitted by William continued without any substantial change, but yet with gradual modifications and progressive improvements, through several of the succeeding reigns. The business of the King's Court steadily and rapidly increased; under Henry II its judicial functions were finally separated from the legislative, and from that time until its abolition in 1874, it has continued to be the highest common-law tribunal of original jurisdiction, under the name of the Court of King's Bench. In the reign of Henry I itinerant justices

(1) Clark's The Law of Receiver.

(2) Pomeroy's Equity Juris prudence §§ 10 & 11.

were sometimes appointed, as by William the Conqueror, and under Henry II their office and functions were made permanent; but during the reign of Edward III. their places were filled and their duties performed by the justices of the Superior Courts, acting under special commissions empowering them to hold courts of oyer and terminer and of *nisi prius*. These itinerant justices—"justices in eyre"—went from county to county, holding pleas civil and criminal, and as a consequence the old local courts of the shire, hundred, and manor were abandoned as means of determining controversies between litigant parties. The King's Court, even after it became a purely judicial body, was attached to the person of the king, and followed him in his journeys and residences in different parts of the realm. The great inconvenience to suitors resulting from this transitory quality of the Court was remedied by Magna Charta which provided in one of its articles that "Common Pleas shall no longer follow the king." In obedience to this mandate of the Charter, justices were appointed to hear controversies concerning lands, and other matters purely civil,—known as "common" pleas,—and the new tribunal composed of these Judges was fixed at Westminster. Thus commenced the Court of Common Bench. The third superior common-law tribunal acquired its powers in a much more irregular manner. In arranging his government, William the Conqueror had established a board of high officials to superintend and manage the royal revenues, and a number of barons, with the chief justiciary, were required to attend the sittings of this board, in order to decide the legal questions which might arise. These judicial assessors, in the course of time, became the Court of Exchequer, a tribunal whose authority originally extended only to the decision of causes directly connected with the revenue, but its jurisdiction was subsequently enlarged, through the use of legal fictions, and thus made, to a certain extent, concurrent with that of the two other Superior Law Courts. The office of Chancellor was very ancient. It had existed before the conquest, and was continued by William. Under his successors, the Chancellor soon became the most important functionary of the King's government, the personal adviser and representative of the crown, but, in the very earliest times, without, as it seems, any purely judicial powers and duties annexed to the position. How these functions were acquired, it is the main purpose of this historical sketch to describe. The three Superior Law Courts whose origin has thus been stated have remained, with some statutory modification, through the succeeding centuries until by the Judicature Act of 1873, which went into operation on November 2, 1875, they and the Court of Chancery, and certain other courts, were abolished as distinct tribunals, and were consolidated into one "Supreme Court of Judicature" (1)

The local folk courts left in existence at the conquest, and even the itinerant justices and the Central King's Court, for a while continued to administer a law which was largely customary. The progress of society, the increase in

(1) Pomeroy's Equity Jurisprudence §§. 10, 11, 12.

importance of property rights, the artificial system which we call feudalism, with its mass of arbitrary rules and usages, all demanded and rapidly produced a more complete, certain, and authoritative jurisprudence for the whole realm than the existing popular customs, however ancient and widely observed. This work of building up a positive jurisprudence upon the foundation of the Saxon customs and feudal usages, this initial activity in creating the common law of England, was done, not by parliamentary legislation nor by royal decrees, but by the justices in their decisions of civil and criminal causes. The law which had been chiefly customary and therefore unwritten, preserved by tradition, *lex non scripta*, was changed in its form by being embodied in a series of judicial precedents preserved in the records of the courts, or published in the books of reports, and thus it became, so far as these precedents expressed its principles and rules, a written law, *lex scripta*. (1)

Causes which made a Court of Equity Necessary.—"The one which was perhaps the source and explanation of all the others consisted in the rigid character, external and internal, which the common law soon assumed after it began to be embodied in judicial precedents, and the unreasoning respect shown by the judges for these decisions merely as precedents. There was, of course, a time, before the character of the law as a *lex scripta* became well established, when this rigidity and inflexibility was not exhibited. The history of civilized jurisprudence can show nothing of the same kind comparable with the blind conservatism with which the common-law judges were accustomed to regard the rules and doctrines which had once been formulated by a precedent, and the stubborn resistance which they interposed to any departure from or change in either the spirit or the form of the law which had been thus established. The most that was ever allowed was the extension of a doctrine to facts and circumstances presenting some points of difference from those which had already formed the subject-matter of adjudication, but in which this difference was not so great as to require a substantial modification of the principle. The frequent occurrence of cases in which the rules of the law produced manifest injustice, and of cases to which the legal principles as settled by the precedents could not apply, and the unwillingness of the common-law judges to allow any modification of the doctrines once established by their prior decisions, furnished both the occasion and the necessity for another tribunal, which should adopt different methods and exhibit different tendencies (2).

When the same difficulty of rigidness, arbitrariness, and non-adaptation to the needs of society began to be severely felt in the administration of the law at Rome, the Magistrates, supplied the remedy by means which they already possessed. The prætors constantly invented new actions and defences, which preserved, however, a resemblance to the old ; and at length they boldly freed the jurisprudence from the restraints of the ancient methods, and introduced

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(1) Pomeroy's Equity Jurisprudence § 13.

(2) 1 Spence's Equity Jur. pp. 321, 322 ; Pomeroy's Equity Jurisprudence § 16.

the notion of *æquitas* by which the whole body of judicial legislation became in time reconstructed. All the process of development was completed without any violent or sudden change in the judicial institutions, and the Roman law thus preserved its unity and continuity. The English common-law judges, on the other hand, set themselves with an iron determination against any modification of the doctrines and rules once established by precedent, any relaxation of the settled methods which made the rights of suitors to depend upon the strictest observance of the most arbitrary and technical forms, any introduction of new principles which should bring the law as a whole into a complete harmony with justice and equity. In fact the English common law was always far behind the progress of the English people, and in very many particulars retained the impress of its primitive barbarism down to the present century (1).

The procedure of Common Law Courts furnished a fixed number of forms of action. Every remedial right must be enforced through one of these forms; and if the facts of a particular case were such that neither of them was appropriate, the injured party was without any ordinary legal remedy, and his only mode of redress was by an application made directly to the King. The initial step in every action was a written document issued in the name of the King, called a writ, which was both the commencement and the foundation of all subsequent proceedings. This document gave a brief summary of the facts, upon which the right of action was based, and contained certain technical formulas indicating what form of action was brought and what remedy was demanded. If it had been possible for suitors or the officers of the court to multiply these writs indefinitely, so as to meet all possible circumstances and social relations, there would have been no difficulty, and the procedure could have been expanded so as to embrace every variety of wrong and every species of remedial right which might subsequently arise in the course of national development. But there was absolutely no such possibility, and herein was the essential vice of the system. The nature of these writs was fixed, and could not be substantially changed. The precedents of all the writs which had been thus established were kept in the office connected with the chancery, called the *Registra Brevium*. If no writ could be found in the collection which substantially corresponded with the facts constituting the ground of complaint, then the plaintiff could have no action. To remedy this, at length Parliament interposed by Stat. 13 Edward I, Chap. I s. 24. As all writs for the commencement of actions were drawn up by the clerks in chancery, the legislature attempted to remove all the existing difficulties by enlarging the powers of these officials, and conferring upon them a wide discretion in the invention of new forms of writs, suitable to new conditions of fact, and providing for remedial rights hitherto without any means of enforcement. The general intent of the enactment was perfectly clear, but unfortunately it was not

(1) Pomeroy's Equity Juris prudence § 17.

liberally construed by the Common Law Judges. Thus the condition of the common law and the attitude of the common law courts rendered necessary a separate tribunal with an equitable jurisdiction, and a procedure capable of being adapted to a variety of circumstances, and of awarding a variety of special remedies (1).

Original Powers of the King's Council.—Under the early Norman kings, the Crown was aided by a Council of Barons and high ecclesiastics, which consisted of two branches,—the General Council, which was occasionally called together, and was the historical predecessor of the Parliament, and a special council, very much smaller in number, which was in constant attendance upon the King, and was the original of the present Privy Council.

It was composed of certain high officials, as the Chancellor, the Treasurer, the Chief Justiciary, and other members named by the King. This Special Council aided the Crown in the exercise of its prerogative, which, as has been stated, embraced a judicial function over matters that did not or could not come within the jurisdiction of the ordinary courts. The extent of this judicial prerogative of the King was, from its nature and from the unsettled condition of the country, very ill defined. It appears from an ancient writer that in the time of Henry I the Select Council generally took cognizance of those causes which the ordinary judges were incapable of determining. From later records it appears that the council acted on all applications to obtain redress for injuries and acts of oppression, wherever, from the heinousness of the offence, or the rank and power of the offender or any other cause, it was probable that a fair trial in the ordinary courts would be impeded, and also wherever, by force and violence, the regular administration of justice was hindered. The council also seems to have had a jurisdiction in cases of fraud, deceit, and dishonesty, which were beyond the reach of common-law methods (2).

Origin of Equitable Jurisdictions.—Side by side with this extraordinary or prerogative judicial function exercised by the King, or by the Select Council in his name and stead, there grew up a jurisdiction of the Chancellor. The Chancellor possessed and exercised an important ordinary—that is, common-law—jurisdiction, similar to that held by the common law courts, and wholly independent of the extraordinary prerogative jurisdiction originally possessed by the King and council, and afterwards delegated to the Chancellor himself (3). In addition to this ordinary function as a common law judge, the Chancellor began at an early day to exercise the extraordinary jurisdiction—that of *grace* —by delegation either from the king or from the Select Council. The commencement of this practice can not be fixed with any precision. (4) The practice of appealing directly to the King or his Chancellor grew quite common and finally

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(1) Pomeroy's Equity Juris prudence §§ 16 to 30.

(2) Pomeroy's Equity juris prudence: § 31.

(3) Pomeroy's Equity Jurisprudence § 32.

(4) Pomeroy's Equity Jurisprudence § 33

King Edward III, in the twenty second year of his reign, by a general writ, ordered that all such matters as were of grace should be referred to and despatched by the Chancellor or by the Keeper of the Privy Seal. This was a formal declaration of the existence of the Chancellor's court and of the distinction between its jurisdiction and procedure and the jurisdiction and procedure of the ordinary King's Courts or Common Law Courts. The Court of Chancery as a regular tribunal for the administering of equitable relief and extraordinary remedies, is usually spoken of as dating from the decree of King Edward III; but it is certain that the royal action was merely confirmatory of a process which had gone on through many preceding years (1). The delegation made by this order of the king conferred a general authority to give relief in all matters, of what nature soever, requiring the exercise of the prerogative of Grace. This authority differed wholly from that upon which the jurisdiction of the law-Courts was based. These latter tribunals acquired jurisdiction in each case which came before them by virtue of a delegation from the Crown contained in the particular writ on which each case was founded, and a writ for that purpose could only be issued in cases provided for by the positive rules of the common law. This was one of the fundamental distinctions between the jurisdiction of the English common-law Courts, under their ancient organisation, and that of the English court of Chancery. The principles upon which the Chancellor was to base his decision in controversies coming within the extraordinary jurisdiction thus conferred upon him were Honesty, Equity and Conscience. The usual mode of instituting suits in Chancery became, from this time, that by bill or petition, without any writ issued on behalf of the plaintiff (2).

In the earliest periods the jurisdiction was ill defined, and was in some respects even much more extensive than it afterwards became when the relations between the equity and the common law tribunals were finally adjusted. The nature of its procedure and the extent of its remedial functions operated to extend the authority and increase the business of the Chancery Court. It possessed and exercised the power, which belonged to no common law court, of ascertaining the facts in contested cases by an examination of the parties under oath,—the "probing their consciences,"—a method which gave it an enormous advantage in the discovery of truth, and which has recently been extended to all other tribunals. Again the Chancellor was able to grant the remedy of prevention, which was beyond the capacity of the law courts; and he seemed to have used this kind of relief with great freedom, unrestrained by the rules which have since been settled with respect of Injunction (3).

Origin of the writ of Injunction.—Equity consists, to a very great extent of Remedies and Remedial rights different from any which the law administered by means of its ordinary actions. They may be separated into

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(1) Pomeroy's Equity Jurisprudence § 34.

(2) Pomeroy's Equity Jurisprudence. § 35.

(3) Pomeroy's Equity Jurisprudence § 37.

three classes (I) Those which are entirely different from any kind of reliefs known and granted by the law. Of this class are the preventive remedy of Injunction, the restorative remedy of Mandatory Injunction, the remedies of Reformation, specific performance, and many others. (II) Those which the procedure recognizes, but does not directly confer, and the beneficial result of which it obtains in an indirect manner. A familiar example is the relief of Recession or cancellation (III) Those which are substantially the same both in equity and at law. Familiar examples of this class are the partition of land among co-owners, and the admeasurements of dower, the process of accounting and determining the balance in favour of one or other party, etc (1).

It is impossible to tell exactly when the first writ of injunction was issued by the Court of Chancery, but it is assumed that it is co-eval with its creation (2). We find that during the reign of Elizabeth, the practice of granting injunctions to stay waste and preserve property was very common (3). But prior to Lord Eldon's time the scope of this writ was rather restricted. During the many years he sat upon the woolsack this remedy was resorted to with increasing frequency, and with the development of equity jurisprudence, which has taken place since his time, the constantly increasing use of injunction as a phase of equitable jurisdiction is noted everywhere among the English speaking people (4). The writ of injunction bears some analogy to writs of prohibition and estrepment which were formally granted by courts of law in cases of waste, and seems to have superseded them in England, because they were found to be inadequate (5)

The writ of Injunction is peculiar to courts of Equity.—The writ of injunction is peculiar to courts of Equity, although there are some cases where courts of law may exercise analogous powers, such as by the writ of prohibition and estrepment in cases of waste (6). The cases however to which these processes are applicable are so few and so utterly inadequate for the

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(1) Pomeroy's Equity Jurisprudence § 110.

(2) Spelling on Injunctions and other Extraordinary Remedies.

(3) Moore's Reports (1688) p. 554 parch 41, Elizabeth.

(4) *Campbell* v. *Seaman*, 63 N. Y. 568, 582.

(5) H. C. Joyce on Injunction § 1.

(6) In the case of *Jefferson* v. *The Bishop of Durham* (1 Bos & Pull 105, 120 to 132), the subject of these remedies in the courts of law, in cases of waste, is very learnedly discussed. A single passage from the opinion of *Lord Chief Jastice Eyre* may serve to explain them and show their inadequacy as a remedy. "The state of the common law" said he, "with respect to waste has been so fully laid open by the bar that I need do little more than allude to it. At common law the proceeding in waste was by writ of prohibition from the court of chancery, which was considered as the foundation of a suit between the party suffering by the waste and the party committing it. If that writ was obeyed, the ends of justice were answered. But if that was not obeyed, and an alias and pluries produced no effect, then came the original writ of attachment out of chancery, returnable in a court of common law, which was considered as the original writ of the court. The form of that writ shows the nature of it. It was the same original writ of attachment which was and is the foundation of all the proceedings in prohibition, and of many other proceedings in this court at this day. That writ being returnable in a court of common law, and most usually in the court of common pleas, on the defendant appearing the plaintiff counted against him, he pleaded, the question was tried, and if the defendant was found guilty,

purpose of justice, that the processes themselves have fallen into disuse, and almost all the remidial justice of this sort is now administered through the instrumentality of courts of Equity. The jurisdiction in these courts then has its true origin in the fact that there is either no remedy at all at law or the remedy is imperfect and inadequate. The jurisdiction was for a long time most pertinaciously resisted by the Courts of Common Law, especially when it was applied by an injunction to stay suits and judgments in these courts. But it was firmly established in the reign of King James the First upon an express appeal to that monarch, and it is now in constant and unquestioned exercise (1)

Early origin—Analogy to Roman Interdicts.—It would be difficult to conceive of a government anywhere, effectively functioning as such, without the power, lodged somewhere, to prevent as well as to remedy wrongs. A writ or process, similar in all essentials was in use in the days of the Roman Empire, and the injunctive process has been in use in England almost from the foundation of the common law (2). In the Scotch Law, inhibition performs the office of injunction to restrain sale of land in prejudice of a debt, and to prevent credit being given to a wife to a creditor's detriment (2). So the antiquity of this writ is no less than that of equity as a distinctive branch of administrative justice. Indeed it may be regarded in the light of a virtual rescript of the praetorian interdict of the Roman Civil law. (3)

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the plaintiff recovered single damages for the waste committed. Thus the matter stood at common law. It has been said (and truly so) I think, so far as can be collected from the text-writers that at the common law this proceeding lay only agaist tenant in dower, tenant by the courtesy, and guardian in chivalry. It was extended by different statutes to farmers, tenants for life, and tenants for years, and, I believe, to guardians in socage. That which these statutes gave by way of remedy was not so properly the introduction of a new law as the extension of an old one to a new description of persons. The course of proceeding remained the same as before these statutes were made. The first act which introduced anything substantially new was that which gave a writ of waste or estreppment pending the suit. It follows of course that this was a judicial writ, and was to issue out of the courts of common law. But except for the purpose of staying proceedings pending a suit, there is no intimation in any of our text-writers that any prohibition could issue from those courts. By the Stat. of West. 2, the writ of prohibition from the chancery which existed at common law is taken away, and the writ of summons substituted in its place. And although it is said by Lord Coke, when treating of prohibitions at the common law, that it "may be used at this day" these words, if true at all, can only apply to that very ineffectual writ directed to the sheriff, empowering him to take the *posse comitatus* to prevent the commission of waste intended to be done. The writ directed to the party was certainly taken away by the statute. At least as far as my researches go no such writ has issued even from chancery in the common cases of waste by tenant in dower, tenants by the courtesy, and guardians in chivalry, tenants for life, etc, etc, since it was taken away by the Statute of West. 2. Thus the common law remedy stood with the alteration above mentioned, and with the judicial writ of estreppment introduced *pendente lite*." See 1 Law Quarterly Rev. 461, 462 ; *Story's Equity Jurisprudence*, 14th Ed. 1184 Foot note.

(1) Storey's Equity Jurisprudence 14th Ed. § 1184.

(2) Spelling & Lews on Injunctions § 1.

(3) Story's Eq. Jur. (12th Ed.) § 51. Halifax's Rom. Civ. L. Ch. 6 p. 102 ; Spelling's Injunction § 2. The term "interdict" was used in the Roman law in three distinct but cognate sense. In

Pursuing the analogy between Roman interdicts and injunctions we find the former divided into three sorts, *prohibitory*, *restitutory*, and *exhibitory*. Prohibitory, were those most commonly in use. In this form the praetor forbade something to be done; as when he forbade force to be used against a lawful possessor. By the *restitutory* writ he directed something to be restored to any one who had been ejected from the possession by force. The office of the *exhibitory* form was to compel a person or thing to be produced (1). It will be seen that the only form of interdict corresponding with the form of injunction chiefly in use at the present day was the prohibitory form. Indeed it is stated in the Institutes that the term "interdict" was properly applicable to this form only because to interdict is properly to denounce or prohibit; and that the restitutory and exhibitory interdicts should properly be called decrees, but that by usage they are called interdicts because they are pronounced between two persons (2). These interdicts were after a time, superseded by what were called extraordinary actions, in which judgment was pronounced without a preceding interdict after the manner of a beneficial action given in consequence of an interdict (3). But it is plainly apparent that while they were in use, Roman interdicts partook very much of the nature of injunctions in courts of equity, and were applied to the same general purposes. They were employed to restrain undue exercise of rights, to prevent threatened wrongs, to restore violated possessions, and to secure the permanent enjoyment of the right of property. (4)

Office of Injunction.—Without the powers to prevent as well as to undo wrongs, to restrain as well as to compel actions, to preserve as well as to reinstate the status of persons and things, courts of equity would possess but little power, and command but little respect as dispensers of justice and arbiters between man and man. The important restraining function is given effect to by the great extraordinary remedy of injunction, which may be appropriately termed the strong arms of courts of equity. Its office is to require

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the first place, it was often used to signify the edicts made by the praetor by which he declared his intention to give the remedy in certain cases, generally to preserve or restore possession. Then it was termed an *edictal*. In the second place it was sometimes employed to signify his order or decree applying the remedy in the given case before him, and was termed *decretal*. And finally, it was used to signify the very remedy sought in the suit commenced under the praetor's edict, and thus became identified in name with the action itself. *Livingstone* on the *Batture Case*, 5 Am. L and Jour. 271, 272. "It is in the latter sense" says *Story* "that the interdict of the Roman law bears a resemblance to the injunctions of courts of equity. It is said to have been called interdict because it was originally interposed in the nature of an interlocutory decree between two parties contending for possession, until the property could be tried. But afterwards the appellation was extended to final decretal orders of the same nature." Story's Eq. Jur. 12th Ed. § 866. The following definition of such order is given: "Interdicts were certain forms of words by which the praetor either commanded or prohibited some thing to be done; and they were chiefly used in controversies respecting possession or quasi possession. "Inst. Lib. 4 tit 15. Introd.

(1) Inst. Lib. 4, tit. 15. See 1; *Halifax* On civil Law Ch. 6 p. 101.
(2) Inst. Lib. 4, tit 15, sec. 1.
(3) Inst. Lib. 4. tit 15, sec 8.
(4) Spelling on Injunctions § 2.

a party to do or restrain from doing a particular thing according to the exigency of the occasion as indicated on the face of the writ. A court of equity has no power before the final hearing, or otherwise than by a decree to order a party to undo what he has done (1). It would be difficult to conceive of a government anywhere, effectively functioning as such without the power, lodged some where, to prevent as well as to remedy wrongs (2). Nor should it be employed in lieu of other extraordinary remedies more appropriate to give the relief required. (3).

Usually the sole purpose of granting a preliminary injunction is to stop the mischief complained of pending the action, and keeping things as they are until final hearing, when the question involved may be finally disposed of and full justice done to all parties interested (4).

Injunction and prohibition compared.—A writ of prohibition differs from an injunction in that it acts upon courts and not upon parties. "A prohibition is a remedy against an encroachment of jurisdiction, issues only from a superior court, is granted on the suggestion that the court to which it is directed has not the legal cognizance of the cause, and is directed to the Judge of the inferior court, as well as to the parties to the cause. An injunction on the other hand, where its object is to restrain proceedings in another court, is directed only to the parties; neither assumes any superiority over the court in which they are proceeding, nor denies its jurisdiction; but it is granted on the sole ground that from certain equitable circumstances, of which the court that issues it has cognizance, it is against conscience for the party to proceed in the cause (5). "The writ of prohibition" says Mr. Thomas Curl Spelling, "is that process by which a superior court prevents an inferior court or tribunal from usurping or exercising jurisdiction with which it has not been vested by law. It is an extraordinary writ, because it only issues when the party seeking it, is without other adequate means of redress for the wrong about to be inflicted by the act of the inferior tribunal. The writ was well known to the common law, being frequently resorted to, to prevent usurpations of jurisdiction, and to keep them within the jurisdictional limits prescribed for them by law. But the writ of prohibition lies only when the inferior court proposes to exceed its lawful jurisdiction as to the person or the subject matter, or in the enforcement of its rulings in a manner or by means not intrusted to its judgment or discretion. That the judicial tribunals should be restrained from unwarranted assumptions of power, and that an appropriate remedy to prevent their doing so should exist, needs no argument, such remedy being of vital importance to the due administration of justice, and the prevention of gross injustice. The writ of prohibition, like most extraordinary processes, is a specific remedy for a distinct species of wrongs.

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(1) *Bradbury* v *The Manchester & R. R. Co*, 8 Eng. Law Eq. 143.
(2) Spelling and Lewis on Injunctions § 1
(3) *Otta quechee* v. *Newton*, 57 Vt. 451
(4) Spelling on Injunctions § 3
(5) Eden on Injunctions p. 4.

and is analogous to others in the respect that it only issues because of the absence or inadequacy of ordinary remedies. While it resembles in some respects the equitable remedy by injunction, yet there are important distinctions between them. Like injunction, prohibition is granted to prevent, never to reverse action, and the exclusive use of prohibition, like an important use of injunction, restrains judicial proceedings. But there is a striking difference between the manner of employing the two remedies for the accomplishment of the last named purpose. Injunction never questions the jurisdiction, nor is addressed to the court; it only lies against the parties. Prohibition, on the contrary, takes no notice of the parties, ignoring for the most part any interest they may have in the matter forming the subject matter of the grievance, and goes direct against the court. Injunction may issue from a court of co-ordinate jurisdiction, but prohibition can only be addressed by a superior tribunal, possessing supervisory or appellate jurisdiction, to an inferior..... .....The writ was devised to prevent a failure or miscarriage of justice, for which the ordinary common law writs were inadequate. It is of very ancient origin, having been first granted exclusively by the King's Bench. But jurisdiction in prohibition was gradually extended to other courts of common law jurisdictions and in some cases might even be granted out of the court of chancery, and directed to the judges and parties to a suit, commanding them to desist from the prosecution thereof, upon suggestion that either the cause originally or some collateral matter arising therein did not belong to that jurisdiction, but to the cognizance of some other court. The earliest and most frequent resort to the writ in England was to prevent encroachment by ecclesiastical upon the civil courts.

"The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest that the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect of a writ of prohibition is to suspend all action, and to prevent further proceeding in the prohibited direction. On this principle a writ prohibiting the trial of a cause will not be issued where judgment has been regularly rendered, though it has not been formally entered. The remedy by prohibition is distinct from, and independent of, though collateral to, the proceeding sought to be prohibited." (1) "This writ resembles an injunction in that its issue depends upon judicial discretion and is an extraordinary remedy which will not be granted where an adequate remedy can be had by the ordinary process of the courts" (2).

Nature and Limits of the jurisdiction of the Court of chancery in England before the passing of the Judicature, Act, 1873—Under the old Chancery practice an injunction was

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(1) Spelling on Injunctions etc. §§ 1716-1720.

(2) H. C. Joyce on Injunction § 9 a.

a writ, issuing by the order and under the seal of a court of equity, and was of two kinds, the one was the *Writ Remedial*; amongst the most ordinary objects of which the following might be enumerated: to stay proceedings in courts of law, in the spiritual courts, the courts of admiralty, or in some other court of equity; to restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation, to restrain trustee from assigning the legal estate, from setting up a term of years, or assignees from making a dividend; to prevent the removing out of the jurisdiction, marrying, or having any intercourse which the court disapproves of, with a ward: to restrain the commission of every species of waste to houses, mines, timber, or any other part of the inheritence, to prevent the infringement of patents, and the violation of copyright either by publication or the theatrical representation; to suppress the continuance of public and private nuisances; and by the various modes of interpleader, restraint upon multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation. These however were far from being all the instances in which that species of equitable interposition was obtained. It would indeed be difficult to enumerate them all; for in the endless variety of cases in which a plaintiff was entitled to equitable relief, if that relief consisted in restraining the commission or the continuance of some act of the defendant, a court of equity administered it by means of the writ of injunction (1).

The other species of injunction was called the *Judicial Writ*, and issued subsequent to a decree. It was a direction to yield up, to quiet, or to continue the possession of lands, and was properly described as being in the nature of an execution.

A writ of injunction may be described as "a judicial process whereby a party is required to do a particular thing or to refrain from doing a particular thing according to the exigency of the writ" (2).

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(1) Eden on Injunctions, p. 1; Smth's Equity p. 724. It will be observed that this enumeration admits of a division into two strongly distinguished classes of cases; first those in which the wrong restrained is one which was formerly regarded as such in equity only, and in which, accordingly the ground of jurisdiction is the absence of a legal remedy altogether; secondly those in which the wrong restrained is both legal and equitable, in which therefore the ground of the jurisdiction is the superiority of the equitable to the legal remedy. The former class comprises,—first, injunctions which are designed to prevent the abuse of legal processes, under circumstances, which render it inequitable to apply them; secondly, injunctions protecting equitable estate and interests not recognised at law. The latter class includes— first injunctions protecting common rights as to the enjoyment of land secondly injunction protecting the pecular rights arising from patents copy rights and the use of trade marks. The enumeration above quoted does not indeed pretend to be exhaustive nor is it possible to specify every case to which the remedy of injunction might be applied. Wherever a plaintiff is equitably entitled *in rem or in personam* to restrain the commission or continuance of an act, he may be aided by means of injuction. "Smith's Principles of Equity pp. 724, 725.

(2) Story Eq. Jur. § 861; quoted by

Originally there were two kinds of Injunctions, namely common injunctions and special injunctions (1). The Injunction issued for default of the defendant either in appearing or answering, was called the common Injunction. The effect of this order was materially different in the Court of Chancery from what it was in the Court of Exchequer (2). A special injunction was usually obtained upon motion or certificate of bill filed, and affidavit verifying the material circumstances (3). The old distinction between common and special injunctions ceased to exist in 1852. The Chancery Procedure Act, 1852 (15&16 Vict. c. 86, c 5), abolished the common injunction (4), and all injunctions thence forward were special, that is to say, granted upon merits only, and at any stage of the suit after a bill was on the file, and, in an extremely urgent case an injunction had been granted upon petition and affidavit, although no bill had been on the file (5). Since the passing of the Chancery Procedure Act, 1852 (15&16 Vict. c. 86, s, 58) a *prima facie* case must now be made by the bill and supported by affidavit (6).

Injunctions are either *ex parte*, that is to say, granted upon the *ex parte* statement of the plaintiff, or are such as are granted upon hearing both plaintiff and defendant. The *ex parte* injunction is obtainable in urgent cases before the appearance of the defendant, and even without notice to him. It is an injunction that is granted where delay might produce irreparable injury to property, and is also granted in urgent cases to restrain proceedings at law (7).

Injunctions were usually divided into two classes, one to stay wrongful acts of a special nature (not being proceedings in other courts); the other to stay proceedings in courts of law and other courts. The first class of injunctions provided a remedy for the prevention of the commission, or for stopping or for the abatement of any act that is contrary to the principles of equity; this class of injunctions is obtained in a court of equity in those cases where there was no necessity for exercising the power such a court possessed of restraining proceedings in the Courts of law and other Courts (8).

Woodroffe in his Injunction s. 12 and cited in *U. S.* v. *Haggerty*, 116 Fed. 510, 515 ; *Wangelin* v. *Goe*, 50 Ill. 459, 463. As to the form of a writ of injunction in chancery, Vide Eden on Injuctions pp 367-387.

(1) William Joyce on Injunction p. 1.

(2) Vide Eden on Injunction p. 68.

(3) Eden. on Injunction p. 320.

(4) William Joyce on Injunction p. 1 "The common injunction was grantable as an order of course without reference to the merits of the case, upon the defendent making default in appearing, or in pleading, ansewring, or demurring within the time prescribed by the then practice of the Court, and was that which was most generally obtained in suits where the object of the injunction was to stay proceedings at law (vide Drewry on Injunctions p p. vii, viii, Introduction ; Eden Inj. 68. 'The common injunction stays proceedings at law till answer or further order." *Moore* v. *Usher*, 7 Sim. 383) "

(5) *Mayor of London* v. *Bolt*, 5 Ves. 130 ; Eden on Injunction p. 320.

(6) *Senior* v. *Pritchard*, 16 Beav. 473 ; *Lovell* v. *Galloway*, 17 Beav 1.

(7) Drewry p. vii citiug 8 Ves. 522 ; 2 Mer. 476 ; *Lane* v. *Williams*, 6 Ves 798 ; *Thorpe* v. *Hughes*, 3 My & Cr. 753 ; *William Joyce* on *Injunction* p p 1, 2.

(8) Eden on Injunction p. 2 ; William Joyce's Doctrines and Principles of the Law of Injunction pp. 1, 2.

The second class of injunctions provided a remedy, by means of which, a party was prevented from taking advantage of the fact that he was entitled to institute or continue proceedings against another party in a court, not being a court of equity ; and enabled a party who would not have a defence in such a Court, but nevertheless might be entitled to be relieved by a court of equity to stay the proceedings in that court, and to obtain a decision of a court of equity upon the question of his right to equitable relief (1).

Effect of the passing of the Judicature Act, 1873—Under the former procedure, the Court of Chancery was the only court, which had jurisdiction to restrain by injunction the doing of wrongful acts. The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) (2) empowered the common law courts to grant injunction only in particular cases. Statute 15&16 Vict. c. 83, also authorised those courts to grant injunctions in patent cases. But until the passing of the Judicature Act of 1873. (Stat. 36&37 Vict. c 68) the remedy by injunction continued to be, with the above exceptions, a remedy peculiar to the Court of Chancery.

By section 16 of the Act, all the jurisdiction of the Court of Chancery was transferred to the High Court of Justice (3). But this section confers no new jurisdiction (4). The jurisdiction transferred by this section is vested in all the judges of the High Court, irrespective of the division to which they are attached. In *Pinney* v. *Hunt* (5), *Sir G. Jessel M. R.* said : "All the Judges of the High Court have the same jurisdiction ; and it is clear that any judge may, if he chooses, when an action has been brought in the wrong division, retain the action and exercise the jurisdiction" (6). So now an injunction may be granted even in probate proceedings (7). Now "in every civil cause or matter commenced in the High Court of Justice law and equity shall be administered concurrently, and that whenever there is conflict between the rules of common-law and those of equity, the rules of equity shall prevail" (8). Section 25 (8) of the Act, enacts that "a mandamus or an injunction may be granted or a receiver appointed by an inter-locutory order of the Court in all cases in which it will appear to the High Court to be just or convenient that such order should be made ; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just ; and if an injunction is asked either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such

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(1) Eden on Injunction p. 3 ; William Joyce's Doctrines and Principles of the Law of Injunction. p. 2

(2) Vide ss. 81, 82. since repealed by the Statute Law Revision Act, 1883.

(3) *Warner* v. *Murdoch*, 4 Ch. D. 752-46 L J. Ch. 121 ; Kerr on Injunctions 6th Ed p. 3

(4) Vide *Re Mills' Estate* (1886) 34 Ch D p. 33 per *Cotton L. J* ; *Bow, Maclachlan & Co* v. *Owners of Ship Camusan*, (1909) 101 L. T. 167 P. C. at p. 170 per *Lord Gorrell*.

(5) (1877) 6 Ch. D. 98, 100, 101

(6) see also *Bradford* v. *Young*, 26 Ch. D. 656, *Re Gils*, 70 L. T. 757 : *Walker* v. *Gaskill* (1914) p. 192, 200.

(7) *Nicholas* v. *Dracachies*, (1875) 1 P. D. 72.

(8) Vide ss. 24, 25 of the Judicature Act, 1873.

injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title ; and whether the estate claimed by both or by either of the parties are legal and equitable." Section 45 of the Judicature Act of 1925, which has replaced section 25 (8) of the Judicature Act, re-enacts its provision with slight verbal alteration. Under the Common Law Procedure Act, 1854 (17 & 18 Vic. c 125) ss 79—82 (repealed by Stat 46 & 47 Vict. c. 49) and under special statutory jurisdiction, the Courts of Common Law had certain powers of granting injunctions. Such powers together with the jurisdiction formerly execised by the Court of Chancery in granting injunctions were, by the Judicature Act of 1873, conferred upon all the divisions of the High Court. This sub-section has not altered the principles on which the courts act in granting injunctions (1). It was not intended by the section "to give the right to an injunction to parties who before had no legal right whatever, but simply to give to the court, when dealing with legal rights which were under its jurisdiction independently of this section, power, if it should think it just or convenient to superadd to what would have been previously the remedy, a remedy by way of injunction, altering therefore not in any way the right of parties, so as to give a right to those who had no legal right before, but enabling the court to modify the principle on which it had previously proceeded in granting injunctions, so that where there is a legal right the court may, without being hampered by its old rules, grant an injunction where it is just or convenient to do so for the purpose of protecting or asserting the legal rights of the parties.....All that was done by this section was to give to the High Court power to give a remedy which formerly would not have been given in that particular case, but still only a remedy in defence of or to enforce rights, which according to law were previously existing and capable of being enforced in some one or of the different divisions which are now united in the High Court. The sole intention of the section is this : that where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity, then, whatever may have been the previous practice the High Court may interfere by injunction in the protection of that right (2)". Referring to the case of *North London Railway Co.* v. *Great Northern Railway Co*, *Buckly L. J.* said : "It was there held that the section gave no power to the court to grant an injunction in a case in which no court could have granted one before the Act" (3). The Judicature Acts, however, have not altered the principles on which the court acts in granting injunctions where principles have been established as just and convenient (4).

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(1) *Per James L. J.* in *Day* v. *Brownrigg* (1878) 10 Ch. D. p. 307 C. A ; *Gaskin* v. *Balls*, (1879) 13 Ch. D. p 329 C. A.

(2) *Per Cotton L. J.* in *North London Railway Co.* v. *Great Northern Railway Co*, 11 Q. B. D. 39,40 ; Kerr pp 4,5.

(3) *Per Buckley L. J.* in *Morgan* v. *Hurt*, (1914) 83 L. J K. B. 783, 786.

(4) Kerr on Injunctions p. 6 citing *Gaskin* v. *Balls*, 13 Ch. D. 329, per *Thesiger L. J.*

Origin of the jurisdiction of the British Indian Courts to grant injunction.—In civil suits (1) the law relating to the issue of injunction is contained in the Civil Procedure Code (2) and the Specific Relief Act (3) which supplements the Code, and occupies a middle ground between substantive law on the one hand, and procedure on the other (4). "Now Chapter IX, of the Specific Relief Act, deals with injunctions generally. As regards temporary injunctions, s. 53 expressly provides that they are regulated by the Civil Procedure Code. Chapter X lays down a number of conditions involving a grant of perpetual injunctions" (5).

The first statutory provision for the grant of injunction was made by Ss. 92, 93, 95 and 96 of the Civil Procedure Code (Act VIII. of 1859). Section 92 lays down that "in any suit in which it shall be shown to the satisfaction of the Court that any property which is in dispute in the suit is in danger of being wasted, damaged, or alienated by any party to the suit, it shall be lawful for the Court to issue an injunction to such party, commanding him to refrain from the doing the particular act complained of, or to give such other orders for the purpose of staying or preventing him from wasting, damaging or alienating the property as to the Court may seem meet." Section 93 enacts that "in any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied with any claim for damages or not, it shall be lawful for the plaintiff at any time after the commencement of the suit, and whether before or after judgment, to apply to the court for an injunction to restrain the defendant from the repetition or the continuance of the breach of contract and wrongful act complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right ; and such injunction may be granted by the court on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as to such court shall seem reasonable and just, and in case of disobedience such injunction may be enforced by imprisonment in the same manner as a decree for specific performance. Provided always, that any order for an injunction may be discharged or varied or set aside by the court, on application made thereto by any party dissatisfied with such order." Section 95 provides that before granting injunction, court may direct reasonable notice to be given to the opposite party. By section 96 provision is made for compensating the defendant for needless issue of injunction. The Specific Relief Act (I of 1877) was placed on the statute book on the 7th February, 1877. The Civil Procedure Code (Act X of 1877) which repealed Act VIII of 1859 got the assent of the Governor General on the 30th March, 1877. Chapter XXXV

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(1) Ss. 133, 142 and 144 of the Criminal Procedure Code (Act V of 1898) deal with the issue of injunctions by Criminal Courts in cases of nuisance. *Woodroffe* p. 1.

(2) Act V of 1908.

(3) Act I of 1877 ; *Jatiram* v. *Cohen*, 33 C. 203 (P. C.)

(4) Vide Specific Relief Bill—Statement of Objects and Reasons : *Woodroffe* p. 2.

(5) Per *Boys J.* in *District Board of Farrukhabbad* v. *Ikhlaque Husain*, A. I. R. (1933) All. 86=1932 A. L. J. 803 ; *Ram Kessin* v. *Pooran Mull*, 31 C. L. J. 259.

of that Act makes more complete provision for issue of temporary injunction only, the law regulating the grant of perpetual injunction having been provided by Chapter X of the Specific Relief Act.

Origin of Chancery Jurisdiction and Injunction.—in Supreme Courts in three Presidency towns—The Charter of the 43rd Elizabeth to the first East India Company and subsequent charters previous to that of the 13th Charles II, contained no provisions for administration of justice in India. By the charter of the 13th Charles II the Governor in Council was empowered to judge all persons belonging to the said Governor and company according to the laws of the kingdom and to execute judgment accordingly. By the 35th Charles II the company was empowered to constitute courts of judicature "consisting of a person learned in the civil law and two merchants, who were to decide according to equity and good conscience, and according to the law and custom of merchants." Subsequently a new company was formed by the amalgamation of the two companies. The first charter granted to the united company was that of the 13th Geo. I by which at each of the settlements of Madras, Bombay and Calcutta, a Mayor and nine Aldermen were appointed. This was the origin of the Mayor's courts in the three Presidency towns. These courts had power "to try, hear and determine all civil suits, actions and pleas, between party and party that shall or may arise or happen or that have already arisen or happened within the said towns or within any of the factories subject or subordinate thereto." In 1746, the Mayor's court at Madras was abolished owing to the surrender of that town to the French. The English obtained possession of that town in 1753 by the treaty of *Aix la Chapelle*.

In 1753, a fresh charter was granted by George the second to the East India Company which reiterated the powers of the previous charter given to the Mayor's Courts, with this reservation that the Mayor's Courts would have no jurisdiction to try suits or actions between the natives of India, where they were not submitted to their jurisdiction by the consent of parties.

The Judges of the Mayor's Courts were not required to be and never had been persons educated in English laws. So the Judges used to refer to the Board of Directors, on all intricate points of law. This led to much confusion and delay. To remove this and other difficulties in administration the regulating Act (13 Geo. III, c 63) was passed and the crown was authorized by that statute to establish a Supreme Court at Calcutta. Accordingly the Supreme Court of Calcutta was constituted by the charter of the 26th March, 1774.

In Madras a similar Supreme Court was established in 1800 by Stat. 39 and 40 Geo. III. c. 79 and charter dated the 26th December, 1800. Similarly a Supreme Court at Bombay was constituted by charter dated the 8th December 1829. The King was authorised to grant that charter by Stat. 4 Geo. IV. c. 71.

The Mayor's and other courts were abolished and all proceedings, pending therein were transferred to the Supreme Court and all the records of those Courts were ordered to be kept and preserved among the records of the Supreme Court.

The Supreme Courts used to exercise all their jurisdictions, civil and criminal, over all persons residing within specified limits.

S. 18 of the Charter dated 26th March, 1774, by which the Supreme Court of Calcutta was constituted enacted as follows: "And it is Our further will and pleasure, and We do hereby for Us, Our heirs and successors, grant, ordain and establish, that the said Supreme Court of Judicature, at Fort William in Bengal, should also be a Court of Equity, and shall and may have full power and authority to administer justice, in a summary manner, as nearly as may, according to the rules and proceedings of our High Court of Chancery in Great Britain; and upon a bill filed, to issue subpoenas, and other processes under the seal of the said Supreme Court of Judicature, at Fort William in Bengal, to compel the appearance and answer, upon oath, of the parties therein complained against, and obedience to the decrees and orders of the said Court of Equity, in such manner and form, and to such effect, as our High Chancellor of Great Britain doth, or lawfully may, under Our Great Seal of Great Britain." By similar provisions the Supreme Courts of Madras and Bombay were also vested with equitable jurisdictions. So prior to the establishment of the High Courts, the Supreme Courts of the Presidencies granted Injunctions following the principles and practice of the Court of Chancery in England (1).

In granting Injunctions, Indian Courts follow chancery practice.— In granting injunctions, which are equitable reliefs the Courts of India should be guided by the chancery practice in England. In *the Land Mortgage Bank of India* v. *Ahmed bhoy* 8 B. 35 at p. 67, the court observed: "Section 54 of the Specific Relief Act provides that when the defendant invades or threatens to invade the plaintiff's enjoyment of property, the court may grant an injunction, 'where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion, and also where the invasion is such that pecuniary compensation would not afford adequate relief. In applying these provisions we shall do well to be guided by the decisions of the Court of Chancery in England which, it cannot be doubted, are the source from which the above provisions have been drawn." Similarly in the *Shamnagger Jute Factory* v. *Ram Narain Chatterjee* (2), the court observed: "The granting of injunctions is now regulated by ss. 54 and 55 of the Specific Relief Act. But those sections had never been understood as introducing new principles of law into India, but rather as an attempt to express in general terms the rules acted upon by courts of Equity in England, and long since introduced in this country, not because they were English law, but because they were in accordance with equity and good conscience. It is necesary, therefore, to enquire on what principle the courts have acted in England and in India." In *Chunilal* v. *Mani Sankar*, (3) *Candy J.* observed: "It is unnecessary to quote

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(1) *Marsden* v. *Long*, Morton's Decisions, 24 (1800) cited in Woodroffe's Injunctions p. 2.

(2) 14 C. 189 at pp 199, 200

(3) 18 B. 616 at p. 623

authority for the proposition that there being no special custom involved we must be guided by the law of England. Mr. Whitely Stokes in his introduction to the Easement Act (the Anglo Indian Codes, Vol I p. 870) states that the law of England, being just, equitable and almoust free from local peculiarities, has in many cases been held to regulate the subject in India. Many cases could also be quoted in which the same proposition is laid down (1)." In *Callianji* v. *Narsi Tricum* (2) *Candy J.* said: "As I have already shown, rsection 57 of the Specific Relief Act (I of 1877) does in some respects apparently depart from principles which guide Courts of Equity in England. But the general principles remains that in granting an injuction the court must exercise its discretion" So it should only be carefully noted where the Indian law diverges from the English law. Where the law is similar the English cases can well serve as precedents in deciding cases by Indian Courts. As regards section 54 of the Specific Relief Act, which contains the rules as regards the grant of Perpetual Injunction, *Sargent C. J*, said (3):—"The power of the Courts of India to grant a perpetual injunction is determined by the Specific Relief Act I of 1877 s. 54, which provides that the Court may grant such an injunction when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property;" and "where the invasion is such that pecuniary compensation would not afford adequate relief. It is to be remarked that this limitation of the power of granting an injunction is identical with the conditions upon which the Court of Equity in England has always asserted the jurisdiction of granting preventive relief in cases of this nature."

As regards granting mandatory injunction, a Bench of the Calcutta High Court consisting *Sir W. Comer Petharam C. J.* and *Mr. Justice Wilson J* in *Benode Coomaree Dassi* v. *Soudamini Dassee* (4), observed: "That is how matters stand, so the English authorities, and I think, the Indian authorities are to the same effect. I had occasion to refer to the authorities in the case of the *Shamnaggar Jute Factory* v *Ram Narain Chatterjee* (5). I only refer to that case because on pages 200-201 a good many of the authorities are collected." It has already been stated that the Courts of India have adopted the chancery practice in respect of affirmative agreement in s. 57 of the Specific Relief Act (6). In this connection it should also be borne in mind that the first clause of s. 4 of the draft Specific Relief Bill provided that "except so far as they are embodied in this Act, the provisions of the law of England shall not be applicable to the kinds of relief hereafter maintained." But this clause was deleted by the Select Committee with the observation that "for some time at all events the rules of the Bill will have to be elucidated by reference to the decisions of the English Courts (7)."

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(1) See also *Ghansham* v. *Moroba*, 18 B. 474 (488); *Benode Coomari* v. *Saudaminy*, 16 C. 252 (266)

(2) 18 B. 702, (714)

(3) *Dhunjibhoy* v. *Lisboa*, 13 B. 252, 259

(4) 16 C. 252 at p. 266

(5) 14 C. 189

(6) Vide *Nusserwanji* v. *Merwanji*. supra.

(7) Report of the Select Committee on the Specific Relief Bill, Gazette of

In *Nusserwaaji* v. *Gorden*, (1) *Sargent C. J.* observed : "It is plain, however, that, apart from the special circumstances which determine whether court should, in its discretion, grant an injunction before the hearing of the suit, the same general principles must equally apply to the granting of a temporary injunction as to a perpetual injunction, and those principles must therefore, be sought in the Specific Relief Act."

So it is clear that in interpreting an Indian Act, help may be derived from English cases which are as much authoritative as the decisions of the Superior Courts of India, and where the Indian Law is similar or the same their authority is conclusive (2).

So in granting injunctions the Court should generally follow the words of the statute (3) and as regards granting perpetual injunctions, the rules for the guidance of the Courts are to be found in Chapter X of the Specific Relief Act, Ss. 54 and 55. The English cases to which reference can be made, are, after all, only of use as illustrative of the principles embodied in those sections from the aspect that the Courts of Chancery in England have had to treat matters of a similar description (4). In the absence of any law Mofussil Courts are also enjoined to act according to justice, equity and good conscience (5). S. 21 of the Letters Patent of the Calcutta High Court of 1865 also states : "And we do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law and equity and rule of good conscience, which the Court in which proceedings in such cases were originally instituted ought to have applied to such case." Similar provisions also occur in the letters patent of other High Courts (6). So when a statute enjoins that a matter must be decided by equity and good conscience, it means that it must be decided by the rules of English law if found applicable to Indian society and circumstances (7). Letters Patent of various Presidency

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India, November 1875, 1876. "The most of the many illustrations contained in the Bills are taken from the English Equity Reports. "*Statement of Objects and Reason.*

(1) 6 B. 266, 279 ; but see *Subba Naidu* v. *Haji Badsha*, 26 M. 168 ; *Amir Dulhin* v. *The Administrator General of Bengal*, 23 C. 351.

(2) 12 Q. B. D. 724 ; *Lovelock and Lewis* v. *Malabar Timber*. 13 Mad. L. T. 282.

(3) *Callianje* v. *Narsi Tricum*, 18 B. 702, 711.

(4) *Shadi* v. *Anup Singh*, 12 A. 436 (439) per *Straight* J.

(5) Vide Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887) S. 37, Madras Civil Courts Act. (III of 1873) S. 16. *Chunilal* v. *Munishamkar*, 18 B. 616, 623.

(6) Vide Letters Patent of Allahabad High Court s. 14 ; Letters Patent Bombay High Court s. 21 ; Letters Patent, Lahore High Court, s. 14 ; Letters Patent Madras High Court s. 21 ; Letters Patent Patna High Court s. 14 ; Letters Patent Rangoon High Court s. 20.

(7) *Waghela* v. *Sheikh Masludin* 11 B. 551 (561) (P. C.) ; *Maharana Sir Ram Lal Singji* v. *Vadilal*, 20 B. 61, 69 ; *Shamnagar Jute Factory* v. *Ram Narain Chatterji*, 14C. 189 ; 199 ; *Kashinath* v. *Ananta*, 24 B. 407=2 Bom. L. R, 407. Vide Letters Patent Calcutta High Court s. 19 ; Letters Patent Bombay High Court s. 19 ; Letters Patent Madras High Court s. 19.

High Courts also ordain that with respect to the law or equity to be applied to each case coming before the said High Courts in the exercise of their original civil jurisdiction, such law and equity shall be the law or equity which would have been applied by the said High Court to such case if these letters had not issued (1). So the law to be administered in the original side of the Presidency High Courts is the law or equity which would have been applied in the Supreme Court, modified by the legislative enactment since the establishment of the High Court in 1862 (1). The Supreme Court by its charter was vested with five distinct jurisdictions ; Criminal, Civil, Equity, Ecclesiastical and Admiralty, and it was enjoined to accommodate its process, rules and orders, to the religion and manners of the inhabitants of the country, so far as may consist with the due execution of the laws and the attainment of justice (2). So in granting preventive relief by means of injunction, the Courts of India can well follow the chancery practice as it obtains or obtained in England, and follow English cases in interpreting statutory provisions relating to Injunctions as contained in Chapter X of the Specific Relief Act and Order 39 of the Civil Procedure Code (3). In exercise of their discretion as to grant of a mandatory injunction under s. 55 of the Specific Relief Act, the Indian Courts should have regard to the principles laid down by the Courts in England in this connection (4) . The whole law of relief by injunction is a creation of equity, and in England, until the Judicature Act, 1873, was practically exercised only by the court of chancery. In India the granting of injunctions is regulated, by ss. 54 and 55 of the Specific Relief Act. The sections have never been understood as introducing new principles of law into India ; but rather as an attempt to express, the rules acted upon by the Courts of Equity in England (5). The question of a temporary injunction is dealt with by the C. P. Code, whereas the question of a permanent injunction is dealt with under the Specific Relief Act. But the principles applicable to the two proceedings are very similar. They both derive from the Court of Chancery and they postulate that a man will be punished if he does what his conscience tells him not to do. It is therefore impossible in disposing of temporary injunction to exclude from one's mind the English doctrine as contained in the Specific Relief Act (6).

Wider scope of the remedy in Indian Courts—Application of English law.—Although Indian Courts should always pay utmost respect to the wisdom and authority of English Courts, yet they are by no means bound

(1) *Madhab Chander* v. *Rajcoomar*, 14 B. L. R. 76=22 W. R. 370 ; *Grose* v. *Amritamayi*, 12 W. R. O. C. 13.

(2) Clarke's Rules of the Supreme Court of 5th Ed. By the Charter of 1726 all the Common and Statute law at the time extant in England was first introduced into the Indian Presidencies.

(3) See also *N. Govinda Rajalu* v. *Imperial Bank*, A. I. R. 1932 Mad. 180= 136 Ind. Cas. 346 ; *Ganga Singh* v. *Pirthi chand* ; A. I. R. 1922 Pat. 34=69 Ind. Cas. 891=1 Pat. 356 ; but see *Sultan Nawaz* v. *Rustomji*, 20 B. 701 (711) ; *Mahomed* v. *Jagannath*, A. I. R. 1925 Rang 327=89 Ind. Cas. 800=3 Rang. 230.

(4) *Chaturbhuj* v. *Man Sukhram*, 27 Bom. L. R. 73=86 Ind. Cas. 19.

(5) *Bhari Lal* v. *Sheolal* 3 N. L. R 144.

(6) *Deolsche* v. *Prestonje*, 89 Ind. Cas. 321=A. I. R. 1925 Sind. 345.

to adopt all the rules of procedure and practice, which the Equity Courts in England may have established (1) The justification for such a departure is that "the conditions of domestic life in the two countries have from remote times been essentially different, and in my opinion, it is owing to the difference in the conditions of domestic life alone that a custom which appears to me to be a perfectly reasonable one in India should be unknown in England" (2). So in the same case at p. 388 *Mahmood J.* said: "There is no statute law applicable to these Provinces to govern the decision of a case such as this, and I fully concur with the learned Chief Justice in his opinion that the importation of the English law, as to the invasion of privacy being unactionable, is not only not justified, but positively opposed to the customs, habits, and conditons of life of the populations living under the jurisdiction of this court. The *purda* system which in India is based both on religious and social notions may have its faults, but Judges take facts as they are, and in sitting here as Judges with a duty to adjudicate upon such dispute, we must take cognizance of those facts and administer justice between the parties" (3). So where new rights are recognized in India, by virtue of established custom of this country, a British Indian Court should not refuse to grant relief by Injunction simply because in such case the Court of Chancery in England does not grant any relief to the plaintiff.

"But, though, of course, the principles on which English Courts administer the remedy by injunction, must be taken to be those which the legislature meant to affirm in the Specific Relief Act, still the circumstances of this country are very different from those of England; and it would be a dangerous thing to assume that because the Courts in England have very rarely found it necessary to grant an injunction as between co-sharers in order to prevent

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(1) *Per Garth C. J. in the Oriental Bank* v. *Gobin Loll*, 10 C. 713, 737.

(2) *Per Edge C. J.* in *Gokul* v. *Radhe* 10 A. 358, 385; see also *Fazal Huq* v. *Fazal Huq*. 26 A. L. J. 49

3. By the usage of Gujrat the right of privacy is established in that province, see *Mani Sankar* v, *Trikam Nasi*, 5 B. H. C. R. A. C. J. 42; *Kuvarji* v. *Bai Javer*, 6 B. H. C. R. A. C. J. 143; *Keshab Harkha* v. *Ganapat Hira Chand*, 8 B. H. C. R. A. C. J. 143. In Punjab the rights of privacy has been acknowledged beyond doubt, vide *Nanuck Chand* v. *Lalla*, 21 P. R. 1869; *Ghoree* v. *Jaintee*, 91 P. R. 1869; *Shib doyal* v. *Golab*, 196 P. R. 1876; *Nihal Chand* v. *Maulu*, 108 P. L. R. 1903. In *Mahomed Abdur Rahim* v. *Birju Sahu*, 5 B. L. R. 676, the Court observed: "To hold that privacy is a right and the invasion of it an injury would lead, as it appears to me, to the most alarming consequences to the house property in towns." But the decisions of the Judges of High Court at Calcutta on the question as to whether any right of privacy exists or can exist by custom or otherwise or at all, are conflicting. 10 A. 382. In the United Provinces and Oudh the existence of the right of privacy does not depend on the caste or the creed of the person owning building or on the fact whether or not the building is used by ladies. It is a custom of the country and is protected as such. *Bhora Tara Chand* v. *Rayazi*, A. I. R. 1923 All. 404=73 Ind. Cas. 1040; *Fazal Huq*, v. *Fazal Haq* A. I. R. 1928 All. 201=26 A. L. J. 49=107 Ind. Cas. 584; *Abdul Rahaman* v. *Bhawandas*, 4 A. L. J. 445=A. W. N. 1907, 183=29 A. 582; *Abdul* v. *Emile*, 16 A. 69. In the Presidency of Madras, the invasion of privacy by opening windows is not a wrong for which an action will lie. *Swyyad Azuf* v. *Ameeru bibi*, 18 M. 163; *Komathi* v. *Gurunada Pillai*, 3 M. H. C. R. 141

multiplicity of suits or upon any other grounds, Courts in this country may not properly be somewhat less rigid in doing so. The circumstances of the country are different ; the position of co sharers and persons with particular interest in land are very different from those in England : and the interest of part owners may here require protection by injunction in classes of cases in which it is not necessary to grant it in England. There is a large number of cases which go to show that the remedy by injunction may in this country be given in cases between co sharers, when the circumstances of the case are such as to render it necessary, in order to secure those objects which, according to the law should be secured by injunction. Particularly, since the passing of the Specific Relief Act, an injunction may properly be granted, if on a consideration of the facts of the case, the Court thinks that, that remedy is necessary in order to prevent repetition of injury and multiplicity of suits (1)."

In *Anath Nath Dey* v. *Macknitosh Burn*, (2) in construing the words "irreparable injury" a somewhat wider application was accorded to it. In delivering the judgment *Phear J* observed : "I here advisedly have recourse to the principle of 'irreparable injury' although I am perhaps giving to it a somewhat wider application than would be accorded to it in English Courts of Equity on a motion of this kind, because I think that, under the circumstances of native society in this country, there may be such a thing as a trespass which works a truly irreparable injury, although it does not effect a lasting alteration of the subject of enjoyment, and is such as in England might be capable of being compensated for by pecuniary damages." Moreover "the question however, whether damages are a sufficient compensation does not, we think, present itself to the Courts of this country in precisely the same manner and form as it does to a Court of Equity in England. This latter Court in awarding damages under the Lord Cairn's Act exercises a discretionary power in departing from the Specific Relief which it had hitherto exclusively afforded ; and could scarcely be expected to take so broad a view of the subject as the Courts of this country whose 'duty' it is under the Specific Relief Act not to grant an injunction where damages afford adequate compensation" (3).

Origin and History of Equity Jurisprudence in America.—In America Equity Jurisprudence had its origin at a far later period than the jurisdiction properly appertaining to the Courts of Common Law. In many colonies, during their connection with Great Britan, it had either no existence at all, or a very imperfect and irregular administration. Ever since the Revolution, which severed the ties which bound America to the parent country, it has been of slow growth and cultivation ; and there are still some states

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(1) *Ram Chand* v. *Watson*, 15 C. 214, 219, 220 on appeal 18 C. 10 20.
(2) 6 B. L. R. 571
(3) *Dhunjibhoy* v. *Lisboa*, 13 B. 252 (262)

in whose municipal jurisprudence it has no place at all, and no place as a separate distinct science. (1)

The Equity Jurisprudence at present exercised in America is founded upon, co-extensive with, and in most respects conformable to, that of England. It approaches even nearer to the latter than the jurisdiction exercised by the Courts of Common Law in America approaches to the Common Law as administered in England. The Common Law was not, in many particulars applicable to the situation of the United States when it was first introduced. Whereas Equity Jurisprudence in its main stream flows from the same sources in the United States that it does in England, and admits of an almost universal application in its principles. The Constitution of the United States has in one clause conferred on the National Judiciary cognizances of cases in equity as well as in law; and the uniform interpretation of that clause has been that by cases in equity are meant cases which, in the jurisprudence of England (the parent country), are so called as contradistinguished from the cases at the Common law (2). So that in the Courts of the United States Equity Jurisprudence generally embraces the same matters of jurisdiction and modes of remedy as exist in England (3).

Now in most of the States, the Court of Equity as a separate tribunal has ceased to exist. By recent legislation of many of the States, the separate tribunals of law and equity have been abolished; the two jurisdictions have been so far combined that both are administered by the same court and judge; legal and equitable rights are enforced and legal and equitable remedies are granted in one and the same action; and the distinctions which hitherto existed between the two modes of procedure are as far as practicable abrogated, one kind of action being established for all judicial controversies (4).

Administration of Equity Jurisprudence in the Court of the United States.—In nearly all the states in which equity Jurisprudence is recognized it is now administered in the modes and according to the forms which appertain to it in England; that is, as a branch of jurisprudence separate

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(1) Story's Equity Jurisprudence 14th Ed. § 56.

(2) *Robinson* v. *Campbell*, 16 U. S. 212; *Parsons* v. *Bradford*, 28 U. S. 433.

(3) Story's Equity Jurisprudence § 57. "It must not be forgotten that the rules of Court of Equity are not, like the rules of the common law supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time,—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into equity Jurisprudence; and therefore in cases of this kind the older precedents in equity are of very little value. The doctrines are progressive, refined and improved; and if we want to know what the rules of equity are, we must look of course rather to the more modern than the more ancient cases." *Jessel* M. R. in *Knatchbull* v. *Hallet*, 13 Ch. D. 696, 710.

(4) Pomeroy's Equity Jurisprudence § 40

and distinct from the remedial justice of courts of common law. Chancery jurisdiction is conferred on the courts of the United States with this limitation. "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." The rules of the High Court of Chancery of England have been adopted by the Courts of the United States. And there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, which has been decided against in a State Court (1).

Value of American decisions in interpreting Indian Statutes regarding Injunctions.—The Specific Relief Act, was originally drafted by Dr. W. Stokes who framed the Act on the basis of the New York Civil Code of 1862. The Chapter on Injunction was framed with the help of the chapter on Preventive relief of the New York Civil Code, and Kerr's treatise on the subject. So the Indian law on the subject is based on English and American law. In *Malcolem* v. *Smith* (2), *Sir Lawerence Peel, C. J.* said : "The American cases are not authorities to which we must yield, as to the decisions of our own superior courts ; but they are in general well deserving of attention as able exposition of the law." The same learned Chief Justice in *Broddon* v. *Abbott* (3) again said "with respect to American decisions, they are not authorities with us though extremely valuable as guides to the formation of a correct judgment" (4).

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(1) Story's Equity Jurisprudence 14th Ed. § 58.

(2) Taylor's Reports, 283, 288 (1848) ; vide Woodroffe on Injunction p. 5.

(3) Taylor's Report, 342, 359, vide Woodroffe on Injunction p. 5.

(4) "Decisions are further divisible into two classes, which may be distinguished as authortative and persuasive. These two differ in respect of the kind of influence which they exercise upon the future course of the administration of justice. An authoritative precedent is one which judges must follow whether they approve of it or not. It is binding upon them and excludes their judicial discretion for the future. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight as it seems to them to deserve. It depends for its influence upon its own merits, not upon any legal claim which it has to recognise ? In other words, authoritative precedents are legal sources of law, while persuable precedents are merely historical. The former establish law in pursuance of a definite rule of law which confers upon them that effect, while the latter, if they succeed in establishing law at all, do so indirectly through serving as the historical ground of some later authoritative precedent. In themselvs they have no legal force or effect.

"The authoritative precedents recognised by English law are the decisions of the superior courts of justices in England. The chief classes of persuasive precedents are the following :

"(i) Foreign judgments and more specially those of the American Courts (*Castro* v. *R*, 6 A. C. p. 249 ; *S. Caramanga* v. *Stamp*, 5 C. P. D. p. 303)".

(ii) The decisions of Superior Courts in other portion of the British Empire, for example, Irish Courts (*In. re Parsons*, 45 Ch. D. 62 : 'Decisions of the Irish Courts though entitled to the highest respect, are not binding on English Judges)."

'(iii) The judgments of the Privy Council when sitting as the final court of appeal from the Colonies. (In *Leak* v. *Scott* 2 Q. B. D. 376, at p. 380, it is said by the Court of Appeal, speaking of such a decision. "We are not bound by its authority, but we need hardly say

In *Scoramanga* v. *Stamp* (1): *Cockburn C. J.* observed: "Although the decisions of the American Courts are of course not binding on us, yet the sound and enlightened view of American lawyers in the administration and the development of law—a law, except, so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respects and confidence in our part." Similarly in *Steel* v. *Dixon* (2) *Fry J.* in relying upon American authorities made the following observations: "In coming to that conclusion as I do upon principle, I am much strengthened by the American authorities to which my attention has been called." But in this connection the advice given by *Lord Halsbury* L. C. in *Re Missorie Steamship Co.* (3) should also be borne in mind: In that case the learned Judge observed: "We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice which seems to be increasing, of quoting American decisions, as authorities, in the same way as if they were decisions of our own courts is wrong. Among other things, it involves an enquiry which often is not an easy one whether the law of America on the subject in which the point arises is the same as our own." In *Imambandi* v. *Sheikh Haji Mutsuddi*, (4) *Mr. Justice Amir Ali* also said: "Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, judgments of foreign courts, to which the Indian practitioners cannot be expected to have access, based often on considerations and conditions totally differing from those applicable to or prevailing in India, are only likely to confuse the administration of Justice." (5)

In granting Injunction whether the power of presidency High Courts are restricted by statute.—The question is whether apart from the terms of the Civil Procedure Code the Presidency High Courts might issue an injunction under the general equity jurisdiction inherited by them from the Supreme Courts. *Mr. Justice Woodroffe* answering the question in the affirmative observed: "The Civil Procedure Code does not, as I have already held in *Hukum Chand Boid* v. *Kamalanand Singh* (6), affect pre-existing powers of the Court, unless it takes them away. In my opinion, this court had and has, independently of the Civil Procedure Code, power to make the order sought, and that power is not affected by the fact that section 492 and 493 of the Civil Procedure Code do not mention the particular injunction, which is the subject matter of this application. It has been the practice of this court to grant injunc-

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that we should treat any decision of that tribunal with the greatest respect and rejoice if we could agree with it.

"(iv) Judicial *dicta*, that is to say, statements of law which go beyond the occasion, and lay down a rule that is irrelevant or unnecessary for the purpose in hand."

(1) 5 C. P. D. 295 at p. 303.

(2) 17 Ch. D. 825; 28 C. W. N. 620 (p.c.)

(3) 42 Ch. D. 321 (330)

(4) 23 C. W. N. 50 at p. 64=45 C. 878=45 I. A. 73 P. C.

(5) But nevertheless the Courts are in the habit of relying on American authorities vide, *Sudamdih Coall Co* v. *Empire Coal Co*, 42 C. 942=31 Ind. Cas. 581.

(6) I. L. R. 33 Cal. 927

tions of the character sought ; for instance a similar injunction was granted in the case of *Mungle Chand* v. *Gopal Ram* (1) decided on the 6th August 1903 by Sale J., in which case, I am informed, my learned brother issued an injunction upon the defendant in the suit in this Court, restraining him from proceeding with a suit in Bareily. In the case of *Hart* v. *Grosser*, (2), an objection was taken on behalf of the defendant that on the authority of the Bombay decision cited (3) this court has no jurisdiction to grant an injunction. It was held however that this court had jurisdiction to restrain the defendant in the High Court suit from proceeding with the suit in the Small Cause Court" (4). So the jurisdiction of the High Court to restrain proceedings in courts outside its jurisdiction is governed by the same principle as those that govern the courts of Equity in England, namely, that the party, whom it is sought to restrain, must be within the limits of the jurisdiction of the High Court, so that in the event of an injunction being granted against him and being disobeyed, he would be subject to the process of contempt (5). The same question was raised in a recent Madras case (6), where *Curgenven J* answered the question in the affirmative observing : "But there is authority for the view that the High Courts, over and above the powers which they enjoy under the code, possess an eqitable jurisdiction derived from the old Supreme Court to issue an injunction in appropriate cases. This is the basis of the decision of *Peria Kamppan Chettair* v. *Ramasami Chettiar*, (7), where *Ramesam* and *Devadoss JJ.* held that the chartered High Courts have such a power following *Rash Behary Dey* v. *Bhowani Charan Bhose* (8) and *Mungle Chand* v. *Gopal Ram* (9). In the former of these two decisions *Woodroffe J.* who certainly is a high authority on questions of procedure, gave it as his opinion that a High Court had and has, independently of the Civil Procedure Code, power to make an order of the nature sought, and he answered in the negative the question whether there was anything in the Civil Procedure Code which took away that power. That case was decided under the old code, but I do not think that there is anything either in s. 151 or any other provisions of the new code which would deprive a High Court of powers derived independently of it" (10). So also so far the powers of High Court in the matter of issuing injunction on parties to an appeal pending before it are concerned, they are not circumscribed by the provisions of Order 39, rule 1 of the C. P. Code. Any order may be made by the court which ends of justice or expediency may require (11).

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(1) I. L. R. 34 Cal. 101 ; see also *Udiram* v. *Hyderaly*, 33 B. 469.

(2) 9 C. W. N. 248.

(3) *Jairamdas* v. *Zamanlal*, 27B om. 357.

(4) *Rashbehari Dey* v *Bhowani Charan Bose*, 34 C. 97 ; see also *Peria Kappa* v. *Rama Swami*, A. I. R. 1928 Mad. 491.

(5) *Vulcan Iron Works* v. *Bishumber Prosad*, 36 C. 233 ; See also *Jumna Das*, v. *Har charan Das*, 38 C. 405.

(6) *N. Govinda Rajula* v. *Imperial Bank of India*, A. I. R. 1932 Mad. 180= 35 L. W 168=136 Ind. Cas. 346.

(7) A. I. R. 1928 Mad. 491=109 Ind. Cas. 281.

(8) 34 C. 97

(9) 34 C. 101

(10) See also *Singaravelu* v. *Bala Subramania*, A I. R. 1926 Mad. 1126.

(11) *Nanda Lal* v. *Kali pada*, 137 Ind. Cas. 519=54 C. L. J. 317=36 C. W. N. 291=A. I. R. 1932 Cal. 353.

Power of Courts to grant injunction--Modern Expansion of jurisdiction.—Save and except in the case of Presidency High Courts (1), the power of granting injunctions in British India depends upon statute and is governed by the Specific Relief Act. A perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication (2). "Since an obligation includes every duty enforceable by law (3) this form of specific relief, it would appear, is applicable to all cases where one person can enforce a duty against another, or to use the correlative term, where one person is vested with a right which empowers him to constrain the other to adopt a particular line of conduct, or to do or abstain from doing a particular act. This right may or may not arise out of contract, and the remedy of injunction, by which preventive relief is granted by a court, may be held to be available throughout the whole range of the law. But the jurisdiction is carefully defined in Part III, Specific Relief Act, and to some extent circumscribed. It still remains however, a vast and expansive jurisdiction, and forcibly illustrates the power of equity, in spite of the fetters of codification, *to march* with the times, and *adjust its beneficial remedies* to altered social conditions and the progressive needs of humanity" (4). In numerous judicial opinions are to be found recognitions of the expansion which has been found necessary in the use of injunctive processes to keep step with the onward mach of civilization and to meet man's manifold needs (5). The powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations, and the protection of right can command. The jurisdiction of a court of equity depends upon the necessities of mankind, and the general principles of natural justice, which are recognised by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, to all ages and all people (6). That the remedy by injunction has become more common and therefore more prominent in modern or recent times is doubtless true, and this grows out of the ever changing conditions and evolutions in business incident to modern civilization. That the courts adapt themselves to these changing conditions and afford relief, thus preserving the rights of individual citizens from the combinations of many, is a tribute to the conservatism and wisdom of both bench and bar. There is nothing either strange, novel or extraordinary about it (7). The court

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(1) The Presidency High Courts possess the jurisdiction of the old English Chancery Courts as well as the jurisdiction given by the Specific Relief Act.

(2) Section 54 of the Specific Relief Act.

(3) Section 3 of the Specific Relief Act.

(4) Banerjee's T. L. L for 1906 p. 588.

(5) Vide *Oriental Bank* v. *Gobin Lall*, 10 C. 713, 737 ; *Gokul* v. *Radho*, 10 A 358 ; 385 ; *Manisankar* v. *Tricam Narsi*, 5 B. H. C. R. (A. C.) 42 ; *Kuvarji* v. *Prem Chand*, 6 B. H. C. R. (A C.) 143 ; *Keshav* v. *Ganpat*, 8 B. H. C. R. (A. C. 87 ; *Lachman* v. *Jumna*, 16 A. 162;) *Ram Chand* v. *Watson*, 15 C. 214 ; *Anath Nath* v. *Makintosh*, 6 B. L. R. 571.

(6) Lewis and Spelling, Law of Injunction § 3 ; Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887) s. 37 ; Madras Civil Courts Act (III of 1873), S. 16.

(7) Lewis and Spelling Law of Injunction § 3.

will give relief, where an applicant has a substantial right cognizable in law that is or is about to be invaded, and where injunction is necessary to restrain some act prejudicial to him.

"As a remedy for preventing wrongs and preserving rights" says *Mr. Joyce* "the injunction has been regarded as more flexible and adjustable to circumstances than any other process known to the law. The correctness of the estimate is seen in the readiness with which injunctions yield to the convenience o parties: the case with which damages are substituted in their place when justice and public interest so require; the facility with which a preventive and a mandatory injunction are made to co-operate so that by a single exercise of equitable power an injury is both restrained and repaired; and the facility with which injunctive relief can be applied to new conditions and adjusted to the changing emergencies of modern enterprise (1). In this connection it has been declared that a writ of injunction may be said to be a process capable of more modifications than any other in the law; it is so malleable that it may be moulded to suit the various circumstances and occasions presented to a court of equity. It is an instrument in its hands capable of various applications for the purpose of dispensing complete justice between the parties. It may be special, preliminary, temporary, or contracted; in short it is adopted, and is used by courts of equity, as a process for preventing wrong between, and preserving the rights of parties in controversy between them..... So, where too, if a party cannot at once comply with an injunction without being put to great expense or grievous annoyance, the court may order that the injunction do not commence until after a certain stated period." (2)

And the granting of injunction should not be denied on the ground that it would be a novel application of the injunction as the principle underlying the right to this remedy will be extended from time to time to meet new conditions and emergencies, provided statutory provisions are not violated (3). In this connection the following observations of *Clark J* are to be borne in mind: "It must be recognized that jurisprudence both legal and equitable, both in respect of the right and the remedy, is progressive, that it is exhaustive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy, and often a change in the form of the remedy."

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(1) *Toledo etc. R. Co.* v. *Pennsylvania Co.* 54 Fed. 746, per *Ricks J*: "It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore, in its time, without a precedent. If based on sound principles and beneficient results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the Chancellor to meet the constantly varying demand, for equitable relief."

(2) H. C. Joyce's Law relating to Injunctions § 2; see also *Att. Gen.* v. *Brad ford*, L. R. 2 Eq. 71, where the injunction was orderd to commence eight months after the date of the decree.

(3) H. C. Joyce's Law of Injunction § 2 A.

Grant of injunction under inherent power of Court.—Section 94 of the Civil Procedure Code lays down: "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold. "This clause is general and empowers the court to grant a temporary injunction (1). Section 151 of the C. P. Code lays down : "Nothing in the code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." In *Periakaruppan* v. *Rama swami* (2) the Madras High Court has held that it is doubtful whether a subordinate court in British India has power to restrain by injunction a party from prosecuting a suit in a foreign court Bur in *New Delhi Theatres* v. *Kailash Chand*, (3) the court observed : "The next contention put forward was that in view of the provisions of s. 94, Civil Procedure Code, temporary injunction can be issued to prevent the ends of justice being defeated only 'if it is so being prescribed,' i.e. only when the case comes within the provisions of the code (i.e. for example, in the cases provided for in O. 39, Rr. 1 and 2), and if the present case is not covered by the rules, the court could not grant an injunction in the exercise of inherent jurisdiction. This view appears to have been taken by the High Court of Madras in the same case [see. *Peria Karuppan* v. *Ramaswami* (4)] but this court has held that the. court has inherent power to act *ex delito justitiate* even in cases not covered by the provisions in the code: *Manohar Lal Mohabir Parshad* v. *Jai Narain Babua Lal* (5), *Kanshi Ram* v. *Sharaf Din* (6) and A.I.R. 1927 Lah. 833. In view of these authorities I overrule this contention. I have next to consider whether the order passed in the exercise of inherent jurisdiction was justifiable in the circumstances of the case. As regards this, it has been pointed out in *Manohar Lall Mahabir Parsad* v. *Jai Narain Babua Lal* (5) and A. I. R. 1927 Lah. 833 that it is well settled that when the jurisdiction of the Court is invoked under this section, i. e., s. 151, Civil P. Code, and it is called upon to act *ex delito justitiate* and to grant an injunction, it is necessary for the plaintiff to establish a strong *prima facie* case that there is no other remedy open to him to protect himself and that if the injunction asked for is not granted, irreparable injury or inconvenience would result".

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(1) *Vidyapurna* v. *Vicur*, 7 L. W. 328.

(2) A. I. R. 1928 Mad. 491.

(3) A. I. R. 1933 Lah. 73=140 Ind. Cas. 843

(4) A. I. R. 1928 Mad. 491.

(5) A. I. R. 1920 Lah. 436=55 Ind. Cas. 403.

(6) A. I. R. 1923 Lah. 144=73 Ind. Cas. 909.

CHAPTER II.

INJUNCTIONS IN GENERAL.

Injunction—defined.—Injunction is an order or judgment by which a party to an action is required to do, or refrain from doing, a particular thing. In the former case it is called a restrictive injunction, and in the latter a mandatory injunction. Before the passing of the Judicature Act, 1873, an injunction was formerly enforced in England by means of a writ of injunction, but writs of injunction have now been abolished and an injunction is now by judgment and order, but any such judgment or order has the same effect as a writ of injunction previously had (1). So it is clear that an injunction may the either a final remedy obtained by a suit, or a preliminary and interlocutory relief granted while the suit is pending (2). In the first case it is a decree, in the second, an order or a writ. Whatever be its form, decree or order, the remedy by ordinary injunction is wholly preventive, prohibitory, or protective (3). According to the old chancery practice an injunction may be described as a prohibitory writ, issuing out of chancery to restrain the defendant from using some legal right, the exercise of which would be contrary to equity and conscience, or from doing some act inconsistent with the admitted or probable legal rights of the complainant, and with the due preservation of the property affected by the act sought to be restrained (4). An injunction acts *in personam* and does not run with the land (5).

Injunction and old chancery practice.—It has been remarked by Mr. *Eden* (6) that wherever a plaintiff appears entitled to equitable relief if it consists in restraining the commission or the continuance of some act of the defendant, a court of Equity administers that relief by injunction. In many cases it enforces it by means of the process of the writ of injunction properly so called. But he proceeds to remark: "But as the known forms of that remedy are by no means adapted to every case in which the Court has jurisdiction to interpose, the prohibition has in numerous cases been issued and conveyed in the shape merely of an order in the nature of an injunction. And as the court treats the neglect or disobedience of all orders as a contempt, and enforces the performance of them by imprisonment, the object sought is equally attained by an order of this nature as by a writ. The distinction is consequently disregarded in practice, and these

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(1) R. S. C. Order. 50, r. 11; *Halsbury* Vol 17 p. 199.

(2) Vide Ss. 53, 54 of the Specific Relief Act and Civil Procedure Code Orde 39, rules 1 & 2.

(3) Pomerory's Equity Jurisprudence § 1337.

(4) Drewry's Injunc ion p. VII.

(5) *A. G.* v. *Birmingham*, 17 Ch D. 685; *A. G.* v. *Darking Union*, 20 Ch. D. 595.

(6) Eden on Injunction p. 290.

orders, though not enforced by means of the writ of injunction have indiscriminately obtained the name of injunctions" (1). According to Mr. *Jeremy* an injunction is a "writ framed according to the circumstances of the case, commanding an act which the courts regards essential to justice, or restraining an act which it esteems contrary to equity and good conscience" (2). This common law definition of injunction as given by the able exponent of equity jurisprudence it would be difficult to improve upon, and requires but little or no modification (3). As regards this definition Mr. Justice *Story* says: "If one were disposed to be scrupulously critical on such a subject he might object to the apparent contrast between justice in the first part of the sentence and equity and good conscience in the latter. The truth is that in this connection the words have the same identical meaning" (4).

The old distinction between common and special injunction ceased to exist even before the passing of the Judicature Act of 1873. The Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86, s. 58), abolished the common injunction (5), and all injunctions since then are special, that is to say, granted upon the merits only at any stage of the suit after a bill was on the file, and, in an extremely urgent case, an injunction was granted upon petition and affidavit, although no bill was on the file (6). A prima facie case must be made by the bill and supported by affidavit (7). Injunctions were either *ex parte*, that is to say, granted upon the *ex parte* statement of the plaintiff, or were such as were granted upon hearing both plaintiff and defendant. The *ex parte* injunction was obtainable in urgent cases before the appearance of the defendant, and even without notice to him. The *ex parte* injunction was frequently applied in cases of waste, infringement of patents and of copyright, and similar acts of injury to property, where delay might produce irreparable injury; and was not, except in a few rare cases of exception, applied to restrain proceedings at law (7).

Equitable remedies.—Equity consists, to a very great extent, of Remedies and Remedial Rights different from any which the law adminitsters by means of its ordinary actions; although it does, under certain circumstances, grant remedies which are legal in their nature, and are capable of being conferred by a judgment at law, namely, a mere recovery of money, or of the possession of specific lands or chattels. Many of the ordinary equitable remedies are derived

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(1) Eden on Injunction p. 290.
(2) Jeremy's Eq. 307.
(3) Spelling on Injunctions § 1.
(4) Story's Equity Jurisprudence § 1181.
(5) The common injunction was grantable as an order of court without reference to the merits of the case, upon the defendant making default in appearing or in pleading, answering, or demurring within the time prescribed by the then practice of the Court, and was that which was most generally obtained in suits where the object of the injunction was to stay proceedings at law (Vide *Drewry on Injunctions*, pp. vii, viii Introduction; Eden Inj. 68; *Moore* v. *Usher*, 7 Sim. 383.)
(6) *Mayor of London* v. *Bolt*, 5 Ves. 130.
(7) Drewry, p, viii citing 8 Ves. 522; 2 Mer 476; *Lane* v. *Williams*, 6 Ves. 798; *Thorpe* v. *Hughes*, 3 My & Cr. 753; *Joyce* p 2.

directly from the nature of the primary right which they are intended to protect. A large class of remedies are thus based upon and exactly fitted to the nature of the primay right; these remedies are distinctively equitable, and their intimate correspondence with the primay rights which they enforce has, more than anything else perhaps, led to the mistake, of confounding all equitable primary rights with remedial ones, and of supposing that equity is wholly a system of remedies. The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use. Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties. Notwithstanding this unlimited power of expansion and invention, here are certain species of equitable remedies which have become well established and familiarly known, and which are commonly designated by the term "equitable remedies" whenever it is used. They may be separated into three classes: (*a*) Those which are entirely different from any kind of reliefs known and granted by the law. Of this class are the preventive remedy of Injunction, the restorative remedy of Mandatory Injunction, the remedies of Reformation, Specific Performance, and many others (1). (*b*) Those which the legal procedure recognizes, but does not directly confer, and the beneficial results of which it obtains in an indirect manner. A familiar example is the relief of Recession or Cancellation. A court of equity entertains a suit for the express purpose of procuring a contract or conveyance to be cancelled, and renders a decre conferring in terms that exact relief. A court of law entertains an action for the recovery of the possession of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages, and although nothing is said concerning it, either in the pleadings or in the judgment, a contract or a conveyance, as the case may be, is virtually rescinded, the recovery is based upon the fact of such recession, and could not have been granted unless the recession had taken place. Here the remedy of cancellation is not expressly asked for, nor granted by the court of law, but all its effects are indirectly obtained in the legal action. It is true, the equitable remedy is much broader in its scope, and more complete in its relief; for its effect, are not confined to the particular action, but by removing the obnoxious instrument they extend to all future claims and actions based upon it. (*c*) Those which are substantially the same both in equity and at the law. Familiar examples of this class are the partition of land among co-owners, and the admeasurement of dower, in which the final relief granted by equity is the same as that obtained through the now almost obsolete legal actions (2). This

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(1) *Provincial Municipality* v. *Lahman*, 57 Fed. 324 (330)

(2) *Pomeroy's Equity Jurisprudence* §§ 108, 109, 110.

mode of classifying equitable remedies was both common and convenient while the jurisdictions of law and equity were wholly distinct and confided to different tribunals, but has lost much of its efficacy since they have been conferred upon the same court, and under the reformed procedure, which combines legal and equitable remedies in one action, it has become positively misleading (1).

Classification of equitable remedies on different principles.— Abandoning, therefore, this method of arranging and describing remedies, as no longer adopted to the administration of equity jurisprudence at the present day, it is desirable to classify them according to their essential na'ures. Although the number and variety of particular remedies are great, those in common use may be grouped into certain general classes according to their essential elements, which are based upon the primary right violated and the wrongful act or default in combination. These classes are the following: (i) *Declarative Remedies*, or those whose main and direct object is to declare, confirm, and establish the right, title, property, or estate of the plaintiff, whether it be equitable or legal. The remedies of this class are often granted in combination with others, and in fact they sometimes need other kinds of relief as preliminary step to make them effective; but on the other hand, they are often granted by themselves, unconnected with anything else (ii) *Restorative Remedies*, or those by which the plaintiff is restored to the full enjoyment of the right, property, or estate to which he is entitled, but which use and enjoyment have been hindered, interfered with, prevented, or withheld by the wrong doer. The legal remedies of this kind are simple recoveries of possession either of land or of chattels. The equitable remedies of restoration are much more various in their form and complete in their effect. Like those of the first class, they are often granted in combination with other kinds of relief, and frequently need some other special equitable remedy, such as cancellation or reformation of instruments, to remove a legal obstacle to the full enjoyment of the plaintiff's right and to render them efficient in restoring him to that enjoyment. (iii) *Preventive Remedies*, or those by which violation of a primay right is prevented before the threatened injury is done, or by which the further violation is prevented after the injury has been partially effected, so that some other relief for the wrong actually accomplished can be granted. The ordinary injunction, whether final or preliminary, is the familiar example of this class; the mandatory injunction is essentialy a restorative remedy. (iv) *Remedies of Specific Performance*, or those by which the party violating his primary duty is compelled to do the very acts which his duty and the plaintiff's primay right require from him. The remedies of this class are very numerous in their special forms and in respect to the juridical relations in which they are applicable. (v) *Remedies* of Reformation, Correction, or Re-execution, by means of which a written instrument, contract,

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(1) *Pomeroy's Equity jurisprudence* § 110

deed, or other muniment of title, which for some reason does not confrom to the actual rights and duties of the parties thereto, is reformed, corrected, or re-executed. (vi) *Remedies* of Recession or Cancellation, or those by which an instrument, contract, deed, judgment, and even sometimes a legal relation itself subsisting between two parties, is, for some cause, set aside, avoided, rescinded or annulled. (vii) *Remedies* of Pecuniary compensation, or those in which the relief consists in the award of a sum of money. (viii) *The Remedy of Accounting.* This is closely analogous to the remedy of compensation, and is generally used in connection with an auxiliary to some forms of it. It is also a legal remedy, but has become to a great extent equitable (1).

Injunction is a kind of specific Relief.—Section 5 of the Specific Relief Act lays down that specific relief can be given by preventing a party from doing that which he is under an obligation not to do. Such specific relief is called preventive relief (2). Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual (3).

Specific Relief, meaning of,—"Specific Relief" may, in brief, be explained as relief in specie. It is a remedy which aims at the exact fulfilment of an obligation So a specific relief is directed to the obtaining of the very thing that a party under the law is entitled to ask for (4).

Injunction is a preventive relief—Injunction has been styled the "strong arm" of equity to be used only to prevent irreparable injury to him who seeks its aid. The object of this order or decree is generally protective and preventive rather than restorative, though it is not necessarily confined to the former. It is ordinarily used to prevent wrongs and injuries either to persons or to their property. It may also in some cases be used to reinstate the rights of persons to property of which they have been deprived. And it is said to be the most efficient, if not the only, remedy to stay irreparable injury, and to punish those who disobey the order of a Court granting the writ (5). 'The object of the process of injunction is both preventive and protective. It seeks to prevent a meditated wrong and not to redress an injury, which can usually be done only at law, and then to protect the party against any unlawful invasion of his rights" (6).

"Formerly the writ was often used to compel as well as to restrain action, but owing to the growth and extension of jurisdiction of Courts of equity (7) to administer relief by decreeing specific performance, and of courts of law (7) by mandamus, injunction is at present day confined in practice to its uses as a

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(1) Pomeroy's Equity Jurisprudence § 112.

(2) Specific Relief Act s. 6.

(3) Specific Relief Act s. 52.

(4) T. L. L. 1906 pp. 1, 3.

(5) H. C. Joyce's Law of Injunctions § 2A. An injunction is for the most part preventive, and cannot ordinarily be employed to correct a wrong already done, or restore to a party rights of which he has been deprived." H. C. Joyce's Law of Injunction § 41.

(6) *Per Monell J.* in *Palmer* v. *Foley*, 45 How. Prac (N. Y.) 110, 118.

(7) In British India the Courts are and have been both Courts of law and of equity. There has been no fusion of jurisdiction. *Ghanasham* v. *Moraba*, 18B. 474, 484 ; *Begam* v. *Muhammad*, 16A. 344. 358 ; *Woodroffe's* Injunction p. 9.

preventive remedy, and is seldom used by Courts in the exercise of a mandatory function (1). It is not used for the purpose of punishment or to compel persons to do right, but simply to prevent them from doing wrong. Indeed it may be said that the use of the writ is confined to cases of a threatened actual wrong to the person or property of the person seeking it, and will not be granted to prevent mere abstract injury unconnected with actual damage or detriment. Still it must not be supposed that the mandatory function of the writ has become obsolete from non-usage. It is still resorted to upon special occasions demanding it, as the only means of attaining substantial justice. The jurisdiction of mandatory injunction is firmly established, and, though rarely exercised, its existence cannot be questioned".(2)

Injunction and Specific Performance.—Relief by Specific performance, Receiver and Injunction belong to same branch of the law (3). The ground upon which a court of Equity gives specific performance is generally the same as that upon which it grants an injunction, namely the inadequacy of the legal remedy. The remedy of injunction, like that of specific performance, proceeds upon the theory that there are duties the performance of which, as they stand, ought to be insisted upon—duties in regard to which an election, as an equivalent, to violate the same upon the terms of making compensation cannot be permitted ; not indeed that all the duties the violation of which may be enjoined without regard to the question whether damages for a violation could be accurately computed, but that there are duties of a preventory nature within the operation of the remedy of injunction as well as within that of specific performance (4). These duties may here, as well as in the law of Specific performance, be termed primary, since they are not substitutional (4).

The only difference in this respect between the two remedies is that specific performance is directed to compelling performance of an active duty, while injunction (though sometimes in a subsidiary way requiring an act to be done) is generally directed to preventing the violation of a negative one. This difference however is very great. The remedy of specific performance, relating, as it does to active duty, deals in the main only with contracts, while the remedy of injunction, having to do with negative duties, deals not only with contracts, but also with torts, and with many other subjects, among them subjects of a purely equitable nature (5).

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(1) The jurisdiction to grant a mandatory injunction is exercised with caution and is strictly confined to cases where the remedy by damages is inadequate for the purpose of justice. Vide *Kerr* on Inj. p. 40 ; see section 55 of Specific Relief Act.

(2) Spelling on Injunctions etc. § 11. 'Formerly the Court of Chancery would not direct the performance of a positive act, bat by restraining a defendant from allowing things to remain as they were, as, for example, from allowing buildings to remain on land, indirecly accomplished, the same result. An order so framed was called a mandatory order ; but now all mandatory injunctions are in indirect form, and not in indirect form, hitherto used." *Halsbury* Vol. XVII p. 199.

(3) *Woodroffe's* Injunction § 7.

(4) Story's Equity Jurisprudence § 1181 note.

(5) Story's Equity Jurisprudence § 1181.

A decree of specific performance, as its name implies, enforces the performance of some specific act. An injunction is the converse of this: it judicially forbids the performance of some specific act or series of acts (1).

"From the nature of the case the remedy of specific performance only applies to cases arising out of contract; since it rarely happens apart from contract that one person has a right to the performance of a particular act on the part of another. On the contrary, the cases for which injunction is a proper remedy have usually no connexion with contract. There are, indeed, cases in which one person contracts with another not to do a certain act; and such negative contracts may, as we have seen, be specifically enforced by means of injunction (2), and if a contract though affirmative in form, is negative in substance, an injunction may be granted (3). But in the absence of a negative stipulation, an affirmative contract will not generally be indirectly enforced by an injunction restraining an act inconsistent with the contract (4), and a negative stipulation will not be enforced if unreasonable or oppressive (5), or if, though negative in form, it is affirmative in substance (6)."

Injunction and Receiver.— There are many striking resemblances between that branch of the extra-ordinary jurisdiction of equity, which is invoked in the appointment of a receiver and that to which recourse is had in the granting of preliminary or interlocutory injunctions. The two remedies are alike branches of the general preventive jurisdiction of courts of equity, and are prospective rather than retrospective in their operation, being invoked on suitable occasions, for the prevention of future injuries, rather than for the redress of grievances already committed. Thus the object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining the questions of right involved, it seeks to prevent the further perpetration of wrong, or the doing of any threatened act which may result in injury to the rights of the party complaining. So the object sought in appointing a receiver *pendente lite* is to prevent injury to the thing in controversy, in *res* and to preserve it unimpaired for the security of all parties in interest, that it may be disposed of in accordance with the final decree of the court. Both are extraordinary remedies in the strict sense of the term, as distinguished from the usual and accustomed modes of procedure at law and in equity, since they seize upon and control the subject-matter of the litigation *in limine*, and without awaiting the final determination of the court, or its final process. Neither remedy has the effect of changing the title, or of creating any special lien upon the property,

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(1) *Jones* v *Dankerville* (1909) 2 Ch. 440.

(2) *Lumley* v. *Wagner*, 1 De G. M. & G. 615; *Manchester Ship Canal Co.* v. *Manchester Race Course Co.* (1901) 2 Ch. 37; *Grimston* v. *Cunningham*, (1894) 1 Q. B. 125.

(3) *Metropolitan Electric Supply Co.* v. *Ginder* (1901) 2 Ch. 799.

(4) *Whitwood Chemical Co.* v. *Hardman*. (1891) 2 Ch. 416, overruling *Montague* v. *Flockton*, 16 Eq. 189; *Holford* v. *Acton & Council*, (1898) 2 Ch. 240.

(5) *Ehrmann* v. *Bartholomew*, (1898) 1 Ch 671; *Robinson* v. *Heuer* (1898) 2 Ch. 451.

(6) *Davies* v. *Ferguson*, (1891) 2 Ch. 27; *Von Joel* v. *Hornsy* (1895) 2 Ch. 774. Smith's Principles of Equity pp 721, 722.

their common object being only to secure its preservation, until the rights of all parties in interest may be fully ascertained and judicially determined. And both remedies rest, to a considerable extent, in the sound judicial discretion of the court to which the application is addressed, to be governed by a consideration of all the circumstances of the case (1).

Another point of resemblance between these extraordinary equitable remedies, when invoked *in limine*, is that they are of a provisional or auxiliary nature, and frequently employed merely as an adjunct to the principal relief sought by the action, and not always or necessarily the ultimate or principal object of the action. And the granting of either species of relief, upon an interlocutory application, is not a final determination of any questions of right or title which may be involved in the litigation; and the court, in passing upon the application, in no manner anticipates its ultimate judgment upon the rights of the parties, the fundamental idea upon the preliminary application being only to preserve the fund or property in litigation *in statu quo*, for the benefit of whoever may finally be determined to be entitled thereto. The Court, in granting the relief only recognizes that sufficient cause is presented to warrant its summary interference *in limine*, and until a final hearing on the merits, without expressing, and frequently without having the means of forming an opinion as to the ultimate rights of the parties. Indeed, upon an interlocutory application for a receiver, if plaintiff shows an apparent title to the thing in controversy, and presents a *prima facie* case, and if the court is satisfied that there is imminent danger of loss unless it shall interpose the aid of a receiver, it may grant the relief without further investigation into the merits. And since the court is bound to express its opinion only so far as to show the grounds upon which it determines the application, it will usually confine itself to the point which it is called upon to decide, without going into the merits of the case at large (2)

In instituting a comparison between these principal extraordinary remedies of equity, the most striking point of difference between them is found in their effect or operation upon the possession of the fund or property in litigation. An injunction never operates to change possession, a receiver always and necessarily has this direct and immediate effect. An injunction cannot be used to take property out of the custody and control of one party and place it in the possession of another, while in appointing a receiver, a court of equity at once wrests possession from the defendant; assumes and continues by its officer the entire management and control of the property or fund; frequently changes its form or absolutely disposes of it, and usually retains this exclusive possession until the rights of all persons in interest are finally adjusted. An injunction merely restrains action, and aims at preserving the subject-mater, as well as the attitude of all parties in interest thereto, in *statu quo*; while a receivership changes at once the attitude of all parties toward the subject matter of the litigation; divests defendant's possession, and interposes the officer of the court

(1) High on Receiver § 737.

(2) *Skinners Company* v. *Irish Society*, 1 Myl & Cr. 162; High on Receivers § 738.

as a custodian of the property or fund, for the common benefit of all parties concerned (1). The appointment of a receiver operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the receiver, except by permission of the Court (2)

So the principal element of difference between these two important remedies lies in this ; that an injunction is strictly a conservative remedy, merely restraining action and preserving matters in *statu quo*, without affecting the possession of the property or fund in controversy ; while the appointment of a receiver is usually a more active remedy, since it changes the possession as well as the subsequent control and management of the property. From the points of resemblance already indicated between these two extra-ordinary equitable remedies, it is not to be inferred that the appointment of a Receiver necessarily follows from the granting of an injunction, or that the two remedies are necessarily inseparable. And while it frequently happens that the courts are called upon to administer both species of relief in the same action, and at one and the same time, yet it by no means follows that because an injunction is granted a receiver must be appointed, and the two are to be treated as distinct and independent matters. A court of equity may therefore refuse a receiver, although the case presented a fitting one for an injunction, and although an injunction has already been granted (3). It has been held, however, that the power of appointing a receiver, when the relief is necessary for the collection and preservation of property pending an injunction suit, it is a necessary incident to the power of granting an injunction (4). There is another distinction between the case of an injunction and that of a receiver. That distinction seems to be that, while in either case it must be shown that the property should be preserved from waste or alienation ; in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged ; while in the latter case, a good *prima facie* title has to be made out. So, the Court should not interfere by appoining a receiver unless a strong case is made out (5).

A Court has jurisdiction to attach property and appoint a Receiver only in the matter of the custody of the property in dispute, and in cases when the suit comes to an end. An injunction cannot be maintained after a claim is dismissed (6).

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(1) High on Receivers § 739.

(2) *Mahommed* v. *Mahommed*, 21 C. 85 (91).

(3) High on Receivers §§ 15, 16 ; See *Hall* v. *Hall*, 3 Mac. & G, 85, where it is said by the Lord Chancellor that "the rights to those different remedies are essentially distinct, and depend upon totally different grounds and circumstances." See also *Nasarranje* v. *Shahjadi*, 24 Bom. L. R. 378=66 Ind. Cas. 768, where the court disallowed temporary injunction but observed : "what the plaintiffs ought to have asked for was the appointment of a Receiver, so that the court might take charge of the property through its Receiver pending the settlement of the dispute between the plaintiffs and the defendant."

(4) High on Receivers § 16.

(5) *Chandidat Jha* v. *Padmanand*, 22 C. 459, 465.

(6) *Mohecooddeen* v. *Ahmed* 14 W. R. 384.

Forms of Injunction.—An injunction may be either temporary or perpetual. Temporary injunctions are made pending the hearing of the case upon the merits, and are generally expressed to continue until a specified time, or until the further order of the Court. They may be granted at any period of the suit and are regulated by the Code of Civil Procedure (1). Perpetual injunctions are such as form part of the decree made at the hearing upon the merits and perpetually restrain the defendants from the assertion of a right or from the commission of an act, which would be contrary to the rights of the plaintiff (2). A Court may also pass a restraining order, which is an interlocutory order made by a court of equity upon an application for an injunction and as part of the motion for a temporary injunction by which the party is restrained pending the hearing of the motion (3). There is a well known distinction between a restraining order and a temporary or preliminary injunction; which is sometimes important to remember. A restraining order is generally granted without notice to the opposite party, and is intended only as a restraint on him until the propriety of granting a temporary injunction can be determined, and it goes no further than to preserve the status until that determination. It is limited in its operation and continues only for such a reasonable time as may be necessary to have a hearing on an order to show cause why a temporary injunction should not issue. On the other hand, a temporary or preliminary injunction is rarely granted without notice, but when granted, is effective until the trial of the cause in which it is issued (3). The distinction between the two has been thus made: "The former (temporary injunction) embodies a restraint which continues, unless modified by court until the hearing of the cause, and then it is either made permanent or dissolved altogether; while the latter (restraining order), strictly speaking is not an injunction at all but a writ of the court to compel parties to maintain the matters in controversy in *status quo* until the question of whether or not a temporary injunction ought to issue may be determined." (4)

While a restraining order is merely temporary in duration, and a temporary injunction remains in force for a definite period, they are equally effective and binding while in force. And if a court continues in force a restraining order until the final hearing of the case, it thereby, in effect, grants a temporary injunction. Yet in a doubtful case, and if the language of the order will admit of such construction, it should be considered as a restraining order only. Since the two forms are equally effective, the main distinction regards their respective periods of duration. A restraining order is the forerunner of a

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(1) Specific Relief Act s. 53.

(2) Specific Relief Act s 54; Smith's Principles of Equity p. 722.

(3) Lewis & Spelling on Injunction § 18. "It is very clear that the legislature never intended to give the force and effect to a restraining order which attaches to an injunction when regularly allowed. It simply suspends proceedings until an opportunity can be given for hearing the parties; and before that hearing have been had and a decision rendered upon the application, the whole force of the restraining order ceases by its own limitation."

(4) *Ex parte Grimes* 20 Okl. 446; Lewis and Spelling on Injunction § 18.

temporary injunction and continues in force until the hearing on the question of whether a temporary injunction shall be granted when its force automatically ceases. The words "until the further order of the court," (1) which is common formula in restraining orders are usually construed to restrain the party until a hearing can be had, and these words do not have the effect of changing the order into a temporary injunction. On the other hand, an injunctional order which does not contemplate a hearing as to whether a temporary injunction shall be allowed is of itself a temporary injunction (2).

The Court may by order grant an injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the court thinks fit (3). For the protection of the property which is the subject matter of litigation, the court may require it to be brought into court in exercise of its equitable jurisdiction (4). The court shall in all cases except, when it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party (5).

An injunction may be either prohibitory or mandatory. The object of the process issued by the court is governed by the fact, whether the person against whom it is issued has already committed some act or allowed some omission which infringes the complainant's right, or he has only threatened such commission or omission, and the process has also regard to the consequences which have followed upon the commission or omission complained of, if actual and past. If, for the establishment and enforcement of the right infringed or about to be infringed, it is enough to forbid the wrong-doer and restrain him from perpetrating or continuing the wrong, a prohibitory or restrictive order is all that is called for. If on the other hand, the wrong-doer's act or omission has been attended with results which have changed the situation of the parties and altered the *status quo*, there can be no restoration, unless the wrong-doer is compelled to undo the effects of his act or omission ; and, in such a case, a mandate will be issued requiring the performance of such acts as may be necessary to afford specific relief to the injured party (6). An injunction may be either a final remedy obtained by a suit, or a preliminary and interlocutory relief granted while the suit is pending. In the first case, it is a decree in the second, an order or writ. Whatever be its form, decree or order, the remedy by ordinary injunction, is wholly preventive, prohibitory or protective. The same

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(1) Vide Civil Procedure Code Schedule I, Appendix F. form No. 8, where of course no distinction is made between an *Exparte* restraining order and an order for a temporary injunction. Such injunction is also called interlocutory injunction. *Mohini* v. *Surendra*, 21 C. L. J. 68. But it seems that the Civil Procedure Code makes no distinction between a restraining order and a temporary injunction. Vide *Krishna* v. *Hem*, 21 C. L. J. 469.

(2) Lewis and Spelling on Injunction § 19 ; *Krishna* v. *Hem*, 21 C. L. J. 469.

(3) Civil Procedure Code, Order xxxix, rule 2 (2) ; *Promothanath* v. *Joganath*, 17 C. L. J. 427 = 16 Ind. Cas. 359.

(4) *Satoor* v. *Satoor*, 2 M. H. C. R. 8 (11).

(5) C. P. Code Order xxxix rule 3, see also *Hari* v. *Secy. of State*, 27 B. 424 ; *Burma Oil Co.* v. *Sampson*, 64 Ind. Cas. 534 = 13 Bom. L. R. 227.

(6) Banerjee's Specific Relief 2nd Ed. 589.

is true in theory and in form of a madatory injunction, which always by its language prohibits the continuance of an act or of a structure, although, in effect and in its essential nature it is wholly restorative, and compels the defendant to restore the thing to its original situation. While injunctions may thus be final, or preliminary and ancillary to other final relief, they all depend upon the same general principles, doctrines and rules which determine and regulate the exercise of the jurisdiction to award them (1).

"In determining whether an injunction will be issued to protect any right of property," says *Dr. Pomeroy* "to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative (2), and the affirmative aspect of it should never be lost sight of, any more than the negative side. The general principle may be stated as follows. Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited*, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limst its exercise.* This jurisdiction of equity to prevent the commission of wrong is, however, modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not interfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which under the settled doctrine, determines the remedy of injunctions." (3)

Grant of Injunction is discretionary.—The granting or refusal of injunction is not a matter *ex debito justitiae* but one which is purely within sound discretion of the Court; but injunctions are more liberally granted than in former times (4). "The principle is well settled that in granting or with-holding an injunction, the Courts exercise a judicial discretion and weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which, injunction if granted would inflict upon the defendant" (5). "Discretion, when applied to a Court of law," says *Lord Mansfied* "means discretion guided by law. It must be governed by rule and not by humour.

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(1) Pomeroy's Equity Jurisprudence § 1337.

(2) Section 54 of the Specific Relief Act lays down the affirmative and section 56 the negative principle.

(3) Pomeroy's Equity Jurisprudence § 1338.

(4) Storey's Equity Jurisprudence § 1183; *Bacon* v. *Jones*, 4 Myl and Cr. 433; *Bramwell* v. *Halcomb*, 3 Myl and Cr. 744; *Umesh* v. *Nibaran*, 19 C. L. J. 305.

(5) *Shamnaggar Jute Factory* v. *Ram-Narain*, 14C. 189 (200); *Callianji* v. *Narsi*, 18B. 173.

It must not be arbitrary, vague and fanciful, but legal and regular" (1). So the discretion of the Court must be exercised on recognised principles and should not be arbitrary (2). In *Ghansham Nilkant* v. *Moraba Ramchandra Rai*, (3) *Farran J.* observed : "Under the Specific Relief Act the Courts are given a discretion to grant or withhold an injunction, as in England they have a discretionary power to award damages in lieu of an injunction. In this view of the law, the Court has to consider in each case not merely whether the plaintiff's legal right has been infringed, or even materially infringed, but also whether under all the circumstances of the case he ought to be granted an injunction as the proper and appropriate remedy for such infringement." "Consequently no injunction will be granted whenever it will operate oppressively, or inequitably, or contrary to the real justice of the case ; or where it is not the fit and appropriate mode of redress under all the circumstances of the case ; or where it will or may work an immediate mischief or fatal injury' " (4). "Since equitable rights are not referable to the free favour and capricious will of the Chancellor," say *Messrs Spelling* and *Lewis*, "but are based upon established principles, it would not be proper to say that relief by injunctions is never a matter of right but always discretionary. It will suffice to say that granting or withholding the remedy is seldom a matter of absolute right, and is usually discretionary (5) " *In Tituram Mukherjee* v. *Cohen*, (6) *Sir Arther Wilson* said : "The right to an injunction depends in India upon statute as is governed by the provisions of the Specific Relief Act (I of 1877). Section 52 of that Act places the grant of an injunction in the discretion of the Court,—a discretion to be exercised of course as the discretion of Courts always is." In a recent *Rangoon* case (7) *Young J.* said : " 'In India the power of the Courts to grant a perpetual injunction' as observed by *Sargent C. J.* in *Dhunjibhoy Cowasji* v. *Lisboa* (8) 'is determined by the Specific Relief Act, s. 54, which provides that the Court may grant such an injunction when the defendant invades or threatens to invade the plaintiff's right.....and where the invasion is such that pecuniary compensation would not afford adequate relief.' Its duty, therefore, under the Act is not to grant an injunction where damages afford adequate compensation, see the remarks of *Sargent, C. J.* at

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(1) *Wilkin's Case*, 4 Burr. 2539 cited in *Harbuns* v. *Bhairo*, 5C 259 (265).

(2 *Ashutosh Roy* v. *Rampur Boalia Municipality*, 29 C. W. N. 643 (647)

(3) 18B. 474 (488) ; see also *Shadi* v. *Anup*, 12A. 439 ; *Mahomed* v. *Jagannath*, 89 Ind Cas. 800=3 Rang. 230 ; *Ghansam* v. *Moraba*, 18B. 493 : "All questions of discretion are usually questions of degree."

(4) Story's Equity Jurisprudence § 1293. The Court by granting injunction should protect rights and prevent injury according to legal principles. *Beddow* v. *Beddow*, 9 Ch. D. 89; *Aslatt* v. *Southampton Corporation*, 16 Ch. D. 143, 148.

(5) Lewis & Spelling on Injunction § 16 ; see also *Harris* v. *Beachamp Brother*, (1894) 1 Q.B. 801, 808 (C. A).

(6) 9 C. W. N. 1073 (1080) P. C=33 C. 2 3 (218)=7 Bom. L. R. 920 ; *Ramkissen* v. *Puran*, 47C. 733=31 C. L. J. 259.

(7) *Mahomed Auzam* v. *Jagannath*, 89 Ind. Cas. 800=3 R. 230=(1925) A. I. R. Rang. 327 ; *Deotsche* v. *Prestonji*, 89 Ind. Cas. 321=A. I. R. 1925 Sind. 345. "Preventive relief by way of injunction whether perpetual or temporary is within the discretion of the Court depending on the particular circumstances of the case." See also *Day* v. *Browrigg*, 10 Ch. D. 93.

(8) 13 B. 252 at p. 259.

page 262 (of 13 B.) From these authorities it will be seen that to Courts governed by the Specific Relief Act the question of injunction or no injunction presents itself in a different light to what it does to English Courts and that to Courts subject to this Act the English decisions have no application [per *Persons J* in *Sultan Nawaz Jaung* v. *Rustamje Nanabhoy*, (1)]. In *Boyson* v. *Deane* (2) *Shepherd C. J.* said : "The question must be decided with reference to the tests prescribed in section 54 of the Specific Relief Act. If I may take *Martin* v. *Price* (3) as a statement of English law on the subject I think it must be admitted that it is different from the law we have to administer here under the Specific Relief Act and the Easements Act ; see *Dhunjibhoy Cowasji Umirigor* v. *Lisboa* (4) and *Ghansham Nilkant Nadkarni* v. *Moraba Ramchandra* (5). In *Martin* v *Price* (3), *Kekewich J.*, having regard, among other things, to the term for which the plaintiff held, gave judgment for £120 damages and refused an injunction. The Court of Appeal held that as the plaintiff had sustained material injury he was entitled to an injunction in the absence of proof of circumstances depriving him of the *prima facie* right. No inference was made to the test prescribed by the Specific Relief Act. According to that decision the rule of English law is the converse of the rule prevailing here. Then the right to an injunction is a *prima facie* right : here an injunction is not to be given when the remedy in damages is considered as adequate. For a statement of the law in terms more consonant with that which we have to administer I would refer to *Lord Westbury's* judgment in *Jackson* v. *Duke of New Castle* (6). This case decided in 1864, has with reference to another point, been disapproved in later cases. With regard to that other point the Indian Legislature seems to have followed it nevertheless, and it may well have been present to his minds when the Specific Relief Act was being framed."

Commenting on the case of *Newas Jaung* v. *Rustomji Nanabhoy* (1), Dr. Banerjee said : "But this suggestion is repudiated at *Allahabad* (7) ; and it is hard to

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(1) 20 B. 704 at p. 711. *Parsons J.* said : As indicated by us during the hearing of this appeal we see no reason to differ from the ruling of this Court in *Lisboa's Case* (13B. 252) which was followed in the case of *Ghansham Nilkant* v. *Moraba Ramchandra*, 18B. 474. We consider that the principle enunciated in those cases, viz., that an injunction wil only be granted where the invasion of the right or enjoyment is such that pecuniary compensation would not afford adequate relief, is a correct interpretation of section 54 of the Specific Relief Act (1 of 1877), which lays down the law binding on Courts in this country. To Courts subject to that Act the English decisions cited above have no application. We have, therefore, only to see whether the present case is one in which adequate relief can be afforded by pecuniary compensation."

(2) 22 M. 251 at pp. 254, 255.

(3) (1894) 1 Ch. 276.

(4) 13 B. 252.

(5) 18 B. 474 at p. 488.

(6) 3 De. G. J & S. 275 at p. 284.

(7) *Yaro* v. *Sanaulla*, (1897) 19A. 257. In that case *Edge C J* and *Knox J.* said : "In our opinion the rule of law in such cases was correctly laid down by *Sir George Jessel* in *Aynsley* v. *Glover*, L. R. 18 Eq. 544 and by the late justice *Pearson* in *Holland* v. *Warley* L. R. 26 Ch. D. 585. In our opinion it was never intended by the Legislature that a man should not get an injunction unless his property would be practically destroyed if the injunction were not granted. Here there was substantial injury and wrongful inju-

see why, in interpreting and applying the provisions of an enactment admittedly based upon principles of English Equity Jurisprudence, the latest and most approved authoritative exposition of those principles should not be resorted to. Where the Indian Legislature lays down that 'an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding" (1) the stress is laid upon 'equally efficacious' and upon 'certainly', and where a decree for damages cannot even in effect restore the parties to the *status quo ante* and prevent a recurrence of the injury, monetary compensation, however bountiful, is manifestly inefficacious (2). So there is not much difficulty in filling the more liberal principles of advancing judicial conscience into the iron bed of codified discretion prepared for our Courts by the legislature, and relief should be administered to suitors in this country according to the spirit of a beneficient Legislation" (3). This statement of law by Dr. Banerjee it seems was approved by *White C. J.* in *Ramanujulu* v *Apparanji*, (4). According to English law when a plaintiff has established his legal right, and the fact that it has been or is about to be injured, he is *prima facie* entitled to a perpetual injunction unless there be something special in the circumstances of the case, such as laches, or where the interference with the plaintiff's reight is or will be small, or can be fairly compensated by money (5).

"But since it is an extraordinary remedy, it will only be granted where necessary to protect the rights of the litigants. Nor is there any inconsistency between the principle that one must so use his rights as not to infringe the rights of another and that which makes the writ of injunction a matter for silent discretion of the Court. And it may be stated as a settled rule that a bill without equity will not support an injunction of any character, under any circumstances. Otherwise expressed a party seeking relief by injunction must show that he is equitably and in good conscience entitled thereto. The injunctive remedy will not be allowed to accomplish the ends more appropriately reached by other remedies; it will not be granted to punish the wrong doers after the wrong has been done, or to compel the undoing of what has been done. The one who threatens injury is ordered to desist, on penalties prescribed for the punishment of contempt. Nor will it be allowed against public convenience, or against conscience, which is not the mere caprice of the individual Chancellor, but is founded on law" (6). As distinguished from arbitrary discretion and from a lack of discretion, sound discretion consists in an observance of

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ry to the plaintiff's rights. The plaintiff was entitled to the injunction which he got."

(1) Specific Relief Act s. 56 (i)

(2) Cf. *Balsamrat* v. *Sardarsang* (1911) 13 Bom. L. R. 905.

(3) T. L. L. 1906, P. 604

(4) 21 M. L. J. 313, 319=9 Ind. Cas. 417 (420).

(5) Kerr on Injunction p. 166 citing *Martin* v. *Price*, (1894) 1 Ch. 284; *Shelfer* v. *City of London*, (1895) 1 Ch. 316; *Cowper* v. *Laidler* (1903) 2 Ch. 341; *Coles* v. *Horne & Colonial Stores*, (1904) A. C. 173; *Kine* v. *Jolly*, (1905) 1 Ch. 4 5; *Leeds Industrial* v. *Slack*, (1924) A. C. 851; *Slack* v. *Leeds Industrial*, (1924) 2 Ch. 475.

(6) Lewis and Spelling on Injunctions § 16.

the rules and considerations which have generally guided and influenced the Courts in granting injunctions. (1).

No injunction will be granted to restrain a nuisance by the erection of a building, where the erection has been acquiesced in or encouraged by the party asking the relief (2). So it will not be granted in cases of gross laches or delay by the party seeking the relief in enforcing his rights ; as for example where in case of a patent or a copyright the patentee has lain by and allowed the violation to go on for a long time without objection or seeking redress (3). On the other hand a covenant may be of such a nature as ought not in equity to be specifically enforced by an injunction in consideration of the unreasonable and inconvenient consequences which may ensue therefrom. Thus where it was covenanted by the lessee of an inn that he would keep it open and not discontinue it, the Court refused to grant an injunction to enforce the specific performance of the covenant (4). "It may be remarked in conclusion" says Justice Story "upon the subject of special injunctions, (5) that Courts of Equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course ; for it is impossible to foresee all the exigenecies of Society which may require their aid and assistance to protect rights and redress wrongs. The jurisdiction of these courts thus operating by way of special injunction (5) is manifestly indispensable for the purpose of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence. At the same time it must be admitted that the exercise of it is atended with no small danger both from its summary nature and its liability to abuse. It ought therefore to be guarded with extreme caution and applied only in very clear cases ; otherwise instead of becoming an instrument to promote the public as well as private welfare, it may become a means of extensive and perhaps of irreparable injustice" (6).

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(1) H. C. Joyce on Injunction § 118

(2) *Williams* v. *Earl of Jersey*, 1 Cr. & Ph. 91.

(3) *Saunders* v. *Smith*, 3 Myl & Cr. 711 ; *Lewis* v. *Chapman*, 3 Beav. 133.

(4) *Hooper* v. *Broderick*, 11 Simon R. 47 ; *Story's Equity Jurisprudence* § 1292

(5) Now all Injunctions are special injunctions.

(6) Story's Equity Jurisprudence § 1293 ; see the pointed remarks of *Lord Cottenham* on this subject, in *Brown Newall* 2 Myl & Cr. 570, 571. See also *Lord Brougham's* remarks in the case of *Earl of Ripon* v. *Hobart*, 1 Cooper Sel. Cases, 333 S. C. 3 Myl K. & 169. *Mr. Justice Baldin in Bonaparte* v. *Camden and Ambory Rail road Company*, 1 Baldwin's Cir R. 218. made the following remarks on the subject : "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction. It is a strong arm of equity, that never ought to be extended unless to cases of great injury, where Courts of law cannot afford an adequate or commesurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting and preventive process of injunction. But that will not be awraded in doubtful cases, or new ones not coming within well-established principles ; for if it issues erroneously, an irreparable injury is inflicted for which there can be no redress it being the act of a Court, not of the party who prays for it. It will be

As regards the discretion of the old Court of Chancery, *Lord Redesdale* said : "There are certain principles on which Courts of Equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of Equity have in this respect no more discretionary power than Courts of Law. They decide new cases, as they arise, by the principles on which former cases have been decided ; and may thus illustrate or enlarge the operation of those principles. But the principles are as fixed and certain as the principles on which the Courts of Common Law proceed"(1).

But "this descrition" says *Jessel M. R.* (2) "must be a judicial discretion, exercised according to something like a settled rule, and in such a way as to prevent the defendant doing wrongful act, and thinking that he could pay damages for it. Without laying down any absolute rule, in the first place, it is of great importance to see if the defendant know he was doing wrong and was taking his chance about being disturbed in doing it." So it has been truly said that the "rights to equitable relief, where that is the only adequate remedy, are as absolute as to legal relief, the one remedy is no more sacred than the other, and no more capable of lawful denial" (3). In *Imperial Gas & Co.* v: *Board Bent* (4), which is a case of a nuisance having continued and been aggravated, *Lord Campbell C.* said : "Under these circumstances, unless there is something peculiar in this case it would be a matter of course to grant an injunction" (5),

The granting of a temporary injunction under the powers conferred by the Civil Procedure Code is also a matter of discretion. "True it is" said *Sir Arnold White C. J.* "a matter of judicial discretion. But if the Conrt which grants the injunction rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion. With regard to this part of the case *Mr. Grant* contended that the issue of an interlocutory or temporary injunction is governed by precisely the same principles as the granting of a permanent injunction at the trial of the case and in support of that proposition he referred to an observation of *Sir Charles Sargent in Nusserwanji Merwanji Panday* v. *Gordon* (6). The observation is at page 279 of the report and there the learnd judge says, 'It is plain however, that, apart from the special circumstances which determine whether the Court should in its discretion grant an injunction before the hearing of the suit, the

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refused till the Courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act. In such a case the Court owes it to its suitors and its own principles to administer the only remedy which the law allows to prevent the commission of such an act. We know of no rule which excludes from this process any person over whom the Court has jurisdiction on account of the character or capacity in which he acts, although it is conferred upon him by a law of a State or of Congress."

(1) *Bond* v. *Hopkins*, 1 Sch, and Lefr. R. 428, 429

(2) *Smith* v. *Smith*, 20 Eq. 500.

(3) *Per Campbell C. J.* in *Edwards* v. *Allouez Mining Co.* 38 Mich. 46.

(4) 7 H. L. C. 600.

(5) T. L. L. (1906) p. 602.

(6) 6 B. 266.

same general principles must equally apply to the granting of a temporary injunction as to a perpetual injunction, and those principles must therefore be sought in the Specific Relief Act itself.' Now, having regard to the fact that the law with regard to the granting of a perpetual injunction is to be found in the Specific Relief Act and is laid down with great precision and that the law with regard to the granting of a temporary injunction is to be found in the Civil Procedure Code and is declared to be a matter for discretion, if it were necessary to consider the point I am not sure I should be prepared to go quite so far as Sir Charles Sargent.'' In *Mun Mohiny Dassee* v. *Ichamoyee Dassee* (1) *Phear J* said: "I need hardly say that the power of issuing injunctions and appointing a Reciver *pen dente lite* which is given to the Civil Court by s. 92, Act VIII of 1859, ought to be most cautiously exercised." So it is clear that it is always discretionary with a Civil Court to grant injunction, and that descrition must be exercised judicially with extreme caution and only in very clear cases (2). "Now, a remedy by injunction is no doubt useful, but it is at the same time a very strong remedy, and one not ordinarily granted where any other remedy is fairly open to the applicant or where the conduct of the parties has been such as to make it a harsh remedy to give in a particular case." (3) A plaintiff who has established that his common law rights have been violated is entitled to an injunction to prevent recurrence of that violation, and damages may be given in substitution for an injunction only if (i) the injury to the plaintiff's right (a) is small (b) is capable of being estimated in money (c) can be adequately compensated by a small money payment, and (ii) it would be oppressive to the defendant to grant the injunction. The fact that the legislature has provided for the payment of compensation for damages caused by the exercise of statutory powers does not of itself take away the right to an injunction (4).

Equity acts in personam.—Generally if not uninversally, equity jurisdiction is exercised in *personam* and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought upon a bill for the removal of a cloud from title, as upon a bill for specific performance of an agreement to convey. The decree unless otherwise expressly provided by statute, is clearly not a judgment in *rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim and directing him to deliver his deed to be cancelled, or to execute a release to the plaintiff (5). So the decrees of a court of equity are to be regarded, not so much as decisions affecting the property or rights in dispute, as in the light of directions, or commands positive, (as in the case of Specific

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(1) 13 W. R. 60.

(2) *Chunilal* v. *Surat City Municipality*, 27 B. 403 (408).

(3) Per *Willson* J. in *Noyra Misser* v. *Rupikum*. 9 C. 604, 611=12 C. L. R. 300.

(4) *Burma Railway Co.* v. *Municipal Committee*. 13 Bur. L. T. 62.

(5) Story's Equity Jurisprudence § 93 note.

Performance) or negative (as in the case of injunctions), addressed to the individual party or parties. It is seldom in the power of a court literally o compel the performance by a recalcitrant party of a physical act. Its decrees are consequently said to be and in fact are only enforceable by means of attachment and arrest, the power of committal being often termed the keystone of equitable jurisdiction (1). A leading authority upon this point is the case of *Penn* v. *Lord Baltimore* (2). The bill (3) in this case sought specific performance of an agreement entered into between the plaintiffs, and the defendant for settling the boundaries of land in America (then a British colony), by drawing lines in a particular manner specified. *Lord Hardwicke*, after an elaborate judgment, decreed that the relief sought might be granted. In delivering the judgment he observed: "The conscience of the party was bound by this agreement; and being within the jurisdiction of this court, which acts *in personam*, the court may properly decree it as an agreement, if there is a foundation for it. As to the courts not enforcing the execution of their judgment, if they could not at all I agree it would be vain to make a decree; and that the court cannot enforce their own decree *in rem* in the present case. But this is not an objection against making a decree in the cause; for the strict primary decree in this court, as a court of equity, is *in personam*. In *Lord King's* time, in the case of *Richardson* v. *Hamilton, Attorney General of Pennsylvania*, which was a suit of land and a house in the town of Philadelphia, the court made a decree, though it could not be enforced *in rem*. In the case of *Lord Anglesey*, of land lying in *Ireland*, I decreed for distinguishing and setting the parts of the estate, though impossible to enforce that decree *in rem*, but the party being in England, I could enforce it by process of contempt *in personam* and sequestration, which is the proper jurisdiction of this court. And, indeed, in the present case, if the parties want more to be done, they must resort to another jurisdiction." In the *British South Africa Co.* v. *Compenhia de Mocambique* (4) *Wright J.* said :— "Courts of equity have, from the time of *Lord Hardwicke's* decision in *Penn* v. *Baltimore*, exercised jurisdiction *in personam* (5) with respect to foreign land

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(1) Smith's Principles of Equity p. 16.

(2) 1 Ves 444, 1 White & Tudor Leading Cases, 8th Ed. p. 800.

(3) The "Bill of complaint" was under the practice of the old court of chancery, the first step in an equity suit.

(4) (1892) 2 Q. B. 358, (364), (1893) A. C. 602, and see *Deschamps* v *Miller*, (1908) 1 Ch. 856.

(5) "In the infancy of the court of chancery, while the chancellors were developing their system in the face of a strong opposition, in order to avoid a direct collision with the law and with the judgment of law courts they adopted the principle that their own remedies and decree should operate *in personam* upon defendants, and not *in rem*. The meaning of this simply is that a decree of a court of equity while declaring the equitable estate, interest or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff with the legal estate interest or right to which he was pronounced entitled, it was not itself a legal title, nor could it order directly or indirectly transfer the title from the defendant to the plaintiff. A decree of chancery spoke in terms of personal command to the defendant but its directions could only be carried into effect by his personal act. It declared, for example, that the plaintiff was equitable owner of certain land, the legal title of which was held by the defendant, and ordered the defendant to execute a conveyance of the estate; his own voluntary

against persons locally within the jurisdiction of English Court in cases of contract, fraud, and trust, enforcing their jurisdiction by writs of *ne exeat regno* during the hearing, and by sequestration, commitment, or other personal process after decree." The exercise of this jurisdiction is therefore subject to certain limitations: First there must be some equity against the defendant affecting the land in local actions. The second limitation is, that as the Court can only enforce its order indirectly in manner above stated in order to put the plaintiff in possession, the jurisdiction of *lex situs* must be invoked. The third limitation, which seems to follow as a corollary to the second, is, that though the court, in deciding on the equity, acts on its own rules, it will not enforce a judgment where it is illegal or impossible, according to the *lex situs* to give the plaintiff possession (1). In *Ex p. Pollard* (2), where the court compelled a defendant to give effect to an equitable mortgage on lands in Scotland, the Scotch law not recognising such a charge, but there being nothing in the law or circumstances to prevent the defendant carrying out the decree, *Lord Cottenham*, in his judgment (3) said : "If the law of the country where the land is situate should not permit or not enable the defendant to do what the court would otherwise think right to decree, it would be useless and unjust to direct him to do the acts ; but when there is no impediment, the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effects of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities. In giving effect to the security, I act upon the well-known rules of equity in this country, and do not violate or interfere with any law or rule of property in Scotland, as I only order to be done what the parties may by that law lawfully perform"(4). Similarly in *Waterhouse* v. *Stansfield* (5) the V. C. says : "When the law of a foreign country places a restraint upon the alienation of the property of a debtor situated in such country, an equity arising here on a contract entered into in respect of such property cannot be enforced against the *lex loci rei sitae*" (6). If the *lex loci* is merely silent, and no further title has been acquired by a third person, the court will not refuse a decree (7).

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act was necessary to carry the decree into execution ; if he refused to convey, the court could endeavour to compel his obedience by fine and imprisonment. The decree never stood as a title in place of an actual conveyance by the defendant. Nor was it ever carried into effect by an officer acting in the defendant's name." *Pomeroy's Equity Jurisprudence.*

(1) 1 White and Tudor's Leading Cases 8th Ed. p. 815.

(2) Mont & Ch. 239.

(3) At p. 250.

(4) See also *Norton* v *Florence*, etc. *Co.* 7 Ch. D. 332 ; The *Mercantile Investment* v. *River Plate Trust*, (1892) 2 Ch. 303.

(5) 10 H. 254 (259).

(6) "If the *lex situs* excludes such equity then the right to hold the land free from it becomes one of the incidents of property." *Westlake's Private* Inter. Law pp. 64, 65.

(7) *Ex. p. Pollard*, Mont & Ch. 239 ; *Bank of Africa* v. *Cohen*, (1909) 2 Ch. 129 ; *Scott* v. *Nesbitt*, 14 Ves 438 ; *Lord Cranstown* v. *Johnston*, 3 Ves. 170.

In examining the cases in which the jurisdiction has been exercised, it will be found that, with the exception of some few old cases which have been overruled the jurisdiction was entertained on the ground of some contract or equity between the parties, (1). In *Lord Cranstown* v. *Johnstone* (2), *Arden M. R.* observed: "Those cases (3) clearly shew, that with regard to any contract made, or equity between persons in this country respecting lands in a foreign country particularly in the British dominions, this court will hold the same jurisdiction as if they were situated in England. The only distinction is, that this court cannot act upon land directly, but acts upon the conscience of the person living here."

Thus, a forecelosure decree being a decree *in personam* depriving the mortgagee of his personal right to redeem, the English Court of chancery has jurisdiction to make such a decree in respect of a mortgage, between an English mortgagor and mortgagee, of land in colonies (4). In that case *Bacon* V. C. said: "As I am satisfied that jurisdiction has been very often assumed in the case of appointing receivers of mortgaged estates in the colonies, and as I cannot doubt that the court has a right as between the English mortgagor and the English mortgagee to enforce a personal contract between them, although one of the consequences of so doing may be to vest in the plaintiff the absolute interest in the mortgaged estate, which at present is qualified only by the existence of the equity of redemption, I can not hesitate for a moment in saying that the suit, which is brought for the purpose of having the account taken, of realising the estate if it should be necessary, and giving to the mortgagee the opportunity of redeeming it if he thinks fit to do so, is properly brought in this court. Upon the question of jurisdiction, there is, in my opinion, no reason whatever for doubt." In accordance with the principle laid down in *Penn* v. *Lord Baltimore*, (5) the court of Chancery has entertained suits for specific performance of a contract for sale of lands and injunctions (6); for foreclosure and redemption of property (7); for an account of rents and profits (8); for winding up a partnership (9) even when the partnership is outside the jurisdiction.

But an English Court will not pronounce a decree, even *in personam*, which cannot be enforced without the intervention of a foreign court (10). But in cases

(1) *Norris* v. *Chambers*, 29 Beav. 246, *Deschamps* v. *Miller*, (1908) 1 Ch. 856; see *Westlake, International Law* (1905), 210—213; *Dicey's Conflict of Laws* (1908) p. 201; *Foote, Private* International Jurisprudence (1904) 184, 200.

(2) 3 Ves. 170.

(3) *Archer* v. *Priston*, 1 Eq. Ca. Abr. p. 133; *Arglasse* v. *Muschamp*, 1 Vern 75.

(4) *In re Hawthorn*, 23 Ch. D. 743; see also *Paget* v. *Ede*, L. R. 18 Eq. 118, 126; *Toller* v. *Carteret* 2 Vern. 494; *Kildore* v. *Eustace*, 1 Vern. 417.

(5) *Supra.*

(6) *Archer* v. *Preston*, 1 Eq. Ca Abr. p. 183; *Ex Parte Pollard*, 1 Mont & Ch. 209; *Mercantile* v. *River Plate* (1892) 2 Ch. 303; *Beckford* v. *Kemble*, 1 Si & St. 7.

(7) *Toller* v. *Carteret*, 2 Vern, 494; *Paget* v. *Ede*, 18 Eq. 118; *Beckford* v. *Kemble*, 1 Si & St. 7; *Bent* v. *Young*, 9 Si 180 at p. 190; *Colyer* v. *Finch*. 5 H. L. C. 905.

(8) *Roberdeau* v. *Rous*, 1 Atk. 543.

(9) *Maunder* v. *Lloyd*, 2 John & H. 718; *Hendrich* v. *Wood*, 9 W. R. 588.

(10) *Norris* v. *Chambers*, 7 Jur N. S, 689; *Deschamps* v. *Miller* (1908) 1 Ch. 863; *Bank of Africa* v. *Cohen*, 78 L. J. Ch. 780; *British South Africa* v. *Den Beers & Co.*, (1910) 2 Ch. 514, 517; Kerr on Injunction 12.

of constructive trust where lands abroad have been acquired by fraud, the transaction has been set aside, and the defendant ordered to execute the necessary reconveyances (1). The court will not entertain an action where the title to foreign land is in dispute and its adjudication requires decision of foreign law (2). Moreover, when the land in question is out of the jurisdiction no decree will be pronounced which purports directly to affect them. Thus a partition of land in Ireland will not be decreed in England, simply because no power could be given to commissioners to go there and take steps necessary for carrying out the decree (3).

Application of the doctrine in British India.—In British India suits for the recovery of immoveable property with or without rent or profits, for the partition of immoveable property, for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property, for the determination of any other right to or interest in immoveable property, for compensation for wrong to immoveable property, and for the recovery of moveable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate (4). By section 16 of the Code of Civil Procedure suits for recovery of immoveable property, or for the determination of any other right or interest in immoveable property, must be instituted in the Court within the limits of whose jurisdiction the property is situate (5). The evident object of the detailed provisions of section 16 is to limit jurisdiction in respect of claims to immoveable property to the Court to whose local jurisdiction such property may be situated, and as a rule Indian Courts have no power to decide rights and interests in immoveable property lying out side their local jurisdiction (6). But the Court cannot in the case of immoveable property situate without the jurisdiction, give relief *in rem*, still it can entertain a suit in respect of it when the relief sought can be entirely obtained through the

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(1) *Arglasse* v. *Muschamps*, 1 Vern 75 ; *Lord Cranstown* v. *Johnston*, 3 Ves 170 ; *Jackson* v. *Petree*, 10 Ves 164.

(2) Smith's Equity p. 17 citing *Graham* v. *Massey*, 23 Ch. D. 743 ; *Compannia* v. *British South Africa*, (1893) A. C. 602.

(3) Smith's Equity p. 17 ; *Carteret* v. *Petters*, 2 Ch. Ca. 214.

(4) Civil Procedure Code s. 16; See also cl. 12 of Letter Patents of the Calcutta, Bombay and Madras High Courts which runs as follows :—"And we do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or propery shall be situated, or, in all other cases, if cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain, within such limits : except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees."

(5) *Premchand* v. *Mokhoda*, 17C. 699 (703) F. B. ; see also *Kamini* v. *Kali Prosunnna*, 12 I. A. 215=12C. 225.

(6) *Keshab* v. *Vinayak*, 23B. 22 ; *Sreenath* v. *Cally Dass*, 5C. 82 ; *Crisp* v. *Watson*, 20C. 289 ; *Land Mortgage* v. *Sudurudddin*, 19C. 358.

defendant's personal obedience (1). "The last paragraph of s. 16 provides that suits to obtain relief respecting, or compensation for wrong to immoveable property, may be instituted at the plaintiff's option either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain, provided—(*a*) the property is held by or on behalf of the defendant ; (*b*) the relief sought can be *entirely* obtained through the personal obedience of the defendant, and (*c*) the property is situate in, *and not beyond*, British India (2). "We have in this proviso a partial application of the maxim, *Equity acts in personam*. If in condition (b) above, we substitute "partially or entirely" for "entirely," and in condition (c) we substitute "in or beyond" for "in and not beyond," we have the statement of law involved in the doctrine, *Equity acts in personam*" (3). Suits *in personam* can be divided into two main classes, namely, (A) Those in which the relief sought can be entirely obtained by the personal obedience of the defendant, such as suits for injunction (4), or for an account of the rents and profits of land (5). (B) Those in which the relief sought can be obtained only partially by the personal obedience of the defendant. This second group may again be subdivided into two further groups (*i*) cases of contract, fraud and trust and (*ii*) other cases (6). It has already been seen that the Courts of Equity in England act *in personam* so far as the class of cases mentioned in (A) and group (*i*) of class B. But so far as the class of suits mentioned in group (*ii*) of class B is concerned the Courts of Equity in England do not act *in personam*.

According to the proviso to section 16 of the Civil Procedure Code, the Courts in India can act *in personam* in the class of suits mentioned in class (A) provided the property is situate in and not beyond British India. So far as suits mentioned in class (B) is concerned, this proviso confers no jurisdiction (7). To enable the Court to exercise jurisdiction under this proviso it is absolutely essential that the relief sought should be entirely obtainable through the personal obedience of the defendant (8). The obedience must be such as the defendant could render without going beyond that jurisdiction (9). Under this section jurisdiction is given to Courts where the defendant "resides, or carries on business or personally works for gain within the jurisdiction of the Court in which the suit is sought to be instituted" (10). The Civil Procedure Code does not forbid the institution of a suit against a defendant resident in

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(1) *Ram Ranji* v. *Dhup Narain*, (1885) A. W. N. 125.

(2) *Krishnaji* v. *Gajanan*, 33B. 3 3.

(3) Mulla's Civil Procedure Code, notes under s. 16 ; *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444.

(4) *Beckford* v. *Kemble*, 1 Si & St. 7.

(5) *Roberdeau* v. *Rous*, 1 Atk 543.

(6) Mulla's Civil Procedure Code notes under s. 16.

(7) *Crisp* v. *Watson*, 20C. 689.

(8) *Isak* v. *Khatijee*, 23B. 756 ; *Keshab* v. *Binayak*, 23B. 22 (27) ; *Mahadeo* v. *Ramchandra*, 23 Bom. L. R. 903 ; *Vithal* v. *Vaghoji*, 17B. 570.

(9) *Bhojraj* v. *Hiralal*, 1 N. L. R. 121.

(10) s. 16, of Civil Procedure Code proviso.

British India, even if the decision in the suit may involve adjudication regarding the plaintiff's title to immoveable property outside British India. But the Indian Courts may refuse to entertain suits in which an estate in India in foreign country is claimed (1). Courts in British India where they are governed by the Civil Procedure Code cannot deal with immoveable property situated in Native States where the Code is not in force (2). Where a decree contains an injunction directing certain persons to do or not to do a certain thing, the injunction, being an order directed to particular persons will not run with the land (3).

Equity acts in personam—Jurisdiction of the original sides of the High Court.—According to article 12 of the Letters Patent of the Bombay, Calcutta and Madras High Courts, the said High Courts in the exercise of their ordinary original civil jurisdiction are empowered to try the following kinds of suits, namely :—(A) Suits for land or other immoveable property, if the land or property is situated within the local limits of the ordinary original jurisdiction of the said High Courts : (B) Suits other than those for land, that is, suits in which land or other immoveable property is not involved : (*a*) if the cause of action has arisen wholly within the said limits, or (*b*) where the cause of action has arisen in part only within the said limits, if the leave of the Court shall have been first obtained, or (*c*) if the defendant at the time of the commencement of the suit dwells or carries on business or personally works for gain within such limits (4). There has been considerable conflict of opinion as regards the interpretation of the words "suits for land, or other immoveable property." It has been held by the Calcutta High Court that a "suit for land" within the meaning of this clause is a suit substantially for land, that is, the purpose of acquiring title to or possession of land (5) or for declaring any interest in land (6). According to *Jenkins C. J.* the expression suits for land extends to a suit for compensation for wrong to land, where the substantial question is the right to land, and therefore, clause 12 of the Letters Patent, which empowers the High Courts to try 'suits for land and other immoveable property' applies to such suits (7). In delivering the judgment *Jenkins C. J.* said : "The question is, what was intended by that expression (8) ? It appears to me that it was

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(1) *Yado* v. *Krishnaji*, 23 N. L. R. 170.

(2) *Premchand* v. *Hiralal*, 24 N. L. R. 95=A. I. R. 1928 Nag. 295.

(3) *Vithal* v. *Sakharam*, 1 Bom. L. R. 354 ; *Dahyabhai* v. *Bapalal*, 3 Bom. L. R. 564=26B. 140 ; *Amrit* v. *Kanti*, 133 Ind. Cas. 244=33 Bom. L. R. 266=A. I. R. 1931 Bom. 280 : "The rule that a decree for injunction does not run with the land has been deviated from in the case of legal representatives on the death of the judgment debtor made by s. 50 of the Civil Procedure Code and in the case of transferees by virtue of s. 52."

(4) Vide Mulla's C. P. Code notes under article 12 of Letters Patent of Calcutta High Court.

(5) *Delhi* and *London Bank* v. *Wordie*, 1 C. 249 (263) ; *East India Ry* v. *Bengal Coal*, 1 C. 95 ; *Horalal* v. *Netambini*, (1902) 29C. 315.

(6) *Kanti Chunder* v. *Kishori*, 19C. 361, 365.

(7) *Sudandip Coal* v. *Empire Coal*, 42C. 92=31 Ind. Cas. 581 ; see also *The East India Ry.* v. *Bengal Coal*, 1C. 95 ; *Land Mortgage* v. *Suduruddin*, 19C. 358 ; *Kantichunder* v. *Kishori*, 19C. 361 (365) ; *Ebrahim* v. *Trorar*, 36C. 59.

(8) *i.e.*, "suit for land or other immoveable propert'y.

not a mere formal test that was proposed—a test to be determined by the precise form in which a suit might be framed ; but that regard was to be had to the substance of the suit, and I cannot help thinking that the particular expression was used, because there was its equivalent in the Civil Procedure Code of 1859, section 6. Indeed, it is a matter of common knowledge that the Secretary of State's despatch forwarding the Letters Patent to this Court makes special reference to that circumstance. The course of decisions on the charter shows that the description cannot be limited to suits for the recovery of land in its strictest sense, and as to that there can be no dispute ; and, running on parallel lines with that, we find the Code of Civil Procedure of 1859 developed in 1877, so as to embrace a number of topics which perhaps could not in strictness be regarded as suits for land, and it is instructive to observe what they are. They are suits for the recovery of immoveable property (with or without rents or profits), suits for the partition of immoveable property, suits for foreclosure, or redemption of a mortgage of immoveable property, suits for the determination of any other right to or interest in immoveable property, and suits for compensation for wrong to immoveable property (1). This appears to me to be in accordance with principles of general, if not universal, application, according to which suits for land in its strictest sense must come upon the Court where the land is situate. The system on which our procedure is based, the English procedure, regards a suit for damages for trespass to land in the same way." In short the Calcutta High would appear to hold that the suits referred to in clauses (*a*) to (*d*) of s. 16 of the present Code are all suits for land. The Madras High Court also takes the same view (2). A restricted view of the phrase has however been taken by the Bombay High Court. There the expression is restricted to suits for "delivery to the plaintiff of land or other moveable property" (3). In that case *Sargent C. J.* said : "In the *Delhi* and *London Bank* v. *Wordie* (4), the High Court of Calcutta (*Garth C J* and *Pontifex J.*) would appear to have been inclined to construe suits for land in the Letters Patent as meaning 'suits substantially "for land"—that is for the purpose of acquiring title to, or control over, land. However, they decided the case on the ground that the serious question raised by it was whether the trustees of the trust deed for creditors, which it was sought to enforce on the defendant Light-foot, had the legal title to the lands. In *Sreenath Ray* v. *Kallydass Ghose* (5) in a suit for specific performance of an agreement to execute a mortgage of certain land beyond the jurisdiction of the High Court, and in the alternative, for a return of the Rs 4000 advanced, Mr. Justice *Pontifex* held that so far as the suit was for specific performance the court had no jurisdiction to make a decree. The construction which the court of Calcutta would thus appear to have placed on the section, more especially in the last case, would exclude from the jurisdiction of the High courts

(1) Vide s. 16 of Act V of 1908.
(2) *Nalum* v. *Krishnaswamy*, 27 M. 157
(3) *Holkar* v *Dadabhoy*, 14 B. 353.
(4) 1 C. 249 (263)
(5) 5 C. 82.

the large class of cases in which English Courts of Equity exercise jurisdiction, although the lands are in the colonies or even in foreign states. Those cases are set out in detail by K. J. in *Graham* v. *Massey* ; *Inre Howthorn* (1) and the principle on which they procceed is stated by the *Earl of Shelborne L. C.* in *Ewing* v. *Orr. Ewing* (2). 'The Courts of Equity' in England he says 'are and always have been Courts of conscience operating *in personam* and not *in rem* ; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not locally or *ratione domicilli* within their jurisdiction. The present suit, whether it be regarded as a suit for specific performance or to enforce an equitable mortgage by deposit of title deeds, is clearly one which a Court of Equity in England would entertain. *Paget* v. *Ede* (3).....The High Courts in India have all the powers of a Court of Equity in England for enforcing therein decrees in *personam*—*Martin* v. *Lawrence* (4) *Hassanbhoy* v. *Cawosji Jehangir* (5) and we think that, had it been intended to exclude suits *in personam* as well as suits *in rem* from the jurisdiction of the High Courts, the framers of the Letters Patent, who were presumably English Lawyers, would have employed different language". Following this case the Bombay High Court exercised jurisdiction in a suit for specific performance of an agreement to sell (6) land or in a suit for foreclosure (7), although the land in dispute was outside the local limits of the original jurisdiction of the Court. A suit by an unpaid vendor of immovable property to have a charge declared on such property for the balance of the purchase money as against a vendee residing or carrying on business in Bombay is maintainable on the original side of the High Court even though the property is situate outside the limits of the original jurisdiction. The High Court has jurisdiction *in personam* in regard to lands situate outside its ordinary original jurisdiction (8). So also following *Holkar* v. *Dadabhoy* (9) it has been held that the Bombay High Court in the exercise of its ordinary original jurisdiction has power to entertain a suit by a mortgagee to enforce the mortgage security even though the properties are situate outside the limits of the ordinary civil jurisdiction and against mortgagors who are living outside the jurisdictions (10). In *Ganoda Sundary* v. *Nalini*, a recent Calcutta case (11) it was held that the Court may entertain a suit by an executor for a declaration and injunction (though not for possession) in respect of the estate of the deceased consisting of several

(1) L. R. 23 Ch. D. at p. 748.
(2) L. R. 9 App. Cas. 34 p. 40.
(3) L. R. 18 Eq. 118.
(4) 4 C. 655.
(5) 7B. 1.
(6) *Hans Raj* v. *Ranchordas*, 7 Bom. L. R. 319.
(7) *Sorabji* v. *Rattanji*. 22 B. 701.
(8) *Nedan Raja Kotakal* v. *The Malabar Timber*, 26 Bom. L. R. 541=48B. 625=1924 Bom. 412.
(9) 14B. 353.
(10) *Jasraj* v. *Akubai* 26 Bom. L. R. 539=80 Ind. Cas. 1007=1924 Bom. 419 ; see also *Venkata* v. *Khinji*, 80 Ind. Cas. 442=26 Bom. L. R. 535 ; *Abdul Hussani* v. *Mahomed Ali*, 46B 772=23 Bom. L. R. 1326=65 Ind. Cas. 160 ; *Mahomed Ali* v. *Abdul Hussani*, 79 Ind. Cas. 780=26 Bom. L. R. 163=1924B. 313 : but see *Panna Lal* v. *Gokul* 27 Bom. L. R. 570 ; *Yeshradabai* v. *Janardhan*, 81 Ind. Cas. 776=25 Bom. L. R. 1172.
(11) 36C. 28.

immovable properties, provided any one of the properties is situated within its original jurisdiction. It is not necessary that the cause of action should arise within the local limits, or be specifically with reference to the portion of the property, within those limits. In *Land Mortgage Bank* v. *Sudurudeen Ahmed* (1) *Trevelyan J.* observed : "Mr, Jakson has cited a decision of *Mr. Justice Lawrence* and *Mr. Justice Wright*, decided on the 20th February last [*De Souza* v. *British South African Company* (2)]. That case, there is no doubt, shows the present tendency of the English Courts to abstain from interfering even *in personam* when the matter concerns lands outside their jurisdiction."

Application of the doctrine that Equity acts in personam in suits relating to Injunction.—In granting injunctions the Court operates *in personam*. The person to whom its orders are addressed must be within the reach of the Court or amenable to its jurisdiction (3). It has already been stated that the scope of the jurisdiction of British Indian Courts is restricted by s. 15 of the Civil Procedure Code and article 12 of the Letters Patents of three presidency High Courts (4). The plaintiffs, the owners and occupiers of a house and premises in Howrah sued for an injunction in the original side of the High Court of Calcutta, to restrain a nuisance caused by certain workshops, forges and furnaces erected by defendants, and for damages for the injury done thereby. In granting injunction *Macpherson J.* observed : "The defendants contend that the Court has no jurisdiction, as the suit is, 'for land or other immovable property, and therefore ought to have been instituted in the Court of the district in which Howrah lies ; As regards jurisdiction, the defendant company being undoubtedly personally subject to the jurisdiction, as already decided by *Markby J*, by reason of their carrying on business in Calcutta, I think that this Court can properly deal with the suit. The suit is not as it seems to me 'for land or other immovable property' within the meaning of section 12 of the Letters Patent or section 5 of Act VIII of 1859. It is a suit exclusively *in personam* where the person against whom relief is sought is within, and subject to, the jurisdiction though the relief sought is in respect of acts done on land situated beyond the local

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(1) 19C. 358 at p. 367.

(2) Times Law Reports Vol. VIII p. 369 =(1892) 2 Q. B. 358.

(3) Kerr on Injunction p. 11 citing *Bodische.* v. *Johnson*, (1897) 2 Ch. 322 at p. 345 ; (1898) A. C. 203 ; *Bank of Africa* v. *Cohen* (1909) 2 Ch. 146 ; *Eastern Trust* v. *Mackenzie* (1915) A. C. 760. "As a consequence of the rule, that in granting an injunction the Court operates *in personam*, the Court may exercise jurisdiction independently of the locality of the act to be done, provided the person or his agent when relief is sought is within the reach and amenable to the process of the Court. This jurisdiction is not grounded upon any pretentions to the exercise of judicial or administrative rights abroad, but on the circumstance of the person to whom the order is adressed being within the reach of the Court." Kerr on Injunction p. 11 citing *Lord Portalington* v. *Soulby*, 3 M. & K 108 ; *Bushby* v. *Munday*, 5 Madd. 307 ; *Cranstown* v. *Johnston*, 3 Ves. 170 ; *Duder* v. *Amsterdamsch Trustee*, (1902) 2 Ch. 146 ; *Cohen* v. *Rothfield*, 88 L. J. K. B. 468, 471.

(4) The *Delhi and London Bank* v. *Wordie*, 1 C. 249, 263 ; *Land Mortgage* v. *Suduruddin*, 19 C. 358 (367)

limits of the original jurisdiction [See *Chintaman Narayan* v. *Madhavrao Venkatesh* (1) and *Penn* v. *Lord Baltimore* (2) and the other cases their cited; also see *Khalet Chunder Ghose* v. *Minto* (3)]" (4). So also where the plaint in a suit brought by some of the persons appointed trustees under a deed of endowment of certain land against their co-trustees, who were in possession, alleged that the defendant-trustees had ousted the plaintiffs, and had committed breaches of trust, and prayed that the deed might be construed and given effect to, and for a declaration that the plaintiffs were entitled to be shebaits jointly with the defendants, for the settlement of a scheme, for the performance of the worship, for the appointment of a receiver, for an injunction to restrain the defendants from interfering with the property, and for account. By the deed, the land was given to idols named therein and the plaintiffs and defendants were appointed shebaits and managers of the property, and were directed to accumulate for the benefit of the idols any surplus over and above the expenses of management, but were themselves to have no beneficial interest in the property. The land, the subject of the deed, was situated out of Calcutta, but all the parties to the suit resided within the local limits of the High Court's jurisdiction. *Held* that the suit was not a "suit for land or other immovable property" within the clause 12 of the Letters Patent, and therefore the Court had jurisdiction to entertain it without leave to sue being obtained. The Court might, if necessary, appoint a receiver of such property, and direct an account (5). In a suit brought against the owners of a mine adjacent to a mine belonging to the plaintiffs, the plaint alleged that a certain boundary line existed between the two mines, and prayed for a declaration that the boundary line was as alleged, and that the defendants might be restrained by injunction from working their mine within a certain distance from such boundary line. The defendants in their written statement disputed the plaintiff's allegation as to the course of the boundary line. The mines were situated out of the jurisdiction of the High Court, but both the plaintiffs and defendants were personally subject to the jurisdiction. On the facts stated in the plaint and before the filing of the defendant's, written statement, the Court granted an *interim* injunction and refused an application to take the plaint off the file. *Held* that the suit was a suit for land within, cl. 12 of the Letters Patent, and therefore one which, the land being in the mofussil, the Court had no jurisdiction to try (6). In delivering the judgment *Phear J.* observed: "The sole question in dispute between the parties is, whether the margin or strip of land between these two

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(1) 6 B. H. C. R. (A. C.) 29.
(2) 2 Tu. L. C. 837.
(3) I. J. N. S. 426.
(4) *Raimohon Bose* v. *East Indian Railway Co.*, 10 B. L. R. 241, 248; see also, The *East Indian Railway* v. *The Bengal Coal*, 1 C. 95 (100); *Ramlochan* v. *Sm. Kaminee Debee*, 10 B. L. R. 63 note; see also *Corran Iron* Co v. *Maclarn*, 5 H. L. C. 416.
(5) *Jaggodumba Dassee* v. *Puddomoney Dassee*, 15 B. L. R. 318 (324); See *The Delhi and London Bank* v. *Wordie*, 1 C. 249 (261)
(6) *The East Indian Railway Co* v. *The Bengal Coal Co.* 1 C. 95.

lines belongs to the plaintiff or to the defendant.....It is very different from the Howrah case (1), where the only question was, whether defendant, a stranger, was liable for a trespass upon the plaintiff's land, or a nuisance affecting him in the enjoyment of it, and where there was no question whatever between plaintiff and defendant, as to the plaintiffs' right to the land."

A Court can issue an injunction against persons within its jurisdiction, but it will not do so unless that remedy is likely to be an effective one (2). In *Hasim Osman* v. *Phapubai* (3), the Court observed : "Now it is well settled that in granting injunction against an alien, the Court acts *in personam*, and that it will so act only when the person against whom the relief is sought is within its reach and amenable to its jurisdictions. The defendants are in no way amenable to the jurisdiction of this Court or of any British Court to which the decree if any passed in this suit, might be transferred for execution and therefore any decree passed against them will be idle and inoperativ,e or in the language of Lord *Campbel* in *Norrish* v. *Chambers* (4) '*brutum fulmen*.' This is by itself sufficient reason for me to decline jurisdiction in this case,"

No jurisdiction to interfere with public duties of a department of government or Acts of foreign government.—An injunction cannot be granted to interfere with the public duties of the Government of India or the Local Government, or with the sovereignacts of Foreign Government (5). *In Ellis* v. *Grey*, (6) *Vice-Chancellor Sir L. Shadwell* overruled a demurrer to a bill praying an injunction to restrain the Lords of the Treasury from paying the compensation awarded under 11 Geo. 4 & 1 Will 4, c. 68 for the office of side clerk in the Exchequer, which had been abolished. The Vice-Chancellor said that he was of opinion that the bill did not seek to interfere with any public duty which the Lords of the treasury had to discharge, or with any discretion which they had to exercise in their public capacity. But that it sought to restrain them from doing a mere ministerial act, with a view to secure the money for the parties who might be decreed to be entitled to it (7). The general rule is that the courts cannot interpose by injunction or mandamus to limit or direct the discretion and action of departmental officers in respect of pending matters, within their jurisdiction and control (8). In the United States it has been held that as the executive department of the government is not subject to the jurisdiction of the judicial department the President cannot be enjoined from

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(1) *Rajmohon Bose* v. *The East India Co.*, 10 B. L. R. 241

(2) *Venkata Chalan* v. *Raja Gopal Naidu*, 55 M. 966=36 L. W. 498=63 M L. J. 568=A. I. R. 1932 Mad. 705 ; see also *A Milton* v. *Ojha*, 57 C. 1280=A. I. R. 1931 Cal. 279 ; see also *Norris* v. *Chambers*, 3 D. E. G. F. &. J. 584 ; *Deschamps* v. *Miller*, (1908) 1 Ch. 863, 864 ; *Bank of Africa* v. *Cohen*, (1909) 2 Ch. 146, 147=78 L. J. Ch. 780 ; *British South Africa* v. *De Beers and Co*, (1910) 2 Ch. 514, 517=80 L. J. Ch. 76, 77.

(3) 25 S. L. R. 269=A. I. R. 1931 Sind. 136=134 Ind. Cas. 400.

(4) 3 De G. F. & J. 583.

(5) Specific Relief Act s. 56 clause (d), *Ellis* v. *Grey*, 6 Sim. 214, 223 ; *Gladstone* v. *Ottaman Bank*, 1 H. & M. 505.

(6) 6 Sim. 2 14.

(7) Joyce on Injunntions 751.

(8) H. C. Joyce on injunctions § 54.

enforcing an act of Congress, on the ground of its being unconstitutional (1). In *Rex* v. *Board of Education* (2) *Farwell L. J.* said: "Then it was contended that even if this be so, this court has no jurisdiction to interfere—the Attorney General went so far as to say on any ground or in any way whatever. The Solicitor-General qualified the generality of this contention by saying un'ess they have wrongfully given themselves or assumed a jurisdiction that they do not possess.' The Solicitor General's contention is, in my opinion, the more accurate but it requires explanation and expansion. The point is of very great importance in these latter days when so many Acts of Parliament refer questions of great public importance to some Government department. Such department when so entrusted becoms a tribunal charged with the performance of a public duty, and as such amenable to the jurisdiction of the High Court within the limits now well established by law. If the tribunal has exercised the discretion entrusted to it *bonafide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere. They are not a court of appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them in which cases the courts have regarded them as declining jurisdiction. Such tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the court of King's Bench for centuries, and the High Courts since the Judicature Acts, has exercised over such tribunals." (3) So in the United States it has been held that the United States Circuit Court has no power to stay the Land Department in the discharge of a duty which is not ministerial but involve the exerci e of judgment and discretion. The remedy for an infringment of the rights of the plaintiff is at law after the conclusion of the administrative action on the part of the Government (4). But if a head of a department of the Government has no power or authority to do a certain act he may be enjoined from doing it, as he would be subject to a mandamus (5) if he refused to do an act which the law plainly required him to do (6). The English Court of Chancery had no jurisdiction to restrain the appointment or removal of a municipal officer (7). So also it is not the practice of the Court to interfere with corporate bodies "unless they are manifestly abusing their power" (8). The discretion of a public body is not subject to control by the courts (9).

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(1) *Mississippi* v. *Johnson*, 4 Wall. (U. S.) 495; H. C. Joyce on Injunction § 54,

(2) (1910) 2. K. B. 179=79 L. J. K. B. 595 at p. 603 S. C on appeal, 80 L. J K. B. 796.

(3) See also *Hari Pandurang* v. *Secretary of State for India*, 27 B. 424, 450.

(4) *Kirwan* v. *Murphy* 189 U. S. 35, 54.

(5) In India "neither the High Court nor any Judge thereof shall hereafter issue any writ of mandamus". Vide section 50 of the Specific Relief Act,

(6) H. C. *Joyce's Injunction* § 58.

(7) *Att. General* v. *Clarendon*, 17 Ves. 491.

(8) *The Ahmedabad Municipality* v, *Manilal Udinath*, 19 B. 212.

(9) *Patel Pana Chand* v. *The Ahmedabad Municipality* 22 B. 230, see also *Aiyasami* v. *The District Board Tanjori*, 31 M. 117.

The Courts of England have no jurisdiction on a contract as against a foreign sovereign, and they have none as against other parties in favour of whom it is alleged the sovereign has committed an act in derogation of rights and privileges already granted to another party, nor have these courts jurisdiction to interfere with the sovereign acts of a foreign government, nor with the prerogative rights of the sovereign of another country (1).

No injunction in matters purely criminal—The Court of Chancery had no jurisdiction to prevent the commission of crimes except in such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime ; but this exception arose from this peculiar jurisdiction of the Court (2). "Equity has no jurisdiction to interpose for the prevention of crime, or to enforce moral obligations, nor will it interfere for the prevention of illegal acts, merely because they are illegal (3)." "The jurisdiction of a Court of equity rests upon injury to property, actual or prospective, and this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property (4)." So the Court will not interefere by injunction the matters merely criminal or immoral, which do not affect any right to property (5). But if an act which is criminal touches also the enjoyment of property, the Court has jurisdiction, but its interference is founded solely on the ground of injury to property (6). So it was held that where criminal prosecutions were threatened under colour of an invalid statute for the purpose of compelling the relinsquishment of a property right, the remedy in Chancery was available, and a preliminary injunction might properly issue (7). Aid will not be extended by injunction to restrain the violation of public or penal statutes, or in any such case, in the absence of any injury to property rights (8). One reason for non interference is a fundamental want of jurisdiction, another is the existence of an adequate remedy at law. In other words the subject-matter of equity jurisdiction is the protection of civil rights and private property, and not the punishment or prevention of crime or immoral acts when not in connection with violation of private right. An injunction was refused, where no private interests were to be thereby protected, to prevent persons from carrying on the business of banking in violation of the statutes restraining incorporated banking associations (9). In the matter of the *Empress* v. *Denonath Roy*,

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(1) *Gladstone* v. *Ottoman Bank* 1 H. & M. 505 ; *Aksionairnoye* v. *Sagar* & *Co.* (1921) 3 K. B. 532.

(2) *Gee* v. *Pritchard*, 2 Sw. 413 ; *Joyce on Injunction*, p. 716.

(3) Spelling on Injunctions § 24.

(4) *The Emperor of Austria* v. *Day*, 3 De G. F. & J. 217, (232) ; see also s. 7 of the Specific Relief Act.

(5) Kerr on Injunction p. 8 citing *Att. Gen* v. *Sheffield, Gas. Co.*, 3 De G. M. & G. 320 ; *Springfield* v. *Riley*, 6 Eq. 551 ; *Stevens* v. *Chown*, (1911) 1 Ch. 904 ; *Watt* v. *Mac Laughlin*, (1923) 1 Ir. 12.

(6) Kerr on Injunctions p. 8 citing *Macaulay* v. *Schakell*, 1 Bill (N. S.) P. C. 127 ; *Att. Gen.* v. *Sheffield Gas Co*, 3 De G. M. & G. 320 ; *Mogul Steamship* v. *Macgregor*, 15 Q. B. D 476 ; *Dunlop* v. *Dunlop* (1920) 1 Ir. 295, 296.

(7) Spelling on Injunctions § 24.

(8) Spelling on Injunctions § 24.

(9) Ibid. "But where there has been a breach of Statutory enactment, for

(1) a rule was moved for under the Specific Relief Act and under s 170 of the Presidency Magistrates Act, calling upon the Presidency Magistrate to show causes why he should not give to the Bank of Bengal, through their constituted attorney, copies of depositions of the witnesses and the orders recorded in the matter of the Bank's complaint against one *Dino Nath Roy*, who had been discharged by the Magistrate. It was contended against an order of this sort that under section 7 of the Specific Relief Act, no relief was competent to enforce a penal law. The Court in making the rule absolute observed: "But we think that s. 45 of the Specific Relief Act is wide enough in its terms to apply to a case like this. Section 7 of the Specific Relief Act has been referred to as showing that 'specific relief cannot be granted for the mere purpose of enforcing a penal law'. It cannot be said, however, that an application to the Magistrate to grant copies of dep°sition and orders is an application for the mere purpose of enforcing a penal law. Copies may be required for many purposes".

Where Special Statute makes provision for infringement of right—whether injunction should issue.—It is a settled rule according to English law that if a statute creates a new right and gives a particular remedy for enforcing it, there is no other remedy. But there are two exceptions to this rule—The ancillary remedy in equity by injunction to protect a right, that is, a mode of preventing that being done which if done would be an offence. The remedy created by s. 25, sub-section 8, of the Judicature Act (2). The remedy formerly administered by the court of chancery by injunction was more extensive than any common law remedy, and may be invoked to prevent an invasion of proprietory rights, whether newly created or merely confirmed by statute, unless the statute expressly or by a nece sary implication excludes that remedy, and the court will not infer this intention from a provision for the purpose of protecting that right (3).

Application to Legislature.—Under the English Law, upon the principle that courts act *in personam* in granting injunction, it seems that the court has power, in a fit case, to restrain a person from applying to Parliament, although that jurisdiction is exercised under very exceptional circumstances (4). But in India an injunction cannot be granted to restrain persons from applying to any legislative body (5).

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which the sole remedy provided is a penalty, an injunction may be granted to prevent future breaches which are threatend" Kerr on Injunctions p. 9 citing *Cooper* v. *Willinghum*, 49 L. J. Ch. 752, 755 ; *Att. Gen* v. *Ashbourne*, (1903) 1 Ch. 107.

(1) 8 C. 166.

(2) *Cooper* v. *Wittingham*, 49 L. J. Ch, 752=15 Ch. D. 501.

(3) *Stevens* v. *Chown*, 70 L. J. Ch. 571=(1901) 1 Ch. 904 ; *Att. Gen* v, *Ashbourne*, 72 L. J. Ch. 67=(1903) 1 Ch. 191 ; *Att. Gen.* v. *Wimbleton House*, 73 L. J. Ch. 593=(1904) 2 Ch. 34 ; *Carlton* v. *Coleman*, (1911) 1 K. B. 771=80 L. J. K. B. 510.

(4) Kerr on Injunction 12 ; *Ware* v, *Grand Junction Water Co.*, 2 R. & M. 470, 493 ; *Heath Cote* v. *North Staffordshire*, 2 Mac & G. 100 ; *Hartidge Ex, parte*, 17 W. R. 946=20 L. T. N. S. 718. *Steele* v. *North Metropoletan*, L. R. 2 Ch. 237 ; Joyce on Doctrine p 310.

(5) Vide s. 56 (c) of the Specific Relief Act ; see also *Kumar Sankar* v. *Cotton*, 40 C. L. J. 515 ; *Bhupendra* v. *Ranjit*, 41 C. 384.

Application to foreign sovereign.—A court of Equity has no power to restrain British subjects from doing in a foreign country, whatever they are authorised to do by the sovereign power there (1). An English Court has no jurisdiction to enforce the contracts of a foreign sovereign government against the property of such government in England ; and where the government of a State extracts a loan in another country, the contract is governed by the law of the State whose government contracts the loan, and not by the law of the country in which the contract is made (2).

Injunction in political matters.—The court of chancery has no jurisdiction to interfere merely with a view to present resolution, it is only to prevent and injury to property that its aid by injunction can be invoked. The actual reigning Sovereign of a foreign State in amity with Great Britain is entitled to sue in English Court, and to obtain and injunction to prevent the issuing of monetary notes manufactured in England, purporting to be notes of that foreign state, but having no sanction from its government, if the court is satisfied that some substantial injury will thereby accrue to the property of such foreign state and to that of plaintiff's subjects whom he has a right to represent (3).

Preventive and Mandatory Injunctions defined and distinguished.—With reference to their nature, injunctions are divided into two classes, preventive and mandatory, they are more generally preventive than mandatory ; they seek to prevent a meditated wrong more than to redress an injury already done (4). When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel the performance of the requisite act (5). The cases in which relief by mandatory injunction is proper and will be granted may perhaps be better shown by examples than by general rule. Thus defendants who had begun to erect a bridge over a court were restrained from continuance and ordered to remove the portion already built (6). The following illustrations are also appended to s. 57 of the Specific Relief Act where mandatory injunctions can be granted. (*a*) A by new buildings, obstructs light to the access and use of which B has acquired a right under the Indian Limitation Act part IV. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights. (*b*) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project (*c*) A is B's medical adviser. He demands money of B which B declines to pay. A then threatens to make known the effect of B's communications to him as patient.

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(1) Joyce Doctrines p. 6 citing *Glad-Stone* v. *Ottoman Bank*, 9 Jur (N. S.) 246 ; see also Specific Relief Act s. 56.(d).

(2) Joyce Doctrines p. 4 citing *Smith* v. *Wegnelin*, L. R. 8 Eq. 198.

(3) *Experor* of *Austria* v. *Day and Kossuth*, 3 D. E. G. F. & J. 217 ; Joyce Doctrines p. 5.

(4) Storey's Equity Jurisprudence § 862.

(5) Specific Relief Act s. 55.

(6) H. C. Joyce on Injunction § 97.

This is contrary to A's duty and the court may order all written communications made by B, as patient, to A, as medical adviser to be destroyed. (*d*) A, a very eminent man, writes letters on family topics to B. After the death of A and B, C who is B's residuary legatee, proposes to make money by publishing A's letters. D who is A's executor, has a property in the letters, and he may sue for a mandatory injunction and the court may order A's letters to be destroyed. (*e*) A threatens to publish statements concerning B, which would be punishable under Chapter xxi of the Indian Penal Code. The court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property. (*f*) A being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication. (*g*) In the case put as illustrations (v) and (w) to section 54* and as illustrations (*e*) and (*f*) to this section, the court may also order the copies produced by piracy, and the trade marks, statements and communications, therein respectively mentioned, to be given up or destroyed. From the above illustrations it will appear a mandatory injunction is one which commands the doing of some positive act by the defendant, which will some times change the status of the parties, while a preventive injunction restrains the doing of the thing and preserves the status until the rights of the parties are determined. It would, however, be misleading to say that it is destructive of a mandatory injunctions to change the status of parties, for very often its most important if not entire effect is to restore the plaintiff to the original situation. A mandatory injunction may also be in a temporary or perpetual form (1).

CHAPTER III.

TEMPORARY INJUNCTIONS.

Temporary or Interlocutory Injunction.—Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of suit, and are regulated by the Code of Civil Procedure (2). Where in any suit it is proved by affidavit or otherwise—(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or (*b*) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain

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* (*v*) A pirates B's copy-right, B may obtain an injunction to restrain the piracy unless the work of which copy right is claimed is libellous or obscene. (*w*) A improperly uses the trade mark of B. B may obtain an injunction to restrain the user provided that B's user of trade mark is honest.

(1) Kerr on Injunction p. 44; *Kandaswamy* v. *Subramamia*, 41 M. 208=33 M. L. J. 448= 6 L. W. 140=41 Ind. Cas. 384; *Chamse* v. *Jumna Flour Mills*, 16 Bom L. R. 556=28 Ind. Cas. 121=41 C. 436; *Rosul Karim* v. *Pirbhai*, 16 Bom. L. R. 280=24 Ind. Cas. 625.

(2) Specific Relief Act s. 53.

such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders (1). Similarly in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security or otherwise as the Court thinks fit (2). But the Civil Procedure Code is not exhaustive. Therefore a Court of equity has power in a case of specific performance to interfere by an injunction in order to maintain matters in their present state, even if the case does not fall within the purview of Order 39 rule 1 (3). So temporary injunctions may be granted to enjoin waste *pendent lite*, or the breach of a contract or other wrong independant of contract *i. e.*, a tort. The ultimate object of the suit may be a perpetual injunction or the determination of some right to property or otherwise. But, where the defendant has committed or is threatening what the plaintiff alleges to be a breach of an obligation, or more briefly, a wrong, the plaintiff may ask the Court to direct the subject matter of the dispute to be maintained *in statu quo*, till the issue between the parties has been determined. If, specially the plaintiff's suit is to recover properly in specie, the defendant ought not to be allowed to decide the suit in his own favour by making away the property in his favour (4). By the English Judicature Act, 1873, sub-section 8 of section 25, it is

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(1) Vide Order XXXIX rule 1. The Court has no jurisdiction to grant an injunction under its inherent powers. *Ayyaperumal* v. *Muthuswami*, A. I. R. 1927 Mad. 687=102 Ind. Cas. 700. For the grant of injunction under this rule, it is necessary to adduce proof of an intention of waste, damage, alienation. *Prosunna Moyee* v. *Wooma Moyee*, 14 W. R. 409; *Dhundiram* v. *Chandan bai*, 2 B. H. C. R 98.

(2) Order XXXIX, rule 2, paras (1), (2).

(3) *Begum* v. *Dooli Chand*, 2 Ind. Cas. 267 (Cal.); but see *Jairam Das* v. *Zaman Lal*, 27 B. 357.

(4) T. L. L p. 1906 p. 591 citing *Robinson* v. *Pickering* (1881) 16 Ch. D. 636. In *Great Western Railway Co.* v. *Brimingham* and *Oxford Junction*, 2 Phill. 597, *Lord Cottenham* L. C. said: "It is certain that the Court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit in which the rights to it are to be decided, and that, without expressing, and often having the means of forming any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor which the Court prevents by its injunction. Such are cases of *Echliffe* v. *Baldwin* (16 Ves. 267) *Curtis* v. *Lord Buckingham*, (3 V & B 168) and *Spiller* v. *Spiller*, (3 Swan 556). It is true that the Court will not so interfere if it thinks that there is no real question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the Court to decide upon the merits in favour of the plaintiff." See also *Powell* v. *Lloyd*, 1 Y & J. 427; *Glascott* v. *Lang*, 3 My & Cr. 451; *Donnell* v. *Church and Clark*, (1842) 4 I. Eq. R. 630; *Bradbury* v. *Manchester, Sheffield and Linconshire Rail Co.*, 15 Jur.

provided that : "A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just and convenient that such order should be made, and any such order may be made either conditional or upon such terms and conditions as the Court shall think just ; and if the injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of any title ; and whether the estate claimed by both or by either of the parties are legal or equitable" (1). This Statute is construed to confer upon the Courts unlimited power to grant injunctions in all cases in which it would be right and just to do so. But it is held that what is right and just must be determined, not by caprice of the judge but according to established legal principles, precedents and reasons (2). So *Lindley M. R.* said : "(This Act) has not revolutionised the law, but it has enabled the Court to grant injunctions, and receivers in cases in which it used not to do so previously. I will not say where it had no jurisdiction to do so, that would be going too far, but where in practice it never did so." Although the scope of the authority of the English Court in matters of issuing temporary or interlocutory injunction is wider by virtue of the Judicature Act, yet that Act, does "not confer an arbitrary or an unregulated discretion on the Court and does not authorize the Court to invent new modes of enforcing judgments in substitution for the ordinary modes" (3). It does "not mean that the Court is to grant an injunction simply because it thinks it convenient. It means that the Court should grant an injunction for the protection of rights or the prevention of injury according to legal principles" (4).

Temporary or interlocutory injunctions are such as are to continue until the final hearing, or generally until further order (5) The court in granting *ad interim* injunction, will first see that there is a *bona fide* contention between the parties, and then on which side, in the event of obtaining a successful result to the suit will be the balance of inconvenience if the injunction do not issue, bearing in mind the principle of retaining immoveable property in *statu quo* (6). The object of an injunction is to prevent future injury, leaving matters as far as possible in *statu quo* till the suit in all its bearings can be heard and determined, at any rate some strong case of substantial damage to the plaintiff which

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1167. Probability of right is deemed sufficient. *Touson* v. *Walker*, (1752) 3 Swan. 672, 679.

(1) This is now replaced by s. 45 of the Judicature Act, 1925.

(2) *Beddow* v. *Beddow*, 9 Ch. D. 89 ; *Day* v. *Brownrigg*, 10 Ch. D. 294.

(3) *Doherty* v. *Allman*, 3 A. C. 728 ; *Harris* v. *Beauchamps*, (1894) 1 Q. B. 809.

(4) *Per Jessel M. R.* in *Aslatt* v. *Corporation of Southamton*, 16 Ch. D. 148.

(5) Order XXXIX, rules 1 & 2.

(6) *Gomes* v. *Charter*, 1 Ind. Jur. N.S. 411.

would arise from simply allowing things to remain in *statue quo* must be made out (1).

A preliminary injunction is only a provisional remedy, the sole object of which is to preserve the subject in controversy in its then condition and without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controver y may be materially injured or endangered. This doctrine is sustained by numerous authorities (2). In *Preston* v *Lock* (3) *Cotton L. J.* said : "This is an interlocutory injunction, the object of which is to keep things in *statu quo*, so that if at the hearing the plaintiffs obtain a judgment in their favour, the defendants will have been prevented meantime from dealing with the property in such a way as to make that judgment ineffectual." The *statu quo* which it is sought to be protected is that existing at the beginning of the controversy and an injunction should not issue to protect an advantage subsequently gained (4).

A preliminary injunction is different from a permanent injunction in that it is preliminary to a hearing on the merits and by no means dependent on such hearing. A permanent injunction may be had on final hearing on the merits. A preliminary injunction maintaining the *status quo*, may properly issue whenever the question of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving property will be immediate, certain and great if denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if granted. A temporary injunction assumes a pending action, in which allegations are to be settled by judgment, and that judgment puts an end to the temporary injunction, whether it grants or denies a permanent injunction (5). And the temporary injunction is abrogated by the final judgment, even though such judgment be appealed from, so that any restraints, in addition to those of temporary injunction, must be contained in the final judgment, or cannot be granted at all (6).

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(1) Per *Green J.* in *Shepherd* v. *The Trustee of the Port* of *Bombay*, 1 B. 132, 145, *Promotha* v. *Jagannath*, 17 C. L. J. 427.

(2) *Blakemore* v. *Glamargonshire*, 1 Myl & K. 154 ; *Blackpoint* v. *Eastern Concessions Co*, 79 L. T. 660 ; *Leney* v. *Callingham*, (1908) 1 K. B. 84 ; *Jones* v. *Pacaya* (1911) 1 K. B. 457=80 L. J. K. B. 156.

(3) L. R. 27 Ch. D. 497. So the principle as laid down in the case is that where perpetual injunction is sued for, and the plaintiff applies for a temporary injunction, the court should grant a temporary injunction if the effect of not granting such injunction will be to deprive the plaintiff for ever of the right claimed by him in the suit. See also *Munmohinee* v. *Ichamoyee* 13 W. R. 60 ; *Joynarain* v. *Shibprosad*, 6 W. R. Miss 1.

(4) H. C. Joyce on Injunction § 109 (a).

(5) Order XXXIX, r. 1, *Shaikh Moheeoodeen* v. *Shaikh Ahmad*, 14 W. R. 384. *Gossain* v. *Gour*, 11 C. 146 ; *Ayisa Umma* v. *Abdulla*, (1924) M. W. N. 636 ; *Madho Prosad* v. *Draupadi*, 43 A. 383=61 Ind. Cas. 417 ; *Chalavadi* v. *Poloari*, 31 M. 71 ; *Bolton* v. *London SchoolBoard*, 7 Ch. D. 766 ; *Yamminuddallah* v. *Ahmed*, 21 C. 561 ; *Ram* v. *Petam*, 10 A. 506 (512), *Kalyan* v. *Ghansham*, 5 B. 29 (31) ; *Balabhadra* v. *Balla*, A. I. R. 1930 All. 387.

(6) H. C. Joyce on Injunctions § 109 (b) ; see also *Gossain* v. *Gour*, 11C, 146, 149 ; *Yamim* v. *Ahmed*. 21 C. 561, *Chandi Bibi*, *In the matter* of, 26 A. 311 ; *Kripa* v. *Ram*, 10 A. 80 ; *Kanhi* v. *Biddya*, 1 A. 549 ; *Ram* v. *Pitam*, 10 A. 506, 512 ; *Chuni* v. *Dwarka*, A. W. N. 1887, 297.

As the object of a preliminary or temporary injunction is merely to preserve the property in dispute in *statu quo* and to protect it from injury until the rights of the parties can be finally adjudicated, the court will not, on the hearing of an application to grant or vacate a preliminary injunction, decide questions of tittle to the property in dispute, but will reserve such questions until the final hearing upon the merits. (1)

Rule 2 of Order 39, relates to temporary injunction in either cases of contract or cases of tort and though it is temporary in that it is granted only for a specific time generally till the hearing of the suit, or till further order, and really anticipates the decision of the question in issue between the parties, and may or may not result, when that has been decided, in the granting of a perpetual injunction, yet the kind of cases, whether of contract or of tort, in which an injunction either temporary or perpetual, may be granted, do not differ from each other so that if the case, as alleged, be such that at the hearing a perpetual injunction ought not to be granted, then clearly a temporary injunction ought not to be granted before the hearing ; though, of course, it does not follow that a temporary injunction will be granted, before the hearing, in every case in which a perpetual injunction might fitly be granted at the hearing ; for to justify a temporary injunction not only must the case be such that an injunction is the appropriate relief, but there must be the further ingredient that, unless the defendant is at once restrained by an injunction, irreperable injury or inconvenience may result to the plaintiff before the suit can be decided upon the merits (2).

From the accepted definition of an injunction as a remedy, we cannot conceive of its acting retrospectively. It can only affect the status of things *in praesenti* and *in futuro*. On an application for interlocutory relief of this character, courts of equity will only act prospectively, interposing such restrains as is necessary to prevent further infliction of the mischief complained of, and preserve matter in *statu quo* (3). This principle was well expressed in an early case (4) by *Lord Chancellor Brougham*, as follows : "The leading principle then on which I proceed in dealing with this application ; the principle which, as I humbly conceive, ought, generally speaking, to be the guide of the court and to limit its discretion in granting injunctions, at least where no special circumstances occur is, that only such restraint shall be imposed as may suffice to stop the mischief complained of where it is to stay a further inquiry, to keep things where they are for the present."

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(1) H. C. Joyce on Injunction § 110, High on Injunction 6, *Skinner's Co.* v. *Irish Society*, 1 M. & C. 162 ; *Woodbridge* v. *Bellamy*, (1911) 1 Ch. 338 ; *Gopeenath* v. *Kally Dass*, 10 C. 225 (231) ; *Chandidat* v. *Padmanand*, 22C. 459 (466).

(2) Collet's Specific Relief Act 4th Ed. 354. 365. *Nandalal's* C. P. Code.

(3) Spelling on Injunctions § 10.

(4) *Blakemore* v. *Glamorganshire*, 1 Myl & K. 154. On an interlocutory application for an injunction, the court will only act prospectively, and with a view to keep matter's in *statu quo*, and will not. unless in a very special case, grant the order in such a form as indirectly to compel some positive act to be done by the party enjoined. *Ibid*, see also *Leney & Co.* v. *Collingham and Thompson*, (1908) 1 K. B. 84=77 L. J. K. B. 67 ; *Jones* v. *Pacay Rubber & Co.* (1911) 1 K. B. 458 =80 L J. K. B. 156.

It has already been stated, that it is a rule of courts in issuing a temporary injunction, that they will in no manner anticipate the ultimate result of the questions of right involved. It is sufficient, for the purpose of making the order, that a case has been made out warranting interference for the preservation of the property or rights in issue in *statu quo*, until final hearing upon the merits. It is neither usual nor necessary, at this stage of the proceedings, to express even to have the means of forming an opinion on the merits of the principal matters at issue : nor, generally, does it defeat the rights acquiesced under an interlocutory injunction that complainant should not prevent upon the trial of the merits, or should fail to present such a case as will entitle him to a perpetual injunction upon the final hearing. He may be entitled to temporary relief, although his right to the relief prayed for may ultimately fail. But it must not be supposed that the Court will abstain from considering the question of probability of plaintiff ultimately establishing his demand, especially where, by granting an injunction, the defendant would be disturbed in the exercise of a legal right (1). There is an exception to the general rule above stated. In cases where the question involved is merely of a pecuniary nature, plaintiff will not be allowed an interlocutory injunction, unless the Court be satisfied that there is a probability that his bill will not be ultimately dismissed (2). When an *exparte* restraining order is obtained in the shape of injunction and when after service of notice the opposite party shows cause as regards the discharge of such order, there it becomes often necessary for the Court to express some opinion. In such a case (3) *Piggot J.* observed : "In the face of these facts it would be an entire absence of the discretion of the Court to remove the protection which an injunction places over the property until the truth or falsehood of the grave charges against these two persons shall have been investigated by oral evidence. It appears to me that neither in law nor on facts such as can be established by affidavit should I be justified in releasing the property from injunction. But of course in doing this I must not be taken as expressing any opinion as to the truth or falsehood of the plaintiff's case." In such a case the Court is not called upon nor justified to express any opinion upon the merits of the case save and except as is absolutely necessary for the decision of the preliminary question (4). But the Court ought not to interfere upon an interlocutory application for the purpose of preventing a party from enforcing a legal claim, without securing to itself the means of putting him in the same position, in the event of his turning out to be right, as if the Court had not interfered (5). The object of the interference of a Court of Equity by interlocutory

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(1) Spelling on Injunctions § 10 ; *Wilkinson* v. *Doffie* 12 Blatt Ch. p. 298 ; *Clayton* v. *Att. Gen.* 1 Coopt. Cottenham, 97.

(2) *Att. Gen.* v. *Mayor*, 5 Deg. M & G. 52 affirming S. C. Kay, 268.

(3) *Gopeenath Mukherjee* v. *Kalidas Muhherjee*, 10 C. 225.

(4) *Chandidat* v. *Padmanand*, 22 C. 459, 466.

(5) *Sanxter* v. *Foster*, Cr. & P. 302, *Per Lord Cottenham, L. C.*

injunction between two parties who are at issue upon a legal right, is soley the protection of the property in dispute until the legal right shall have been ascertained ; therefore, such an injunction ought always to be accompanied by a provision for putting the question into a course of speedy investigation at Law (1). Where an injunction is applied for upon a distinct ground which fails, it will not in general be granted upon another ground which has not been put forward, but which it appears might have been put forward in the circumstances of the case (2). Where the Legislature has provided a special remedy for the infringement of a right of property, the Civil Court is not ousted of its jurisdiction to protect the right by injunction (3).

The Court has jurisdiction to grant an *exparte* injunction ; but in exercising the discretion the greatest care should be exercised (4). An injunction should not issue in the absence of the opposite party without strong and grave reasons (5). A order granting a temporary injunction without issuing a notice to the opposite party to show cause aagingt it, is irregular (6).

Ordinarily if a plaintiff makes no prayer for a permanent injunction in a plaint, a temporary or *interim* injunction of a like nature should not be issued in his favour. But there may be cases in which a relief in the shape of a permanent injunction may not be necessary for the plaintiff, the other relief which the decree may provide for being sufficient ; consequently the withdrawal of the relief of permanent injunction cannot preclude the plaintiff from asking for a temporary injunction (7).

The effect and object of an *ad interim* injunction is merely to keep matters in *status quo* until the final disposal of the suit, and the principles on which such injunction will issue will be continued pending the final disposal of the suit or any earlier date on which further orders may be passed. The words "until further orders" do not extend its duration beyond the date of the decree (8). The person who seeks the aid of the Court in that behalf must as a rule, be able to satisfy the Court on three points : (*a*) that there is a serious question to be tried at the hearing and there is a probability that he will be entitled to the relief sought by him or in other words, that he has a *prima facie* case to go to the trial, (b) that the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable before his legal right can be established on trial and (c) that the comparative mischief or the in

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(1) *Harman* v. *Jones*, Cr. & P. 299 ; *Joyce's Doctrines*, 29.

(2) *Castelli* v. *Cook*, 7 Hare 89.

(3) *Cooper* v. *Whittingham*, 15 Ch. D. 506 ; *Hayward* v. *East London Water Works*, 28 Ch. D. 139 ; *Stevens* v. *Chown*, (1901) 1 Ch. 904 ; *Att. Gen.* v. *Ashbourne* (1903), 1 Ch. 107 ; *Att. Gen.* v. *Wimbledon*, (1904) 2 Ch. 34, 41 ; *Carlton* v. *Coleman*, (1911) 1 K. B. 782.

(4) *Hari Pandurang* v. *Secretary of State*, 5 Bom. L. R. 431.

(5) *Baddam* v. *Dhunput*, 1 C. W. N. 429.

(6) *Amolak* v. *Sahib*, 7A. 550 ; *Sanwal* v. *Narpat*, 11 O. C. 151.

(7) *Nanda Lal* v. *Kalipada*, 137 Ind. Cas. 519=54 C. L. J. 317=36 C. W. N. 291=A. I. R. 1932 Cal. 353 ; see also *Shiromoni* v. *Banta*, 8 L. L. J. 289=A. I. R. 1926 Lah. 504=27 P. L. R 453 ; *Banta* v. *Lena*, A. I. R. 1926 Lah. 523.

(8) *Balbhadra* v. *Balla*, 127 Ind. Cas. 577=A. I. R. 1930 All. 387.

convenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it (1)

The cases in which temporary injunction may be granted are where the property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree where the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors. A temporary injunction should not issue until it has been ascertained what property in dispute was in possession of each of the parties at the date of the suit (2). It is the duty of a judge before granting an injunction to satisfy himself that the plaintiff is not acting without reasonable and probable cause (3). Although a hard and fast rule cannot be laid down that *ad interim* injunction can never be granted in a suit for declaration, it should not be granted when in that suit there is no prayer for consequential relief or for a perpetual injunction, and where the plaintiff if successful in his suit for declaration must bring another action for enforcing the right he seeks to keep undisturbed by such injunction (4). So a temporary injunction can be granted even in a case where the relief claimed in the main suit is only a declaration (5).

An interlocutory order for an injunction can not be considered in argument as affecting the ultimate decision of a case (6). The Court ought not to grant an *interim* injunction to restrain a person from following his trade or profession if it is satisfied that to do so may prevent such person from earning his livelihood (7). The conditions applicable to perpetual injunction are not to be applied to temporary injunction (8). In the above mentioned case *Boys J.* observed: "The second point, as I have set out above, urged on behalf of the applicant here is that the lower Appellate Court did not decide the question whether a temporary injunction should be granted on the basis of certain principles alleged to be applicable to the grant of temporary injunctions, and when counsel was asked what those principles are, he was forced to admit that the only principles which he could suggest were those which were applicable to perpetual injunctions. I am of opinion that there is no force in this contention. Order 39 provides for the granting of temporary injunctions, and R. 2, sub-rule (2) is particularly applicable: The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving

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(1) *Daily Gazettee* v. *Karachi Municipality*, A. I. R. 1930 Sind. 287=127 Ind. Cas. 690; see also *Messrs Dentchi* v. *Pestonji*, A. I. R. 1925 Sind. 347=89 Ind. Cas. 321=21 S. L. R. 170; *Dharam Das* v. *Persian Gulf*, A. I. R. 1925 Sind. 76=78 Ind. Cas 972=21 S. L. R. 29; *Ismail* v. *Tayabali*, A. I. R. 1929 Sind. 182=125 Ind. Cas. 208=24 S. L. R. 81; *Hindu Punchayat* v. *Muhammadan*, 103 Ind. Cas. 167.

(2) *Lalbharethi* v. *Panchayat*, 110 Ind. Cas. 621.

(3) *Imperial Tobacco* v. *Bouman*, 46 C. L. J. 455.

(4) *Shiromoni* v. *Banta*, 8 L. L. J. 289 =A. I. R. 1926 Lah. 504.

(5) *Banta* v. *Lena*, 92 Ind. Cas. 723=A. I. R. 1926 Lah. 523.

(6) *Drew* v. *Harman*, 5 Price 319.

(7) *Palace Theatere* v. *Clemsy*, 62 T. L. R. 28.

(8) *District Board of Furrukhabad* v. *Ikhlaque Hossain*, A. I. R. 1933 All. 86=1932 A. L. J. 803.

security, or otherwise, as the Court thinks fit. Now Ch. IX, Specific Relief Act, deals with injunctions generally. As regards temporary injunctions, s. 53 expressly provides that they are regulated by the Civil Procedure Code. Chapter X lays down a number of conditions involving a grant of perpetual injunctions. It would be strange indeed if the Legislature deliberately distinguished between temporary and perpetual injunctions in the Specific Relief Act, and yet it intended the very conditions which it applied to perpetual injunctions to be applied to temporary injunctions. In this contention therefore of the applicant here, I think there is no force" (1).

It is not open to a Court frivolously and vexatiously to issue a temporary injunction without proper cause and due consideration (2). Unless plaintiff proves by definite evidence that the defendant threatened to remove or dispose of his property with a view to defraud his creditors a temporary injunction cannot be granted (3). The offending of religious prejudices is not a ground for granting an injunction (4). The Court deals with great stinctness and severity with persons who apply for *ex parte* injunctions. The party applying is bound to put the Court in possession of all the facts, in order to enable it to judge whether the defendant ought to be put to what may be occasionally a very serious evil, viz, a temporay injunction (5). Where, therefore, a plaintiff applies *ex parte* for a special injunction, he is bound to state in his bill every material fact, and set out every material document, bearing upon the subject matter of litigation (6). Where therefore, a plaintiff omitted a material letter written by the defendant, and the attention of the Court was not pointedly called to such letter on the application for the *ex parte* injunction, the Court immediately discharged the order for the injunction, and directed restitution of possession of certain premises, the question in the suit (7). Persons coming for an injunction *ex-parte* must state their case fully and fairly to the Court ; if they do not they will be made to pay costs, even though successful (8). It sometimes happens, that upon an application *ex parte* for an injunction, the Court will, if it thinks

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(1) In the Bombay case of *Nusserwanji* v. *Gordon*, 6 B, 266, 279, it was observed by *Sir Charles Sargent* that the issue of an interlocutory or temporary injunction is governed by the same principles as the granting of permanent injunction. Referring to these observations *Sir Arnold White* said : 'Now having regard to the fact that the law with regard to the granting of a perpetual injunction is to be found in the Specific Relief Act and is laid down with precision and that the law with regard to the granting of a temporary injunction is to be found in the Code of Civil Procedure and is declared to be a matter for discretion, if it were necessary to consider the point I am not sure I should be prepared to go quite so far as *Sir Charles Sargent*." *Subba* v. *Haji Badsha*, 26 M. 168, 175; In *N. W. Ry Administration* v. *N. W. Ry Union Lahore*, A. I. R. 1933 Lah. 203, the Ccurt said : "It is settled law that the issue of a temporary injunction is governed by the same principles as the grant of a permanent injunction at the trial of a case."

(2) *N. W. Ry Administration* v. *N. W. Ry Union*, A. I. R. 1933 Lah. 203.

(3) *Kalian* v. *Shanno* 1924 Lah. 718.

(4) *Badan* v. *Dhunpat*, 1 C. W. N. 429.

(5) *Maclarine* v. *Stainton* 16 Beav. 279 (290).

(6) *Harbottle* v. *Pooly*, 20 L. T. N. S. 436.

(7) Ibid.

(8) *Halden* v. *Waterlow*, 15 W. R. 139 ; Joyce on Injunctions p. 1306.

that the case is not so urgent as to require immediate interference, or that the affidavits in support of it are not sufficiently positive and might be contradicted, order notice of the motion to be given to the defendant (1). The Court shall in all cases except where it appears that the object of granting the injunction would be defeated by the delay, before granting injunction direct notice of the application for the same to be given to the opposite party (2).

When a temporary injunction is granted pending these determination of a suit, it is usual to put the applicant under terms to abide by such order as the Court shall think fit to make by way of damages resulting from the passing of such order (3). There is nothing in the provisions of the Specific Relief Act which can be construed into a prohibition against the grant of a conditional injunction (4).

Interim orders.—*Interim* orders are temporary *ex parte* injunctions, or *interim* restraining orders in the nature of injunctions, which are granted when the plaintiff not showing quite a case for are *exparte* injunction, without more shews a case for giving a short notice of motion for an injunction, and for protection in the meantime. The *interim* order is therefore an injunction or restraining order, obtained *exparte*, to be in force until after a day named, with liberty (if required) to serve a notice of motion for an injunction on the day before that day, when the question of the right to an injunction would be disposed of, on the notice of motion. If a proper case is shown, the court will grant an *interim* order, extending order and including a named day (5). An *interim* order is usually accompanied by putting the plaintiff on terms, to give an undertaking for any damage done to the defendant, by the interim order (6). Interim orders, though generally granted upon *ex parte* applications, may also be granted where the motion is on notice or the pleadings shew issues raised, which must be discussed at the hearing (7). *Interim* orders do not put the other side to the necessity of coming to the court to dissolve them; but if necessary that the court should be informed of every fact, whenever an *interim* order is asked for (8).

Before granting temporary injunction a *prima facie* case must be established.—"In granting a temporary injunction all that is necessary is to see whether the plaintiff has shown a *prima facie* case in support of the title asserted by him." (9) The rule that before the issue of temporary injunction the court must satisfy itself that the plaintiff has a *prima facie* case, does not mean that

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(1) *Lord Byron* v. *Johnston*, 2 Mer. 29; See *Burma oil* v. *Sampson*, 64 Ind. Cas. 534.

(2) Civil Procedure Code Order 39, rule 3; see also *Amolak Ram* v. *Sahib Singh*, 7 A 550; *Hari* v. *Secretary of State*, 27 B. 424; *Baddain* v. *Dhunpat*, 1 C. W. N. 429; *Fermen* v. *Mc. Arther*, 2 Taylor & Bell. 25.

(3) *Shadiram* v *Abdul* 1 A. L. J. 527; see also *Chandra Nath* v. *Sree Gobind*, 6 C. W. N. 308.

(4) *Hari Singh* v. *Municipal Committee*, 78 P. R. 1901.

(5) *Fraser* v. *Whalley*, 2 H. & M. 10; Joyce Injunctions p. 1304.

(6) Seton 3rd Ed. 865.

(7) *Coleman* v. *West Hatlepool Railway Co.*, 3 L. T. (N. S.) 847.

(8) Joyce on Injunctions p. 1305.

(9) *Begg Dunlop* v. *Satish*, 23 C. W. N. 677 (682) = 46 C. 1001 = 29 C. L. J. 584;

the court should examine the merits of the case closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed. This would amount to prejudicing the case on its merits. All that the court is to see is that on he face of it the person applying for an injunction has a case, which needs consideration and which is not bound to fail by virtue of some apparent defects (1). A probability of right is sufficient to sustain and injunction (2). In *Great Western Railway Company* v. *Birmingham and Oxford Junction Railway Company* (3), *Lord Chancellor Cottenham* said that in many cases the court would interfere to preserve the property *in statu quo* during the pendency of the suit in which the rights to it were to be decided, and that, without expressing, and often without having the means of forming, any opinion as to such rights ; that it was true the court would not interfere if it thought that there was no real question between the parties, but that seeing there was substantial question to be decided, it would preserve the property until such question could be regularly disposed of ; and that in order to support an injunction for such purpose it was not necessary for the court to decide upon the merits in favour of the Plaintiff ; and that if the bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed for might ultimately fail (4). But the circumstances of the case, at the time when the motion is made, must be such as to enable the court to interfere between the parties, or to put the question between the parties into a course of trial, and where that is not the case, the motion will not be allowed to stand over till the purpose has been so far executed as that its character may be judged of, but will at once be refused (5). In *Ollendroff* v. *Black*, (6), *Vice Chancellor Sir J. L. Knight Bruce* said, that it had been said in this case, that the legal right was so doubtful, and that the mere existence of the doubt was sufficient to prevent the court from granting the injunction ; that in that he did not agree ; he believed that such a

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Ram Rakhi v. *Brij Bhusan*, 29 P. L. R. 50=110 Ind. Cas. 118=A. I. R. 1928 Lah. 235 ; *Upendra* v. *Union Drug*, 43 C. L. J. 405=A. I. R. 1926 Cal. 837 ; *Imperial Tobacco* v. *Bonnan*, 46 C. L. J. 455 ; *Teja* v. *Harnam*, 89 Ind. Cas. 678 ; *Rameswar* v. *Kumar* A. I. R. 1925 Pat. 337 ; *Deotsche* v. *Prestonji*, 89 Ind. Cas. 321=A.I.R 1925 Sind. 347.. A party who asks for a temporary injunction pending suit must show *prima facie* case. The granting of the application would then depend on the balance of convenience. *Kenneth* v. *Ranjan*, 5 Pat. L. T. 196=75 Ind. Cas. 859=1924 P. 526 ; see also *Rameshwar* v. *Yakin Uddin*, 1924 Lah. 638. Before granting the injunction the Court was bound to consider how far there was any possibility of plaintiff's succeeding in the suit. *Nagendra* v. *Probal Chandra*, 17 C. W. N. 964. The Court will not interfere, if it thinks that there is no real question between the parties ; but seeing that there is a subtantial question to be decided it will preserve the property until such question can be regularly disposed. In order to support an injunction for such a purpose, it is not necessary for the court to decide upon the merits in favour of the plaintiff. *Promotha* v. *Jogendra*, 17 C. L. J. 427.

(1) *Bishambar* v. *Municipal Committee of Delhi*, 96 Ind. Cas. 286=A. I R. 1926 Lah. 589

(2) *Touson* v. *Walker*, 3 Sw. 679 ; *Seodar* v. *Ramsarup*, A. I. R. 1926 Pat. 318=7 P. L. T. 337.

(3) 2 Ph. 547.

(4) Joyce's Doctrines 29.

(5) *Haines* v. *Taylor*, 2 Ph. 209=10 Beav 75.

(6) 4 D. E, G. & Sm. 209, 210 ; Joyce's Injunctions, 1030.

doctrine was new in this court, and would interfere theoretically and practically with its jurisdiction, daily exercised, to a very great extent. That the circumstances of a legal right being in doubt was a matter for serious attention, but did not render it incumbent on the court to refuse an injunction ; that the court must be guided by a discretion to the exegencies and the nature of each particular controversy (1). In *Dalglish* v. *Jarvie*, (2), the *Lord Commissioner*, *Lord Langdale*, said that when a plaintiff came for an injunction to restrain the defendant from the prosecution of his legal right, there were several things to be considered ; not only was the amount of the injury which might be done to be taken into consideration, but also the extent to which the decision at law upon the subject could go, and the decree of certainty more or less, in reference to that decision, and that, taking these several matters into consideration, the court would in some cases refuse to interfere at all, and in others refuse to interfere otherwise than by postponing the question for a time, and giving the opportunity of bringing an action in the meanwhile. It is not necessary for a party who seeks to continue an injunction up to the hearing to shew an indefeasible right to the decree prayed for by the plaint (3). All that is necessary is that a man who seeks the aid of the court must be able to show a fair *prima facie* case in support of the title which he asserts (4). "Being a severe remedy" says *Mr. Spelling* "an injunction will not be granted in the first instance except upon a clear *prima facie* case and upon positive averments of the equities on which the application for the relief is based. The complainant must allege positively the facts constituting his grounds for relief, although it is not essential that he should establish his case upon an application for an interlocutory injunction, with the same degree of certainty that would be required upon the final hearing. Mere argumentative allegations or inferences from the facts stated do not suffice to meet the requirements of the rule requiring allegations to be specific ; and the relief will not be allowed where the facts upon which complainant's equities rest, are stated only upon information and belief" (5). Doubts in matters of law are always sufficient ground for continuing an injunction once granted (6). Upon an application in *Spottishwoode* v. *Clarke* (7), to discharge an order made by the Vice-Chancellor of England restraining the defendant from selling almanacs with the title 'Pictural Almanacs' printed thereon, so as, by colourable representation, to represent the almanac published and sold by the defendant to be the same as the almanac printed and sold by the plaintiff for the year 1847 : *Lord Chancellor Cottenham* said that all these cases depended upon their own circumstances, and that all that the court could

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(1) Joyce's doctrines p. 28.
(2) 2 Mac & G. 231, 242=2 H. & Tw. 437 ; Joyce on Injunctions p. 1031.
(3) *Powell* v. *Lloyd*, 2 Y & J. 427.
(4) Kerr on Injunction 15 ; *Saunders* v. *Smith*, 3 M & C. 728 ; *Hilton* v. *Lord Granville*, Cr. & Ph. 283, 292 ; *Leney* v. *Callingham*. (1908) 1 K. B. 84=77 L. J. K. B. 87 ; *King of Italy* v. *Tornaquinie*, (1918) 34 T. L. R. 623 ; *Krishna Chandra* v. *Hemchandra* 21 C. L. J. 469.
(5) Spelling on Injunctions etc. § 25.
(6) *Maxwel* v. *Ward*, 11 Price 3.
(7) 2 Ph. 154=1 Coop C. C. 254 ; Joyce on Injunctions p. 1032.

do was to lay down the principles upon which it acts, in order that parties might know what measure of relief they had to expect in any particular case, and that he had often expressed his opinion, that unless a case of this kind, depending upon a legal right, was very clear, it was the duty of the court to take care that the right be ascertained before it exercised its jurisdiction by injunction, and that the first question to be determined was as to the lega right, and if the court doubted about that, it might commit great injustice by l interfering until that question had been decided ; and that it was much better, if the legal right was to be litigated, that this court should abstain from expressing any opinion upon it in the meantime ; but that the greatest of all objection seems, that the court ran the risk of doing the greatest injustice in case its opinion on legal right turned out to be erroneous ; and that in this case, if the plaintiff was right, the court had some means, at least, of indemnifying him, by making the defendant keep an account ; whereas if the defendant were right, and he were restrained, it was utterly impossible to give him compensation for the loss he would have sustained ; and that the effect of the order in that event would be to commit a great and irremediable injury, an l that unless, therefore, the court was quite clear as to what were the legal rights of the parties, it was much the safest course to abstain from exercising its jurisdiction till the legal right had been determined (1).

On an interlocutory motion for an injunction as to matter merely pecuniary, the plaintiff cannot succeed without satisfying the Court not merely that there is a case to be tried, but that there is some probability of the case not being dismissed at the hearing (2). *In Moran* v. *River Steam Navigation Company* (3) *Markby J.* said : "It was also broadly contended by the Advocate-General that, when there is a contradiction upon the facts, an *interim* injunction cannot issue, but, in a very large number of cases, *interim* injunctions issue simply in order to keep the parties in *statu quo* while their rights are being determined, and there is generally a conflict upon the facts out of which there rights arise." (4). A probability of right is sufficient to sustain an action (5). Before granting a temporary injunction a Court is bound to consider how far there was any possibility of plaintiff's succeeding in the suit (6). In the case of *Preston* v. *Luck* (7) *Cotton L. J.* said : "Of course in order to entitle the plaintiff to an interlocutory injunction though the Court is not called upon to decide finally

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(1) This case was decided by old Chancery Division of England. A legal right in this case could be determined by a different tribunal. Now this distinction has been abolished by the passing of the Judicature Act of 1873.

(2) *Att. Gen.* v. *Wigan* (*Mayor of*) 5 De G. M & G 52 ; Kerr Inj. 17 ; Joyce's Doctrines. 56.

(3) 14 B. L. R. 357.

(4) But Mr. H. C. Joyce says : 'A preliminary injunction should not be granted where the plaintiff's right to it are doubtful. The pre-requisites to the allowance of a preliminary injunction are that the complainant must generally present a clear title, or one free from reasonable doubt, and set forth acts done or threatened by the defendant which will seriously or irreparably injure his rights under such title, unless restrained."

(5) Joyce's Dectrine ;citing *Touson* v. *Walker*, 3 S W. 679.

(6) *Nagendra* v. *Probal*, 17 C. W. N. 965.

(7) 27 Ch. D. 497 (505)

on the rights of the parties it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief." In *Challender* v. *Royle* (1) the same learned judge said: "It is true that in all cases of interlocutory injunction the Court does consider and ought to consider the balance of convenience and inconvenience in granting or refusing the injunction. But there is a very material question to be considered—has the plaintiff made out a *prima facie* case? That is to say, if the evidence remains as it is, is it probable that at the hearing of the action he will get a decree in his favour." "It would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged" (2). "In cases of interlocutory injunction" says *Mr. Justice Mukherjee* "in aid of the legal right, all that the Court has to consider is whether the case is so clear and free from objection on equitable grounds that it should interfere without waiting for the legal right to be established. This depends upon various circumstances and it is impossible to lay down any general rule on the subject by which the discretion of the Court should in all cases be regulated. It is not necessary that the Court should find a case which entitle the plaintiff to relief at all events; it is quite sufficient if the Court finds a case which shows that there is a substantial question to be investigated and that matters should be preserved in *statu quo* until the final disposal of the question" (3). Where a plaintiff asks the Court to grant an *ad interim* injunction against the defendant during the hearing of the suit, he must show that *prima facie* he is entitled to succeed in his claim on the merits (4).

In *Israil* v. *Samser Rahman*, (5) *Mr. Justice Mookerjee* said: "What the Court has, at this stage to determine is, whether there is a *bona fide* contention between the parties, or, as was said by *Mr. Justice Markby* in *Moran* v. *R. S. N. Co.* (6), whether there is a fair and substantial question to be decided as to what the rights of the parties are. To the same effect is the decision of their Lordships of the Judicial Committee in the case of *Walker* v. *Jones* (7) where *Turner L. J.* observed as follows:—'The real point is, not how these questions ought to be decided at the hearing of the cause, but whether the nature and difficulty of the question is such that it was proper that the injunction should be granted until the time for deciding them should arrive. It is quite sufficient if the Court find a case which shows that there is substantial question to be investigated and that matters should be preserved in *statu quo* until the question can be finally disposed of [*Jones* v. *Pacaya* (8)].' An *ad interim* injunction

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(1) 36 Ch. D. 425.
(2) *Chandidat* v. *Padmanad*, 22 C. 459, 465.
(3) *Krishna Chandra* v. *Hem Chandra*, 21 C. L. J. 469 (471).
(4) *Kenneth* v. *Ranjan*, 75 Ind. Cas. 859=5 Pat. L. T. 196; see also *Singaran* v. *Indra*, 10 C. W. N. 173.
(5) 18 C. W. N. 176 (178)=41C. 436=19 C. L. J. 47=21 Ind. Cas. 861.
(6) 14 B. L. R. 352.
(7) L. R. 1 P. C. 50.
(8) (1911) 1 K B. 455; see also *Kanshi Ram* v. *Sharf Din*, 66 Ind. Cas 161=1922 Lah. 356.

ought not to be granted when permanent relief is not obtainable (1). The Court, in granting an *ad interin* injunction, will first see that there is *bona fide* contention between the parties, and then on which side, in the event of obtainting a successful result to the suit, will be the balance of inconvenience if the injunction do not issue, bearing in mind the principle of retaining immoveable property in *statu quo* (2). In India, the question whether an injunction was obtained without a reasonable and probable cause is purely one of fact (3). A Court cannot be asked to give the relief which forms the cause of action in the suit under colour of temporary injunction (4).

Actual or threatened Injury.—"It is well settled that a man who seeks the aid of the Court by an injunction must show that the act complained of is in fact a violation of his right or is at least an act which, if carried into effect, will necessarily result in a violation of the right. The mere prospect or apprehension of injury or the mere belief that the act complained of may or will be done is not sufficient. As *Lord Brougham* said in *Earl of Ripon* v. *Hobart* (5) proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage; it will go further according to the same practical and rational view, and balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief should it be done, would be vast and over-whelming. To succeed in such an action, the Plaintiff must show a strong case of probability that the apprehended mischief will in fact arise (6), or in the words of *Fitz Gibbon L. J.*, in *Attorney General* v. *Rathmines* (7), the law requires proof by the plaintiff of a well founded apprehension of injury, proof of actual and real danger (8). The plaintiff must show the existence of an intention on the part of the defendant to do the act complained of; but direct evidence of such intention may be unnecessary if a man insists on his right to do or begins to do or threatens or gives notice of his intention to do an act which must, if completed, give a ground of action. As was observed by *Wood* V. C. in *Tipping* v. *Eckersly*, (9), the Court may interfere by injunction whether the defendant has or has not actually committed the breach in respect of which the interference of the Court is sought for. In a case of contract, it is enough

(1) *Bishnu Prosad* v. *Sashi*, 73 Ind. Cas. 294=2 Pat. L. R. 17; *Jital Singh* v. *Kamalaswari* 15 Ind. Cas. 614=16 C. L. J. 555=18 C. W. N. 12.

(2) 1 Ind. Jur. N. S. 411; see also *Kanshi* v. *Bishambar*, 120 Ind. Cas. 535= A. I. R. 1930 Lah. 184.

(3) *Habibulla* v. *Atma Singh*, A. I. R. 1933 Lahore 263; *Pestonji* v. *Queen Insurance Co.* 25 B. 332=2 Bom. L. R. 938=4 C. W. N. 781 P. C.; but see *Nagendra* v. *Basanta*, 57 C. 25=A. I. R. 1930 Cal. 392; "The question whether the injunction was obtained without reasonable and probable cause is a mixed question of fact and law."

(4) *Brojendra* v. *Nawab Syed Abdur*, 21 C. L. J. 464=27 Ind. Cas. 647.

(5) 3 My & Ke 174.

(6) *Attorney General* v. *Manchester Corporation*, (1893) 2 Ch. 87, 91.

(7) (1904) 1 I. R. 161.

(8) *Attorney General* v. *Nottingham Corporation*, (1904) 1 Ch. 673.

(9) 2 K & J. 264.

if the defendant claims and insists on a right to do the act, although he has not already done it *modo et forma* as alleged. To the same affect is the observation of *Jessel M. R.* in *Cooper* v. *Whittingham* (1): Whenever an act is illegal and is threatened, the Court will interfere and prevent the act being done, and as regards the mode of granting an injunction, the Court will grant it either when the illegal act is threatened but has not been actually done, or when it has been done and simply is intended to be repeated. Of similar import is the observation of *Mellish, L. J.* in *Hext* v, *Gile* (2) which arose in connection with the exercise of mining rights; where persons claim to have the right to do a thing even though saying they have no present intention of doing it, it is idle for them to say that they do not threaten to do the thing, and to contend that they are not proper parties to a bill for a declaration of right and for an injunction. The same principle has been affirmed in numerous judicial decisions amongst which may be mentioned: *Attorney General* v. *Forbes*, (3), *Shifts* v. *Blackow & Co.*, (4), *Carleton* v. *Coleman*, (5), *Thornhill* v. *Weeks* (6) and *Pots* v. *Lavy* (7)." (8) In *Martin* v. *Price*, (9), the Court of appeal (10) said: "The plaintiff's legal right and its infringement already, and threatened further infringement, to a material extent, being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the Court is in the habit of acting in these cases." And in the later case of *Shafer* v. *London Electric Lighting Co.*, (11) the same principle was re-affirmed, and a protest entered against the motion that a Court ought to allow a wrong to continue, simply because the wrong doer was able and willing to pay for the injury he might inflict (12). So if the legal right is not disputed, a man who seeks the aid of the Court must be able to show that the act complained of is in fact a violation of the right, or is at least an act which, if carried into effect, will necessarily result in a violation of the right (13). Unless an actual injury results to a private individual from the excessive powers of a company, he is not entitled to any injunction (14). The circumstances that a party is commencing operations avowedly for a purpose which another conceives to be injurious to him and illegal, does not warrant the latter in applying for an injunction, unless the circumstances of the case, at the time when the motion is made, are such as to enable the Court either to form its own opinion as to the legality of

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(1) 15 Ch. D. 501.
(2) L. R. 7 Ch. App. 699 (711).
(3) 2 My & Cr. 132.
(4) 34 Ch. D. 729.
(5) (1911) 1 K B. 783.
(6) (1913) 1 Ch. 438.
(7) 2 Drewry 272.
(8) *Ramjas Agarwalla* v. *Brojamohan*, 19 C. W. N. 886=20 C. L. J. 538=27 Ind. Cas. 244.
(9) (1893) 1 Ch. 276.
(10) *Lindley*, *A. L. Smith*, and *Davey*, L. JJ.
(11) (1895) 1 Ch. 287, judgment of *Kekewich* J was reversed by *Lord Halsbury*, *C.*, *Lindley* and *A. L. Smith* L. JJ.
(12) T. L. L. 1906 p. 602.
(13) Kerr on Injunctions 16, citing *Earl of Ripon* v *Habart*, 3 M & K 169, 176; *Haines* v. *Taylor*, 10 Beav. 75; *Pattison* v. *Gilford*, 18 Eq. 259; *Goodheart* v. *Hyett*, 25 Ch. D. 190; *Fletcher* v. *Bealey* 28 Ch. D. 688; *Fielden* v. *Cox*, (1906) 22 T L. R. 411; *Fraser* v. *Fear*, (1912) 107 L. T. 428; *Ditchfield spear* v. *Queen Anne's Gate*, (1910) 1 Ch. 412; *Binode* v. *Soudaminey*, 16 C. 252 (257).
(14) *Ware* v. *Regents Canal Co.*, 5 Jur. N. S. 25.

the meditated purpose or to put that question into a course of immediate trial, and therefore, where that is not the case, the motion will not be allowed to stand over till the purpose has been so far executed as that its character may be judged of, but will be at once refused (1). So the mere prospect or apprehension of injury or a mere belief that the act complained of will be done, is not sufficient (2).

"Relief" says *Mr. Justice Woodroffe* "whether it be given by the issue of Injunction or the appointment of a Receiver, is granted geneally upon the principle *quia timet* that is, the Court assists the party who seeks its aid, because he fears (*quia timet*) some future probable iniury to his rights and interests, and not because an injury has already occurred, which required any compensation or other relief" (3). "The *quia timet* bills are in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily, applied to prevent wrong or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a Court of equity, because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred, which requires any compensation or other relief. The manner in which this aid is given by Courts of equity is, of course, dependant upon circumstances. They interfere sometimes by the appointment of a receiver to receive rents or other income, sometimes by an order to pay a pecuniary fund into Court, sometimes by directing security to be given, or money to be paid over, and sometimes by the mere issuing of an injunction or other remedial process, thus adopting their relief to the precise nature of the particular case and the remedial justice required by it. In *Fletcher* v. *Bealey* (4) *Mr. Justice Pearson* explained the law as to actions *quia timet* as follows :—'There are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed the damage will be suffered, I think it must be shown that if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action" (5). If, in an action *quia timet* for a

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(1) *Hanies* v. *Taylor*, 2 Ph. 209= 11 Jur. 33=10 Beav. 75.

(2) Kerr on Injunction p. 16 citing *Earl of Ripon* v. *Hobart*, supra.

(3) Woodroffe's Injunction p. 15 cited in *Nathu* v. *Sheosa*, 89 Ind. Cas. 639. *Govinda Lal* v. *Ichavaga*, 22 Bom. L. R. 723=57 Ind. Cas. 414 : "A *quia timet* action can be brought only when the opposite party does something towards infringing the plaintiff's rights, or it is so clear that he is on the point of doing something which will infringe the plaintiff's rights so that consequently there must be the prospect of irremediable injury being suffered by the plaintiff unless he takes proceedings to stop the defendant's action."

(4) 28 Ch. D. 688 at p. 698.

(5) Story's Equity Jurisprudence § 826 ; see also *S. Roy & another* v. *Mr. H. Cotton*, A. I. R. 1925 C. 373 (382) ;

threatened illegal obstruction to ancient lights by the erection of a building, the court is able from the evidence to satisfy itself that substantial damage will be caused by the building when completed, then the action will lie and an injunction be granted, as they will in all other cases of apprehended nuisances, unless the act complained of is in itself lawful and does not *per se* constitute a nuisance (1). Where an act threatening danger to a person's land is such that injury will inevitably follow, a court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit (2). In the case of *Pattisan* v. *Gilford* (3), the Master of the Rolls, speaking of the principles upon whieh a court of equity interferes when an injunction is asked for, says : "I take it that, in order to obtain an injunction, a plaintiff who complains, not that an act in an action is an actual violation of his right, but that a threatened or intended act, if carried into effect' will be a violation of the right, must show that such will be an inevitaole result. It will not do to say that the violation of the right may be the result : the plaintiff must show that a violation will be the inevitable result." And then he proceeds to cite a case decided by *Lord Cottenham*, and another case in which the *Lord Chancellor* says : "I consider this court has jurisdiction to protect property from an act threatened which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as of right, but if the party applying is free from blame and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, an injunction will be granted (4).

There is some conflict of view as to what imminency of irreparable injury must be shown to entitle a party to an injunction, as well as to the true meaning of the term. An injunction is never granted except for substantial reasons founded on actual interest. Nor is an injunction justified by the fact that, if there be no intention on the part of the defendant to do the acts feared, the injunction can do no harm (5). The court will not interfere unless the evidence shows a probability of defendant doing the act which it is sought to restrain (6). It is not sufficient that the complainant apprehends or fears the commission of prejudicial acts by the defendant, since there may, infact, be no substantial

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Pandurang v. *Bayaja*, A. I. R. 1925 Nag. 2 ; *Gangabai* v. *Parsho Atmaram*, 32 B. 146=9 Bom. L. R. 912 ; *Amarendra* v. *Baranagar Jute Co. Ltd.*, 49 C. 1059=70 Ind. Cas. 989=A. I. R. 1923 C. 271 ; A. I. R. 1925 Nag. 251 (255). "It will be seen that this is the principle which underlies the provisions of s. 54 of the Specific Relief Act." *Nathu* v. *Sevsa*, 89 Ind. Cas. 639.

(1) *Litchfield-Speer* v. *Queen Anne's Gate*, 88 L. J. Ch. 137=(1919) 1 Ch. 412 ; see also *Att. Gen.* v. *Manchester Corporation*, (1893) 2 Ch. 87.

(2) *Bindubasani* v. *Jhanabi*, 24 C. 261.

(3) L. R. 18 Eq. 259.

(4) *Bindubasini* v. *Jhanobi*, 24 C. 261 (264) ; see also *Yaro* v. *Sunulla*, 19 A. 259 ; *Kalidas* v. *Gor Parjaram*, 15 B 309 ; *Att. Gen* v. *Acton Local Board*, 22 Ch. D. 221 ; *Hext* v. *Gill*, 7 Ch. 700 ; *Cooper* v. *Whitingham*, 15 Ch. D. 501 ; *Shafts* v. *Bolchow etc.* 57 L. J. Ch. 735.

(5) *Dunn* v. *Bryan*, Ir. Eq. 143 ; *Truly* v. *Warner*, 5 How. 141.

(6) *Lord Cowley* v. *Byas*, 5 Ch. D. 94; *Ramjas* v. *Brojo*, 19 C. W. N. 887.

grounds therefor ; facts establishing the probability of the commission of such acts, unless defendants be restrained are necessary (1). A suit will lie when the threatened act is of such a character that it must inevitably result in injury, that is to say that in the view of ordinary man using ordinary sense the injury would follow (2). So satisfactory proof that defendants threaten the commission of a wrong which it is within the power of the court to prevent, constitutes sufficient ground to justify the inference (3). "In matters of this description" said *Lord Brougham*, C. (4) "the law cannot make over-nice distinctions and refuse the relief merely because there is bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. I say it will go further, according to the same practical and rational view, and balancing the magnitude of the evil against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming."

Where the threatened injury, if committed, will be of a permanent character and the future inconvenience and detriment resulting from it, difficult of present computation, a proper case is presented for interference by injunction (5). "For the setting of the equitable power of a court in motion to grant relief by injuncion, more must be shown than a mere fear or possibility of injury to the applicant. It is incumbent on him to allege facts showing at least a reasonable probability of injury. It is evident that in a matter where there may be so many and wide divergencies of circumstance and judicial view point, no definite rule can be stated. If it be correct to state that there is rule governing herein, that rule was aptly stated to the effect that injury, material and actual and not theoretical or merely possible must be shown as the necessary and probable result of the act sought to be enjoined. It is equally true, however, that equity does not require that applicant for injunctive relief delay until injury is done ; it being necessary only that impending injury be reasonably so threatening and certain as to justly arouse fear of applicant." (6) If an intention to do an act complained of can be shown to exist, or if a man insists on his right to do, or begins to do, or threatens to do, or gives notice of his intention to do, an act which must, in the opinion of the court, if completed, gives a ground of action, there is a foundation for the exercise of the jurisdiction (7). The mere denial

(1) Spelling on Injunctions § 18.
(2) T. L. L. for 1906 p. 662 ; *Bindubasini* v. *Jhanabi*, 24 C. 260 ; *Progdas* v. *Ori*, 21 A. W. N. 23 ; *Hargu* v. *Dwarka*, 1 A. L. J. 239 ; *Mahadeo* v. *Narayan*, 6 Bom. L. R. 123 ; *Att. Gen.* v. *Corporation of Manchester*. (1893) 2 Ch. 87. 92.
(3) Spelling on Injunctions § 18.
(4) *Earl of Ripon* v. *Hobart*, 3 My & K. 169, 176 ; see also *Hepborn* v. *London*, 34 L. J. Ch. 293 ; *Att. Gen* v. *Shrewsbury Co.* 21 Ch. D. 752.
(5) Spelling on Injunctions § 18.
(6) Lewis & Spelling on Injunctions § 33 ; *Chabildas* v. *Municipal Com*, 8 B. H. C. R. 85.
(7) Kerr on Injunction p. 17 Citing *Att. Gen* v. *Forbes*, 2 M & C. 132 ; *Tipping* v. *Eckersley*, 2 K & J. 264 ; 270 ; *Hext* v. *Gill*. 7 Ch. 699 ; *Cooper* v. *Whittingham*, 15 Ch. D. 506 ; *Shafts* v. *Blockow*, 31 Ch. D. 729 ; *Phillips* v. *Thomas*, 62 L. T. 793; *Dickens* v. *National Telephone Co.* 75 J. P. 557 ; *Att. Gen* v. *Dorin*, (1912) 1 Ch. 378 ; *Thornhill* v. *Weeks*, (1913) 1 Ch. 438 ; *Att Gen* v. *Long* (1915) 1 Ch. 127 ; *Port of Manchester* v. *Cheshire*, 17 Ry & Com. Tr. Cas. 54.

by a man of his intention to do an act or to infringe a right will not prevent a court from interfering (1). Where no right of the plaintiff was invaded, no damage accrued, and no case of prospective damage was made out, no ground exists for granting injunction (2). If a man who claim's a right to do a certain act asserts positively that before proceeding to do the act, he will give reasonable notice of his intention to do it, and there exists no reason to doubt the truth of his assurance, the court will not interfere (3). In order to obtain relief by way of injunction there should be an infringement or denial of the right or threat of injury. The infringement or denial is a question of fact, but it need not necessarily be evidenced by actual resistance followed by open rupture and quarrel. In cases of this short, the attitude of the defendants even after the commencement of litigation is not without force and significance (4). When an application asking for temporary injunction does not show that the requirements of Order 39, rule 1, were fulfiled, e. g. risk of the property being damaged, the court is justified in summarily rejecting it (5).

Irreparable Injury.—If it is impossible to obtain adequate relief at law or to estimate the damage to which the party will be exposed if an injunction is not granted, and the injury will be irreparable, a court of equity will grant an injunction (6). "It is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights" (7). It has been truly said: "An injunction will not be granted unless the anticipated injury is not reparable by recovery of damages in an action at law, whether from need of numerous successive suits or from insolvency of defendants, or from derangement of business" (8). "In its general sense an irreparable injury is one which cannot be repaired by any means accessible to individual parties or by invoking the aid of others. In its technical sense, as used in connection with the question of

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(1) Kerr on Inj. 17; *Potts* v. *Levy*, 2 Drew. 272, 279; *Jackson* v. *Cator*, 5 Ves. 688.

(2) *Kristna* v. *Venkata*, 7 M. H. C, R. 60.

(3) *Lord Cowley* v. *Byas*, 5 Ch. D. 950.

(4) *Dodda* v. *Papiah*, 9 Mys. L. J. 49.

(5) *Ahmad* v *Pirthipal*, 88 Ind. Cas. 581 = A. I. R. 1925 Oudh.698.

(6) *Holmes* v. *Eastern Countries Railway Co.*, 2 K. & J. 675; *Anath* v. *Mackintosh*, 6 B. L R. 571; *Chet Ram* v. *Hari Baksh*, 93 Ind. Cas. 848 = A. I. R. 1926 Lah. 435. A person asking the Court to exercise its discretionary jurisdiction must make out a strong *prima facie* case in support of the title which he asserts and must satisfy the court that its interference is necessary to protect him from irreparable or at least serious injury before his legal right could be established at the trial. Being an exceptional injury, an injunction will be refused in the first instance except on a clear *prima facie* case, and "upon positive averments, of the equities on which the application for relief is based." The rule of law is that the court, should before disturbing any man's legal right or stripping him of any rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the suit. *Rameswar* v. *Yakinuddin*, 1924 Lah. 633.

(7) H. C. Joyce's Injunction § 35.

(8) *Haskell* v. *Thurston*, 80 Me. 129; see also *Johnson* v. *Shreswbury*, 3 De G. M & G. 931; *Lumley* v. *Wagner*, 1 De G. M & G. 613.

granting or withholding preventive equitable aid, we mean by saying that an injury is irreparable either that no legal remedy furnishes full compensation or adequate redress, owing to the inherent ineffectiveness of such legal remedy, or that, owing to the delay incident to the prosecution of an action at law to final judgment and obtaining service thereon, such judgment, and process would prove fruitless of beneficial results. "By the term, 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury ; all that is meant is that the injury be a serious one, or at least a material one, and not adequately reparable by damages at law (1) ; and by the term "the inadequacy of the remedy by damages,' is meant that damages obtainable at law are not such a compensation as will, in effect, though not *in specie*, place the parties in the position in which they formerly stood (2). The fact that the amount of damage cannot be accurately assertained may constitute irreparable damage (3). It is no objection to the exercise of jurisdiction by injunction that a man may have a legal remedy. The question in all cases is whether the remedy at law is, under the circumstances of the case, full and complete" (4). "In applying the rule" says *Mr. Joyce* "that an injunction will not be granted where there in an adequate remedy at law but that the remedy at law must be practical and efficient as that in equity it is decided that a party may be granted an injunction restraining the doing of certain acts notwithstanding he has a remedy at law, it appearing that the latter remedy is clearly inadequate" (5). So an injunction will be granted to an innocent purchaser of stock and goodwill of a business to prevent the sale thereof by the sheriff under attachments, where the damages recoverable in trespass or replivin would be only for the value of the stock and not for the destruction of plaintiff's business, and would therefore be an inadequate remedy (6). And where a lessee is in possession of leased premises and entiiled to the natural gas underlying them, he can enjoin the lessor from drilling on the leasehold as the damage likely to result from the threatened waste would be entirely incapable of measurement at law, if not irreparable (7). So in a recent case in the United States Supreme Court it is said : "It is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties ; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which if inflicted, would be wholly destructive of his

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(1) *Pinchin* v. *London*, 5 De G. M. & G. 860 ; *East Lanca shire* v. *Hattersley*, 8 Ha. 90 ; *Litchfield* v. *Queen Anne's Gate*, (1919) 1 Ch. 411 ; *Begg. Dunlop* v. *Satish Chandra*, 46 C. 1001.

(2) *Wood* v. *Sutcliffe*, 2 Sim N. S. 165. "The expression 'adequate relief' (in s. 54 cl. c.) is not defined but it is used probably in the sense in which *Kindersley V. C.* used it in *Wood* v. *Sutcliffe*, as meaning (such a compensation as would, though not in *specie*, in effect place the plaintiff in the same position in which they stood before." *Ghanasham* v. *Moraba*, 18 B. 474 (488).

(3) *Cory* v. *Yarmouth*, 3 Ha. 630 ; *Wood* v. *Conway*, (1914) 2 Ch. 57 (60)= 83 L. J. Ch. 504 ; Vide Specific Relief Act S. 54 cl. (b).

(4) Spelling on Injunction etc. § 13.

(5) H. C. Joyce on Injunction § 31.

(6) *North* v. *Peters*, 138 U. S. 271.

(7) *Westmoreland* & *Cambria Gas* Co. v. *De Witt*, 130 Pa. St. 235.

rights" (1). And an injunction has been held proper to prevent the destruction of trees which were ornamental to plaintiff's grounds and which sheltered his dwelling house from storms aud shaded it from the sun (2). In the above case the court observed that though an Injunction will not be granted to restrain a trespasser merely as such, yet equity will inrerfere where the injury is irreparable, or where full and adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property as it has been held and enjoyed, or where it is necessary to prevent a multiplicity of suits (3). Again, a court of equity in the exercise of its discretion may grant an injunction to prevent a breach of an injury for which there can be no other redress on account of the defendant's insolvency (4).

" 'While irreparable injury' can not be precisely defined by general definition, it is obvious that there are many injuries to person and property for which there can be no adequate compensation. An irreparable injury may arise either from the nature of the injury itself or from the want of responsibility in the person committing it. An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result there from cannot be measured by any certain pecuniary standard" (5). "There are many injuries which, in the very nature of things, cannot be repaired by any money consideration. Such for instance, as a result from acts which outrage the feelings and wound the sensibilities, or deprive us of objects of affection and of things, perhaps trivial in themselves, but of inestimable value, by reason solely of being associated with some precious memory or touching incident of our lives. Or it may be that the maintenance of the writ is required to preserve to us our homes, and to establish us in a state or condition which, lost for the moment, can never be recovered, nor the loss atoned for by money. In all this class of cases the injunction should be maintained, because the injury from its dissolution would be irreparable" (6). The same principles which govern the granting of perpetual injunctions are applicable to the case of temporary injunction (7). Where the defendant threatens to invade the enjoyment of property by the plaintiff, and the invasion is such that pecuniary compensation would not afford adequate relief, the plaintiffs have a right to obtain a perpetual injunction under s. 54 of the Specific Relief Act (8). To entitle a party to an injunction, he must prove either damage or apprehended damage. The apprehended damage must, to form a ground for an injunction, involve imminent danger of a substan-

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(1) *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S 65, 82.

(2) *Shipley* v. *Ritter*, 7 Md. 408.

(3) Vide S. 54 of the Specific Relief Act ; *Karnadhar* v. *Hari Prosad*, 6 M. L. T. 245=3 Ind. Cas. 338.

(4) *Salties* v. *Belford Company*, 133 N. Y, 499 ; see also clause (d) of section 54 of the Specific Relief Act.

(5) H. C. Joyce on Injunctions § 36.

(6) *Crescent City etc. Co.* v. *Police Jury*, 32 La. Ann. 1192 ; H. C. Joyce § 36.

(7) *Malik Sohara* v. *Ahmad Khan*, 57 P. R. 1899=17 P. L. R. 1900.

(8) *Kalidas Jivram* v. *Gour Parjaram*, 15 B. 309.

tial kind, or injury that will be irreparable (1). Where a man builds on another man's property against his will, the invasion is one where pecuniary compensation cannot be regarded as adequate relief, and an injunction is proper remedy (2).

Inorder to warrant a relief by way of injunction, it must appear from the circumstances in evidence in each case that the interference or obstruction complained of, is not a trival but a substantial injury (3). The principal object of an injunction, is to prevent future injury, leaving matters as far as possible in *statu quo*, till the suit in all its bearings can be heard and determined; and the court will grant it only when some strong case of substantial damage to the plaintiff, which would arise from simply allowing things to remain in *statu quo*, is made out (4).

In order that an injunction may be issued, it is enough to show that the act complained of was done is such a way as to be likely to damage the plaintiff, though proof of specific damage may not be given (5). Where the injury complained of is such as to destroy plaintiff's property, or render it entirely worthless, for his purposes, it may properly be regarded as irreparable (6). Equity also has jurisdiction to protect a vested franchise from an unlawful invasion or disturbance, upon the ground of irreparable injury or such injury as cannot be adequately estimated in damages at law (7). The nearest approach to a dependable definition of irreparable injury is found in a recent American case (8) where it was said: "By irreparable injury is not meant such injury as is beyond the possibility of repair, or beyond possible compensation or damages but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which because it is so large on the one hand, or is so small on the other, or is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a Court of law." As coming within the principle comprehended within judicial views of what constitutes irreparable injury, an injunction is properly granted where to refuse to grant it would result in a denial of all relief sought in the action to which the party upon the showing made by him, otherwise would be entitled (9).

In considering the term irreparable injury the English and American precedents are not to be followed blindly, but considerations must be had to the circumstances of the country. In *Anathnath Dey* v. *Mackintosh and others* (10)

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(1) *Mahadev* v. *Narayan*, 6 Bom. L. R. 173; *Khattar Singh* v. *Ladha*, A. I. R. 1931. Lah. 624=132 Ind. Cas. 586.

(2) *Bhaosingh* v. *Hazari*, 7 N. L. R. 179.

(3) *Pannusamy* v. *Collector*, 5 M. H. C. 6.

(4) *Shepherd* v. *The Trustees of the Port of Bombay*, 1 B. 132.

(5) *Rama Odayan* v. *Subramania*, 18 M. L. J. 178=31 M. 171. But in America it is held otherwise. There it has been held that a mere allegation that the injury will be irreparable will not suffice. *H. C. Joyce* on Injunction § 39.

(6) *Word* v. *Ohio River Co.*, 35 W. Va 481.

(7) *Bessemer* v. *Bessemer*, 44 So. 663.

(8) *Heine* v. *Roth*, 2 Alaska 416; Lewis & Spelling on Injunction § 42.

(9) Lewis and Spelling on Injunction § 42.

(10) 6 B. L. R. 571,

Mr. Makintosh obtained a decree against certain persons for possession of an individual moiety of a dwelling house, to the remaining moiety of which Anathnath (a Hindu) alleged he was jointly entitled, and that he and his family were in possession. On Mr. Mackintosh's proceeding to obtain execution of his decree, *Anathnath* brought a suit, alleging that Mackintosh had obtained no title under his purchase, and praying for a partition of his property. On application for an *interim* injunction to restrain *Makintosh* from executing his decree pending the partition suit, the court granted the application. In granting the application *Phear J* observed : "Now I ought not to grant an injunction, if the mischief against which it is directed is capable of being compensated for by a money payment, or if it is not of such a kind as will cause the plaintiff irreparable damage, supposing that he has the right which he seeks to enforce in his suit. I here advisedly have recourse to the principle of 'irreparable injury,' although I am perhaps giving to it a somewhat *wider application* than would be accorded to it in the English courts of equity on a motion of this kind because I think that, under the circumstances of native society in this country, there may be such a thing as a trespass (1) which works a truly irreparable injury, although it does not affect a lasting alteration of the subject of enjoyment, and is such as in England might be capable of being compensated for in pecuniary damages. If in this case the question concerned simply possession, without more, of ordinary immoveable property other than a family dwelling house, I see no reason why the planitiff should not wait until he had made his tittle, and be then content with the compensation which would be afforded him in respect of the defedant's misdoing, in the shape of pecuniary damages. But here *Makintosh* is seeking to obtains possession of an undivided moiety of a dwelling house, a portion of the other moiety of which is admittedly in the rightful enjoyment of the plaintiff and his family ; and certainly the plaintiff is in this position that he is entitled at any time to say that he will have his share divided off from the rest, and that he will not live in the house jointly with any given person who may be entitled to

(1) In England injunction in trespass is not a matter of course. If the trespass did not amount to destructive trespass, but was a case of mere ordinary trespass, the court of chancery would not under the old procedure, interfere by way of injunction. *Garstin* v. *Asplin*, 1 Madd. 152 ; *Jackson* v. *Stanhope*, 15 L. J, Ch. 446 ; *Cooper* v. *Crabtree*, 20 Ch. D. 589; Kerr on Injunction 91. In granting injunction against trespass, the damage must be irremediable. *Ibid.* Now of course the law is more liberal and court exercises jurisdictions in restraining by injunction even when there has been no destructive trespass. Kerr on Injunctions 92. It is said that an injury resulting from trespass may be incapable of compensation for damages for a variety of reasons. (1) It may be destructive of the very substance of the estate. (2) It may not be capable of estimation in terms of money. (3) It may be so continuous and permanent that there is no instant of time when it can be said to be complete, so that its extent can be computed. (4) It may be vexatiously persisted in, inspite of repeated verdicts at law. (5) It may be committed by one who is wholly irresponsible, so that a verdict against him for damages would be entirely valueless. (6) It may be committed against one who is legally incapacitated from a beneficial use of the remedy at law. *Jerome* v. *Ross*, 7 Johns Ch. (N.Y.) 315 ; *Lewis & Spelling's* Injunctions § 47.

another share of it. He has exercised this right as against *Makintosh* by saying that he will not live in the house jointly with *Makintosh*, and asking for a partition (1). Of course, if the parties who are jointly entitled to property cannot come to an amicable arrangement for a partition, some interval of time must elapse before binding partition can be effected between them in the ordinary course of law. If the parties are already in joint possession, that joint possession will generally continue during this interval. But, when one of the parties, as in this case, is a new comer, a difficulty no doubt occurs. Assuming that *Mackintosh* has a good title to the moiety of which he is seeking to get possession, inasmuch as an interval must elapse before a partition can be effected, the question before me becomes at any rate reassured to this: Is *Mackintosh* entitled during the interval to force himself into the family-society of the plaintiff, and to make himself, so far as it is practically possible, a member of the plantiff's joint family in the occupation of the dwelling house? It appears to me clearly that he is not. I think that a forced joint occupation in this fashion of an undivided dwelling-house by an intruder, even though he be an owner against the will of the resident Hindu co-parcener, amounts to a proprietory injury which the latter is not in equity called upon to sustain, and for which pecuniary damages would not be compensation. Money alone will not in any degree set the matter right, and therefore the injury is in its character irreparable ; also, there can be no doubt, I think, that it is substantial enough to justify the interference of this court."

An injunction without issuing notice cannot be granted unless there is any risk of irreparable injury or grave inconvenience (2).

Injunction is an equitable relief and based upon well known principles of equity.—It should be borne in mind that an injunction is an equitable relief and as such the granting of such relief is governed by well known equitable principles. "Certain principles in equity" says *Justice Story* "are well established, and dominate in the administration of justice in that field with as much certainty as do principles upon the law side, so to speak, of the court. But mere precedents are of no avail except to illustrate the extent to which the principles have been applied. The text writers disagree, in some respects, in the manner of stating this, but are in harmony in this : While new principles are not to be added to those long established for the government of equitable remedies, the rules, not the precedents, are to control. There is no vitality in precedents ; there is in rules. They are susceptible of expansion along every line necessary to reach new conditions. The ingenuity of man in devising new forms of wrong cannot outstrip such development" (3). Section 56 of the Specific Relief Act lays down some of the well known rules of the Courts of Chancery, upon which injunctions are generally issued. Clause (j) of that section

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(1) The Partition Act (IV of 1793) to a great extent has now removed the difficulties of members of joint family. *Vide* s. 4 of that Act.

(2) *Balabh* v, *Muhammad*, A. I. R. 1933 Lah. 282 ;

(3) Story's Equity Jurisprudence 4th Ed. § 63.

lays down that an injunction cannot be granted when the conduct of the applicant or his agent has been such as to disentitle him to the assistance of the court (1), This clause is based upon two well known principles, namely (a) he who seeks equity must do equity and (b) he who comes into equity must come with clean hands (2). Equitable remedy will be refused unless the conduct of the applicant is fair and honest and free from any taint of fraud or illegality (3).

Conduct of the applicant must be fair and honest and free from any taint of fraud and illegality.—"As the relief is of purely equitable character" says Mr. Spelling "the plaintiff must come with equitable conditions generally imposed upon parties asking equitable relief (4). He must be prepared and willing to do equity, and must come into court with clean hands. If for instance, he seeks to have enjoined the sale of mortgaged premises about to be sold for an amount greater than is due to the mortgagor he must make and allege an offer to pay the sum actually due" (5). "He who would have equity must do equity and give effect to all equitable rights in the other party respecting the subject matter of the suit" means that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he had acknowledged and conceded, or will admit or provide for, all the equitable rights, claims, and demands justly belonging to the adverse party, and growing out of, or necessarily involved in, the subject matter of the controversy. It says, in effect, that the court gives the plaintiff the relief to which he is entitled only upon condition that he has given or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject matter of the suit (6). "In the first place the rule only applies where a party is appealing as *actor* to a court of equity in order to obtain some equitable relief; that is, either some relief equitable in its essential nature, as an injunction or a cancellation, or equitable because it may come within the power of the court to administer by virtue of its concurrent jurisdiction, as an accounting, or a pecuniary recovering; and it is necessarily assumed that the party would, but for the operation of the rule, be entitled to all the relief which he demands" (7). The maxim only applies where the relief sought by the plaintiff and the right demanded by the defendant belong to or grow out of the same transaction (8).

In this connection the maxim "He who comes into equity must come with clean hands" has been frequently quoted and applied (9). It is one of the

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(1) *Noyna Misser* v. *Rupicam*, 9 C. 609 (611).

(2) *Seeni Chettiar* v. *Santhanatham Chettiar*, 20 M. 58; Spelling on Injunctions etc. § 26. *Kassim Hussain* v. *Ram Sarup*, A. I. R. 1929 All. 877.

(3) Kerr on Injunction p. 19.

(4) *Blackmore* v. *Glamargonshire*, 1 Myl. & K. 154; *Williams* v. *Roberts*, 8 Hare 315, 327; *Ward* v. *Higgs*, (1864) 12 W. R. 1074.

(5) Spelling on Injunctions etc. § 26.

(6) Story's Eqaity Jurisprudence § 72; Pomeroy,s Equity Jurisprudence § 3.

(7) Pomeroy's Equity Jurisprudence § 386.

(8) Story's Equity Jurisprudence § 75.

(9) *Semichittiar* v. *Santhanatham* 20 M. 58.

fundamental principles upon wnich equity jurisprudence is founded, that before a complainant can have a standing in court he must show that not only has he a good and meritorious cause of action, but he must come into the court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court (1). This maxim says that whenever a party, who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limini* ; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy (2). "The principle involved in this maxim" says Dr. Pomeroy "is merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence. We have seen that in the origin of the jurisdiction the theory was adopted that a court of equity interposes only to enforce the requirements of conscience and good faith with respect to matters lying outside of, and some times perhaps opposed to the law. The action of the court was, in pursuance of this theory, in a certain sense discretionary ; and the terms 'discretionary' and 'discretion' are still occasionally used by modern equity judges while speaking of their jurisdiction and remedial functions. Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days, that while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside the strict rules of the law, or even in contradiction to those rules, while it could act upon the conscience of a defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavours to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defenesive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the maxim, He who comes into a court of equity must come with clean hands ; and although not the source of any distinctive doctrines, it furnishes a most important and even universal rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights" (3).

The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to

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98. (1) Storey's Equity Jurisprudence § § 397.
(2) Pomeroy's Equity Jurisprudence § 398.
(3) Pomeroy's Equity Jurisprudence

or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the parties and arising out of the transaction ; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go out side of the subject matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands (1).

To entitle a party to an injunction, he must show, not only that he is in danger of losing a substantial right, but that he is in no fault. Any element of fraud in the applicant's case, or mis-representation in the application, will prevent the court from granting the relief (2).

Similarly in cases of apprehended breach of contract, injunction will be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious (3). Where the contract is tainted with illegality no relief can be granted in shape of injunction (4). So also whatever be the nature of the plaintiff's claim and of the relief which he seeks, if his claim grows out of or depends upon, or is inseparably connected with, his own prior fraud, a court of equity will, in general, deny him any relief (5). In every case the party seeking for injunction must come to the court with clean hands and clear conscience (6). In *Joseph* v. *Macowsky*, (7) the plaintiff was denied an injunction because he has mis-represented the razors in question to be manufactured in Sheffield, England, when in fact he did not know where nor by whom they were manufactured. In refusing the relief the court observed : "It is a general rule of law, in cases of this kind, that courts of equity will not interfere by injunction, where there is any lack of truth in the plaintiff's case ; that

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(1) Pomeroy's Equity Jurisprudence § 399 Snell's Equity p. 25 ; Storey's Equity Jurisprudence § 100.

(2) Lewis & Spelling on Injunction § 32 ; see also illustrations (b) and (c) of section 56 of the Specific Relief Act. *Illustration* (b) is based on *Morgan* v. *Mc Adam*, 36 L. J. Ch. 228 and *Illustration* (e) is based on *Perry* v. *True fitt* 6, Beav 66. In *Perry* v. *True fitt*, 6 Beav. 66 it was laid down that the ground on which a court of equity protects trade marks is, that it will not permit a party to sell his own goods as the goods of another ; and that a party will not therefore be allowed to use names, marks, letters, or other *indicia*, by which he may pass off his own goods to purchasers as the manufacture of another person. But if a plaintiff coming for an injunction in such a case appears to have been guilty of mis-representation to the public, a court of equity will not interfere in the first instance, and give its assistance in the aid of a legal right ; and the case was ordered to stand over, with liberty to bring action. Joyce on Injunction p. 332. *Illustration* (a) is based upon *Little wood* v. *Cald well*, 11 Price 97.

(3) Pomeroy's Equity Jurisprudence § 400 ; s. 54 of Specific Relief Act.

(4) *Davies* v. *Makenna*, 29 Ch. D. 596; *Woodword* v. *Battersea Corporation*, (1911) 104 L. T. 51 ; *Joe Lee* v. *Lord Dalmeny*, (1927) 1 Ch. 300.

(5) Pomeroy's Equity Jurisprudence § 401.

(6) H. C. Joyce on Injunctions ‡ 14.

(7) 96 Cal 518 (Am).

where there is any misrepresentation in his trade mark." So also where a land-owner lowers the ditch on his land and makes lateral drains and thereby causes water to flow into the ditch which does not naturally belong there, and to flood defendant's lower land, defendant digs up a part of the ditch in order to stop such flooding, the former is not entitled to a mandatory injunction to compel defendant to restore the ditch to its former condition because he is not free from wrong himself in relation to the matter in which he seeks equitable relief (1). In illustration of the rule that a party applying for an injunction must come with clean hands, it is repeatedly decided in the Federal Supreme Court of the United States that an injunction should not be granted to restrain the collection of a tax on the ground of excessive valuation and discrimination, unless the part of the tax which is clearly due has been paid and tendered, for otherwise the injunction would be, as in fact it has often proved to be, a vexatious means of delaying the payment of a just demand (2). In the above case *Brewer J.* said: "With respect to the taxes of 1889, there was no payment or tender of payment of any amount. Plaintiff seeks to avoid the necessity therefor by alleging that it is impossible to separate the legal from the illegal portions of the taxes, an allegation which is manifestly untrue in view of the fact that it had no difficulty in making the separation in the taxes of 1888, the assessment for which was paid in a similar way, and in view of the further fact that it must be known what property it had which was subject to taxation as well as its value, and therefore, the rate of taxation being fixed by law, it would of course have known what amount was undoubtedly due. The rule in respect to this matter is perfectly well settled in this court. In *State Railroad Cases* (3) it was fully considered. In that case it was said by *Mr Justice Miller* speaking for the Court: 'It is profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is indirect violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered and tendered without the condition annexed of a receipt in full of all the taxes assessed." So a person seeking to prevent the enforcement at law of usurious contracts must show that he has paid or tendered the amount justly due (4).

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(1) *Mc Allister* v. *Henderson*, 134 Ind 453; H C. Joyce § 14.

(2) *Albuquerque* v. *Perea*, 147 U. S. 87: H. C. Joyce § 16.

(3) 92 U. S. 575.

(4) *Morgan* v. *Schernerhorn*, 1 Page (N. Y.) 544; H. C. Joyce on Injunction § 16.

Acquiescence—An injunction is not a matter of right and will not be issued when upon a broad consideration of the situation of the parties, good conscience does not require it (1). A Court of equity frequently refuses an injunction, where it acknowledges a right, when the conduct of the party complaining has led to the state of things which occasions its application (2). Acquiescence is an important factor in determining equitable rights and remedies, in obedience to the maxims; He who seeks equity, must do equity, and He who comes into equity must come with clean hands. Even when it does not amount to a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel—may produce a *quasi* estoppel—upon the rights of remedy.

"Acquiescence in the wrongful conduct of another by which one's rights are invaded may often operate, upon principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This form of *quasi* estoppel does not cut off the party's title, nor his remedy at law; it simply bars his right to equitable relief and leaves him to his legal action alone. In order that this effect may be produced, the a quiescence must be with knowledge of wrongful acts themselves, and of their injurious consequences; it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrong doer to enforce the peculiar remedies of equity against him, after he has been suffered to go on unmolested, and his conduct apparently acquiesced in. It follows that what will amount to a sufficient acquiescence in any particular case must largely depend upon its own special circumstances. The equitable remedy to which this *quasi* estoppel by acquiescence most frequently applies is that of injunction, preliminary or final, when sought by a proprietor to restrain a defendant from interference with easements; from committing nuisances, from trespasses, or other like acts in derogation of the plaintiff's proprietory rights (3). This effect of delay is subject to the important limitation that it is properly confined to claims for purely equitable remedies to which the party has no legal right. Where an injunction is asked in support of strict

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(1) H. C. Joyce on Injunctions § 42.

(2) *Saunders* v. *Smith*, 3 Myl. & C. 711; *Kazim Hussain* v. *Ram Sarup*, A. I. R. 1929 All. 877: "An injunction is an equitable remedy and should be refused when the plaintiff does not come into Court with clean hands. This principle is laid down for India in s. 56 Specific Relief Act, where the issue of injunction is prohibited if the conduct of the plaintiff has been such as to disentitle him to the assistance of the Court."

(3) The following cases furnish illustration of the rule and limitations, when it does or does not operate. *Coles* v. *Sims*, 3 De G. M. & G. 1; *Great Western Ry.* v. *Oxford etc. Ry*, 3 De G M & G 341; *Att. Gen* v. *Sheffield Gas Co.*, 3 De G M & G. 304; *Child* v. *Douglas*, 5 Deg M & G 739; *Graham* v. *Birkenhead etc.*, 2 Mac & G 146; *Buxton* v. *James*, 5 De G & S. 80; *Att. Gen* v. *Eastlake*, 11 Hare, 205; *Wood* v. *Satcliffe*, 2 Sim N. S. 163; *Rochdale Canal Co.*, v. *King*, 2 Sin. N. S. 78; *Cooper* v. *Hubbock*, 30 Beav. 160; *Bankart* v. *Howton*, 27 Beav. 425; *Gordon* v. *Cheltenham*, 5 Beav. 229; *Mitchell* v. *Steward*, L. R. 1 Eq. 451; *Western* v. *Mc Dermott*, L. R. 1 Eq. 499; *Senior* v. *Pawson*, L. R. 3 Eq. 330; *Smith* v. *Smith*, L. R. 20 Eq. 500; *Att. Gen.* v. *Lunatic Aslylum*, L. R. 4 Ch. 146; *Lee* v. *Haby* L. R. 5 Ch. 155; *Gaint* v. *Feynney*, L. R. 8 Ch. 8.

legal right, the pary is entitled to it if his legal right is established ; mere delay and acquiescence will not, therefore, defeat the remedy, unless it has continued so long as to defeat the right itself (1). The same rule applies, and for the same reasons, to a party seeking purely equitable relief against fraud, such as the surrender or cancellation of securities, the annulling of a transaction, and the like. Upon obtaining knowledge of the facts, he should commence proceedings for relief as soon as reasonably possible. Acquiescence consisting of unnecessary delay after such acknowledgment will defeat equitable relief (2).

In *Wilmot* v. *Barber* (3), in dealing with the subject of acquiescence, *Fry J.* observed at p. 105 : "It has been said that acquiescence which deprives a man of his legal right must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as could make it fraudulent for him to set up these rights. What then, are the elements or requisites necessary to constitute fraud of that description ? In the first place the plaintiff must have made a mistake as to his legal right. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly the defendant, the possessor of the legal right, must have known of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff and the doctrine of acquiescence founded upon conduct with a knowledge of your legal right. Fourthy, the defendant the possessor of the legal right, must know of the plaintiff's mistaken belief of his right. If he does not there is nothing which calls upon him to assert his own rights. Lastly the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but in my judgment, nothing short of this will do (4)." So where a defendant relies on acquiescence the onus would be on him to show (*a*) That they had been mistaken as to their legal rights (5) (*b*) that they had expended some money or done some act on the faith of their mistaken belief, (6) (*c*) that the plaintiff knew of the existence of his own right which was inconsistent with the right claimed by the defendants (7), (*d*) that the plaintiff knew of the defendants' mistaken belief in his

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(1) *Fullwood* v. *Fullwood*, L. R. 9 Ch. Div. 176; *Gaint* v. *Feynney*, L. R. 8 Ch. 8

(2) Pomeroy's Equity Jurisprudence § 816, 817.

(3) 15 Ch. D. 96=28 W. R. 911=43 L. T. 95

(4) *Jai Naran'* v. *Jafar Beg*,=A. I. R. 1926 All. 324=48 A. 352 ; see also *Noyna* v. *Rupican*, 9 C. 609, 611 ; *Uda Begam* v. *Imamuddin*, 1 A 82, 85.

(5) *Bankart* v. *Houghton*, 27 Beav. 425. 431 ; *Tubbs* v. *Esser*, 26 T. L. R. 146,

(6) *Clegg* y. *Edmond son*, 8 De G. M. & G 787 ; *Eaernest* v. *Vivan*, 33 L. J. Ch 513 ; *Crossley* v. *Darby Gas Co.*, Webs P. C. 120 ; *Great Western Ry* v. *Oxford, Worcester Ry*, 3 De G. M. & G. 341

(7) *Marker* v. *Marker*, 9 Ha 19 ; *Greenhalgh* v. *Manchester & Birmingham Rey*, 3 M & C. 791 ; *Ramsden* v. *Dyson*, L. R. I. H. L. 129 ; *Wilmot* v. *Barber*, 15 Ch. D. 105 ; *Russell* v. *Watts*, 25 Ch. D. 576 ; *Civil Service* v. *Whteman*, 68 L. I. Ch. 484 ; *Haines* v. *Taylor*, 2 Ph. 209

rights and (*e*) that the plaintiff must have encouraged the defendents in their expenditure of money directly or by abstaining from asserting his legal rights (1). So acquiescence is not a question of fact but of legal inference from facts found (2).

In *De Bussche* v. *Att. Gen* (3). *Thesiger L. J.* observed that if a person having a right and seeing another person about to commit or in the course of committing an act infringing upon that right stands by in such a manner as really to induce the person committing the act and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as *Lord Cottenham* said in *Duke of Leeds* v. *Earl of Amherst* (4) is the proper sense of the term of acquiescence and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or by conduct. In the case of *Cairncross* v. *Lorimer* (5) *Lord Campbell* enunciated the same principle in these words :— Generally speaking if a party having an interest to prevent an act being done, has full notice of its being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have if it had been done by his previous license," Mere quiescence or absence of interference is not sufficient to create an estoppel (6). "Now the word acquiescence is used in two senses ; sometimes it is used to denote conduct which is evidence of an intention by the party conducting himself to abandon an equitable right, sometimes to denote conduct from which another party would be justified in inferring such an intention, i. e. it is sometimes employed as equivalent to conduct which amounts to release and sometimes as equivalent to conduct which creates an estoppel or constitutes a promise, for which acts of the defendant supply a consideration. Acquiescence properly speaking, relates to inaction during the performance of an act ; lachs relates to delay

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Jugo Bundho v. *Kurum*, 22 W. R. 341 ; *Weldon* v. *Dicks*, 10 Ch. D. 247 ; *Gopal* v. *Mudo*, 14 B. L. R. 35 ; *Ban Kart* v. *Houghton*, 27 Beav. 425

(1) *Karim Hussians* v. *Ram Sarup*, A. I. R. 1929 A. 877 ; *Moolji* v. *Ronjan*, A. I. R. 1930 Cal. 678=129 Ind. Cas. 618 ; *Jai Narain* v. *Jaffar Beg*, A I. R. 1926 All 324=48 A. 353 ; *Kanhaiya* v. *Hamid*, 7 O. W. N. 271=A. I. R. 1930 Oudh. 235 ; *Bhonutal* v. W. A. *Vincent*, 3 Pat. L. T. 653=65 Ind. Cas . 882 ; *Jagannath* v. *Din Mahamad*, 65 Ind. Cas. 705 *Randal* v. *Errington*, 10 Ves. 428 ; "To fix acquiescence upon a party, it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded, and to which it refers'. See also *Scotland* v. *Siddael*, 3 De G. F. & J. 74 *Chalmer* v. *Bradley*, 1 J. & W. 51 ; *Charter*, v. *Trevelyan*, 11 Cl. & Fin. 714 ; *Savery* v. *King*, 5 H. L. Cas. 624 ; *Smethurst* v. *Hastings*, 30 Ch. D. 497.

(2) *Baneswar* v *Amulya Charan*, 82 Ind. Cas. 309 ; *Beni Ram* v. *Kundan*, 21A. 496 (504) =3 C. W. N. 502 P. C. ; *Ananda Chandra* v. *Parbati*, 4 C. L. J. 198 (204, 205).

(3) (1878) 8 Ch. D. 286 (311)

(4) 2 Ph. 117

(5) 7 Jur. N. S. 149=3 Macg. H. L. 827.

(6) *Baneswar* v. *Amulya* 82 Ind. Cas. 309 ; *Baswantappa* v. *Ram*, 9 B. 86 ; *Joy Chandra* v. *Sreematee*, 32 C. 357=1 C. L. J. 23 ; *Uda Begam* v. *Imam-uddin*, 1 A 82 ; *Fatihyab* v. *Muhammad*, 9 A. 434 ; *Chintaman* v. *Dareppa*, 14 B. 506 ; *Jaherruddin* v. *Debnath*, 33 Ind. Cas. 762=20 C. W. N. 637.

after the act is done.....So to fix acquiescence upon a party it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded" (1). A corporation may also be debarred by acquiescence (2). A principal is bound by the acquiescence on the part of his agent ; where the agent acts within the scope of his authority (3). It seems that acquiescence when it does not amount to an equitable estoppel will deprive a person of the equitable remedy of injunction although it will extinguish his legal remedy (4).

A party may forfeit his rights to an injunction by sleeping on his rights and allowing a grievance to continue for a long time, (5) especialy when the defendant has incurred expenditure in the meantime (6). In *Noyna Missir* v. *Rupikan*, (7) *Wilson J* said in refusing injunction : "Now the one way an applicant may disentitle himself to the assistance of the Court, is if he has stood by for a considerable time and allowed the person, against whom he applies, to go on with his work, and lay out his money and labour upon the land without any objection, and only applies to the Court after allowing all this to go on for sometime." The Court lends its aid only to the vigilant, active and faithful, unreasonable delay and mere lapse of time, independently of any statute of limitations, constitutes a defence in a Court of equity. This doctrine is very ancient and established by a great number of decisions (8) In *Lewis* v. *Chapman* (9), the plaintiff sought to restrain the publication of a work of which he was the owner of a copyright. It appeared that he had lain still for six years and seen the defendant expending his money in printing the work, etc ; upon this ground equity refused to relieve the plaintiff. The acquiescence of the plaintiff is sometimes measured by the extent of the expenditure incurred by the defendant (10).

"The rule that a person's right to an injunction may be barred" says *Mr. H. C. Joyce* "by laches includes those cases where the complainant has stood by and permitted the defendant to expend large sums of money in the exercise of supposed or asserted right. In such a case it would be inequitable to grant the injunction and the complainant will be left to his legal remedy"11().

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(1) *Muranlal* v. *Bal Kishen*, 95 Ind. Cas. 636=A I. R. 1926 Nag. 416 ; *Kunhammad* v. *Narayan*, 12 M. 322 (323).

(2) *Laird* v. *Birkenhead*, 29 L. J. Ch. 218 ; *Hill* v. *South Staffora Shire*, 11 Jur. N. S. 192.

(3) *Att. Gen* v. *Biggs*, 1 Jur, N. S. 1084 ; *Gordon* v. *Cheltenhum* 5 Beav. 238 ; *Miles* v. *Tobin*, 16 W. R. 463.

(4) Specific Relief Act s. 56 cl. (h).

(5) Specific Relief Act s. 56 clause (h) ; *Clover* v. *Roydon*, L. R. 17 Eq. 190, (204).

(6) *Noyna Messir* v. *Rupikan*, 6 C. 609 ; 611 ; *Birmingham, Canal Co.* v. *Lloyd* 18 Ves. 515 ; *Great Western Railway* v. *Oxford, etc. Railway*, 3 *De G.* M. & G. 359 ; *Crossley* v. *Derby Gas Light*, 1 Web. Pat. Cas. 119 ; *Rochdale* v. *King*, 2 Sim. N. S. 78 ; *Leeds (Duke of)* v. *Amherst*, 2 Ph. 153 ; *Davies* v. *Sear*, L. R. 7 Eq. 424 ; *Wilmot* v. *Barber*, 15 Ch. D. 105 ; *Russel* v. *Watts*, 25 ; Ch. D. 576 ; *Ramsden* v. *Dyson*, L. R. 1 H I. 129, 140 ; *Att Gen* v. *Collom*, (1916) 2 K. B. 203=85 L. J. K. B. 1489 ; *Civil Service* v. *Whiteman*, 68 L. J. Ch. 484 ; *Jones* v. *Woodhouse*, 92 L. J. K. B. 642.

(7) 9 C. 600 (611).

(8) H. C. Joyce on Injunctions § 42.

(9) 3 Beav. 133.

(10) *Great Western Roy* v. *Oxford Worcester. etc.*, 3 De G. M. & G. 341.

(11) H. C. Joyce on Injunctions § 42 (a).

So where a person stands by and silently sees a public rail road constructed upon his land, it is too late for him, after the road is completed, or large sums have been expended on the faith of his apparent acquiescence, to seek by injunction to deny to the rail road company the right to use his property (1). This rule is also applicable in the case of mineral property (2) and where the granting of an injunction would have the effect of stopping the works of the defendant (3),

To entitle the plaintiff to an injunction, he must not be guilty of any improper delay in applying for the relief (4) "If a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief; more especially where a party, being cognisant of his rights, does not take those steps to assert them which are open to him, but lies by, and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character" (5). Where the abutting owner does not bring an action to enjoin the construction of a public work until such work is substantially completed, the Court is justified in refusing to grant a preliminary injunction in view of the public interests involved, and of the fact that such an injunction while it would affect most seriously those engaged in the construction of the work would be of no material advantage of the abutting owner (6).

The owner of a land upon which a Railway company empowered by Parliament are about to enter under their parliamentary powers, is not entitled to an interlocutory injunction to restrain them from so entering and taking proceedings in respect of his land under the powers of this Act, if by his silence and conduct, he has permitted the company to carry on their work upon the supposition that they were entitled to enter on and take the land in question (7),

At the hearing of a cause a much greater degree of acquiescence must be shown to deprive parties of their rights than would be a sufficient defence to an interlocutory application; a degree amounting, in fact, not only to positive

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(1) *Goodin* v. *Cincinati & W. C. Co.* 18 Ohio St. 169, holding that in such a case there only remains to the owner the right of compensation. The Court said: "The injunction in the present case might have been sought at the first known attempt, or even threat, to despoil the canal, or to construct the rail road upon its line. The omision to do so is an implied assent. The work being completed the public as well as those directly interested in the road, as stock holders and creditors, have a right to insert on the application of the rule that he who will not speak when he should, will not be allowed to speak when he would".

(2) Halsbury vol. 17 citing *Earnest* v. *Vivian*, 33 L. J. Ch. 513, 517 *Clegg* v. *Edmundson*, 8 De G. M. & G. 787.

(3) *Greenhalgh* v. *Manchester & Birmingham Rail Co.* 3 My & Cr. 784; see also *Att Gen* v. *Grand Junction canal Co*, (1909) 2 Ch. 510, 518.

(4) Joyce on Injunctions p. 580 citing *Gray* v. *Ohio*, 1 Grant, 412; *Burden* v. *Stein*, 27 Ala. 104; *Long* v. *Cross*, 5 Jones, Eq. 323; *Whitney* v. *Union*, 11 Gray. 359 (Am)

(5) Per *Biglow J.* in *Tash* v. *Adams* 10 Cush 253 (Am); see also *Uda Begam* v. *Imamuddin*, 1 A. 82, 85.

(6) *Barney* v. *City of New York*, 83 App. Div. (N Y) 237.

(7) *Greenhalgh* v. *Manchester and Birmingham Rail Co.* 3 My E. & Cr. 784.

licence, but to an implication of an actual grant (1). There is a distinction between the effect of acquiescence, upon a motion for an injunction and on a demurrer, in the former case acquiescence merely prevents the special protection by injunction, but in the latter it must be such as to disentitle the plaintiff to any relief whatever (2). In *Gordon* v. *Cheltenham Railway* (3) *Lord Gangdale* said : "A short acquiescence, may properly induce the court not to interfere *ex parte*. A longer acquiescence may, under the circumstances, throw serious doubt upon the right of the platntiff, and induce the court not to interfere by interlocutory order even when applied for on notice. But when acquiescence is used as an argument in support of a demurrer, there must, to make it effective, be such an acquiescence as wholly disentitles the plaintiff to any relief. It must be assumed that the plaintiff had originally a right, but that he has altogether deprived himself of it by acquiescence.',

In *Rundell* v. *Murry* (4) *Lord Chancellor Eldon* said, that a court of equity frequently refused an injunction where it acknowledged a right when the conduct of the complaining party has led to the state of things which occasioned the application ; laying down that not only conduct with the party with whom the contest exists, but conduct with others, may influence the court in the exercise of its equitable jurisdiction by injunction (5) acquiescence will also be taken into account in considering whether an injunction or damages should be granted (6) and an amount of acquiescence, not sufficient to bar an action, may be sufficient to induce the court to give damages instead of an injunction (7). A plaintiff may by his acquiescence preclude himself even from recovering damages (8). "The second mode" says *Dr. Pomeroy* "by which the remedial right may be destroyed and the transaction rendered unimpeachable, is acquiescence. The term 'acquiescence' is some times used improperly. If differs from confirmation on the one side, and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. The theory of the doctrine is, that a party, having thus recognised a contract as existing, and having done something to carry it into effect and to obtain or claim its benefit, although perhaps only to a partial extent, and having thus taken his chances, cannot afterwards

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(1) *Patchin* v. *Dubbins*, 1 Kay. 1 ; Joyce on Injunctions, p. 1053 ; Kerr, 22. *Johnson* v. *Wyatt*, 33 L. J. Ch. 394 ; *Lee* v. *Haley*, 18 W. R. 181.

(2) *Gordon* v. *Cheltenham Railway*, 5 Beav 229, (238) ; see also *Att. Gen.* v. *Lutton Board of Health*, 2 Jur. N. S. 181; *Att. Gen.* v. *Borough of Birmingham*, 4 K & J. 546.

(3) 5 Beav. 229 (238).

(4) Jac 311 ; *Saunders* v. *Smith*, 3 My & Cr. 711, 730.

(5) Joyce on Injunctions p. 1035 : Kerr on Injunction p. 20

(6) Halsbury Vol. 17 citing *Lockwood* v. *London & North Western Rail*, 19 L. T. 68 ; *Sayers* v. *Collier*, 28 Ch. D. 133 C. A ; *Shelfer* v. *City of London*, 5 Ch. D. 769.

(7) *Sayers* v *Collier* supra *Per Fry* L.. J. ; *Ranchhod* v. *Lalla* 10 B. H. C 95 (97) ; *Narabhai* v. *Munshi*, 16 B. 533, 535; Halsbury Vol 17 p- 213.

(8) *Kelsey* v. *Dood*, 52 L, J. Ch. 34 ; *Sayers* v. *Colliers*, 28 Ch. D. 103.

be suffered to repudiate the transaction and allege its voidable nature. It follows that *mere delay*, mere suffering time to elapse without doing anything is not acquiescence, although it may be, and often is strong evidence, of an acquiescence ; and it may be and often is, a distinct ground for refusing equitable relief, either affirmative or defensive (1). As acquiescence thus is a recognition of and consent to the contract or other transaction as existing, the requisites to its being effective as a bar are, knowledge or notice of the transaction itself; knowledge of the party's own rights, absence of all undue influence or restraint, and consequent freedom of action ; a conscious intention to ratify the transaction, however, is not an essential element. When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights and of all the material facts freely does what amounts to a recognition of the transaction as existing or acts in a manner inconsistent with its repudiation or lies by for a considerable time and knowingly permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized there is acquiescence and the transaction although originally impeachable, becomes unimpeachable in equity (2) Even where there has been no act nor

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(1) *Duke of Leeds* v. *Amherst*, 2 Phill. Ch. 117, 123. The true nature and effect of acquiescence was admirably stated by *Thesiger* L. J. in delivering the opinion of the Court of appeal in the very recent case of *De Bussche* v. *Att, Gen.* L. R. 8 Ch. D. 286, 314. The suit was brought to set aside a sale made by an agent to himself in violation of his fiduciary duty. The Lord justices said : "It still remains to be considered whether short of such ratification or adoption, the plaintiff can be held to have by his conduct in any way precluded himself from taking this present proceedings, the term 'acquiescence' which has been applied to his conduct, is one which was said by *Lord Cottenham*, in *Duke* of *Leeds* v. *Amherst, supra*, ought not to be used ; in other words, it does not accurately express any known legal defence but if used at all it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced is in progress or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon his right stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he asserts to its being comitted, he cannot afterwards be heard to complain of the act. This, as *Lord Cottenham* said in the case already cited is the proper sense of the term acquiescence and in that sense may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct But when once the act is completed, without any knowledge or assent upon the part of the person whose right is. infringed the matter is to be determined on very different legal consideration. A right of action has then vested in him which, at all events as a general rule can not be diverted without accord or satisfaction, or release under seal. *Mere* submission to the injury for any time short of the period limited by statute for the enforcement of the right of action, cannot take away any such right, *although under the name of laches it may afford* a ground for refusing relief under some peculiar circumstances ; and it is clear that even an express promise by the person injured, that he would not take any legal proceedings to redress the injury done by him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding."

(2) *Randall* v. *Errington*, 10 Ves. 423. 426 428 ; *Colomondely* v. *Clinton*, 2 Mer. 171, 361 ; *Honner* v. *Morton*,

language properly amounting to an acquiescence, a mere suffering delay to mere time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exerise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands, laches are often a defence wholly independent of the statute of limitation. Promptness in asserting a remedial right against fraud is sometimes required ; but no delay will prejudice a defrauded party as long as he was ignorant of the fraud. Each case involving the defence of delay or lapse of time must, to a great entent, depend upon its own circumstances." (1) Acquiescence in the erection of noxious works while they produce little injury does not warrant the subsequent extension of them to an extent productive of great damage (2). So also acquiescence in a breach of a covenant not attended with substantial damage will bar the right to restrain a subsequent breach so attended. (3)

Delay or laches.—"Probably no principles of equity" says *Dr. Pomeroy* "have been the subject of more contradictory judicial statements than those relating to the effect of laches or delay. The resulting confusion is the more deplorable owing to the frequency with which the defence is asserted, and the favour with which it appears to be regarded by many courts. Apart from the element of uncertainty shared by it in common with other equitable defences, the application of which must necessarily rest in judicial discretion, there appears to be a fundamental difference of opinion as to the ultimate reason in ethics or in public policy upon which the defence of laches should be based. The subject is further complicated, by a hopeless confusion in nomenclature. The term

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2 Russ. 65 ; *Selsey* v. *Rhoades*, 1 Bligh, N. S. 1 ; *Vigers* v. *Pike*, 8 Cl. & F. 562, 650 ; *Charter* v. *Trevelyan*, 11 Cl. & F. 714 ; *Bernal* v. *Lord Donegal*, 3 Dow. 133 ; *Bayne* v. *Ferguson*, 5 Dow. 151 ; *Archbold* v. *Scully*, 9 H. L. C. 360 ; *Bullock* v. *Downes*, 9 H, L. C. 1 ; *Wall* v. *Cockerell*, 10 H. L. C. 229 ; *Loader Clark*. 2 Mac & G. 387 ; *Wright* v. *Vander plank*, 8 De G. M. & G. 132 ; *Stone* v. *Godfrey*, 5 De G. M. &. G. 76 ; *Wall* v. *Cockerell* 3 De G, F. & J. 737 ; 742 ; *Skotowe* v. *Williams*, 3 De G. F & J. 535 ; *Graham* v. *Birkenhead*, 2 Mach & G, 146 ; *Coles* v. *Sims* 5 De G. M. & G 1 ; *Life Association of Scotland* v. *Ciddal*, 3 De G. F & J. 58, 74 ; *Great Western Ry* v. *Oxford etc. Ry*, 3 3 De G. M. & G. 341 ; *Ormez* v. *Beadel* 2 De G. F. G J. 333 ; *Edwards* v. *Myrick*, 2 Hare 60, 75 ; *Tanner* v. *Smith*, 10 Sim. 410 ; *Dimisdale* v. *Dimsdale*, 3 Drew. 556 ; *Bellew* v. *Russel* 1 B. G B. 96 ; *Blennerhassett* v. *Day*, Ball G B 104 ; *Nagle* v. *Baylor*, 3 Dru G War 60. The following cases are remarkable instances of relief given after a considerable lapse of time : *Gresly* v. *Mously* 4 De G. G. J. 78 ; *Baker* v *Bradly*, 7 De G M & G. 597. The doctrine concerning acquiescence from lapse of time is applied with special strictness in mercantile contracts, such as dealing with stocks and subscriptions from shares, and in agreements of speculative nature *Ashley's Case*, L. R. 9 Eq. 263 ; *In re Estates Invest Co.* L. R. 10 Eq. 503 ; *Small cambice case*, L. R. 3 Eq. 769 ; *Kent* v. *Free hold Co.* L. R. 3 Ch. 493 ; *Sharply* v. *Louth etc Ry*, L. R. 2 Ch. 663 ; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275 ; *Heymann* v. *European Etc, Ry.* L. R. 7 Eq. 795 ; *Denton* v. *Mac Neil*, L. R. 2 Eq. 352 ; *Tuites case*, L. R. 3 Eq. 795 ; *Jenkings* v. *Broughton*, 5 De G. M. & G. 126, 140 ; *Clegg* v. *Edmondson*, 8 De G. M. G 787 ; *Clements* v. *Hall*, 2 De G. G J 173 ; *Whalley* v. *Whalley* 2 De G. F' G J. 310.

(1) Pomeroy's Equity Jurisprudence § 965

(2) *Bankart* v. *Houghton*, 27 Beav. 425

(3) *Western* v. *M'Dermot*, 35 L. J. Ch. 190

'acquiescence' in one of its two legal significations, is often used interchangeably with the term 'laches', while in the innumerable cases relating to relief from fraud, actual or constructive, the courts have seldom been at pains to distinguish the general doctrines relating to laches from the particular doctrine as to 'confirmation' of the fraudulent act, and the necessity of prompt election to rescind by the defrauded party'' (1).

In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. The meaning of this rule is that, under orninary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after the time fixed by the analogous Statute of Limitations at law ; but if unusual conditions or extraordinary circumstances make it equitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer period than that fixed by the Statute, the Chancellor will not be bound by the Statute, but will determine the extra-ordinary case in accordance with the equities which condition it. When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches ; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case" (2). The true doctrine concerning laches has never been more concisely and accuratly stated than in the following language of an able Judge of the United States : "*Laches in legal significance, is not mere delay, but delay that works a disadvantage to another.* So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law ; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced *delay becomes inequitable*, and operates as estoppel against the assertion of the right. *The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court* sees negligence on one side and injury therefrom on the other it is a ground for denial of relief. (3) "Several conditions may continue to render a claim or demand stale in equity. If by the laches and delay of the complainant it has become doubtful whether the adverse party can command the evidence necessary to a fair presentation of the case on their part, or if it appears that they have been deprived of any such advantages they might have had if the claim had

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(1) Pomeroy's Equity Jurisprudence § 1440. To delay in instituting judicial proceedings, although for a less period than that prescribed by the Statute of Limitations, may be, and generally will be regarded as an acquiescence, and this may be and generally will be a bar to equitable remedy." Storey's Equity Jurisprudence 65.

(2) Pomeroy's Equity Jurisprudence § 1441.

(3) *Per Stinners C. J.* in *Chase* v. *Chase*, 20 R. I. 202 cited the Pomeroy's Equity Jurisprudence § 1442.

been reasonably insisted upon, or before it become antiquated, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief, but will remain passive ; and this although the full time may not have elapsed which would be required to bar a remedy at law. If, however, upon the other hand, it clearly appears that lapse of time has not in fact changed the conditions and relative positions of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the Court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. *Every case is governed* chiefly by its *own circumstances*. "(1) The doctrine of laches for the most part is merely an application of the broader *maxims* of equity, "He who seeks equity must do equity" and "He who comes into equity must come with clean hands." It exacts of the plaintiff no more than fair dealing with his adversary. It is in no way dependant on these general considerations of public utility, and the "repose of society" which are, in legal theory, the legislative motive for statutes of limitations. (2).

A delay of a party holding an equitable right to property which has permitted another, who holds the legal title, to expend large sums of money in the improvement of the property, and thereby greatly enhance its value, which he would not have done had the right been properly asserted, has usually been considered such laches as will preclude the party guilty of it from relief. If the party holding the equitable right would avail himself of it, he must assert it in a reasonable time. Equity will not permit him to stand by and permit the other party who holds the legal title, to imprve and develop the property until it has become valuable, or greatly increased in value, and then assert his right. Again, when the property in dispute has been sold by the party at fault to innocent parties, a delay by the complainant may amount to laches. Where important evidence in behalf of the defendant has been lost during the delay of the complainant, he will generally be barred from relief. The loss may result from the death or incapacity of some of the witnesses. Again, the delay may be so long that under the circumstances many of the important facts have become obscure. To allow a complainant relief in such cases would frequently risk a great hardship to innocent parties. Consequently, the Courts decline to interfere (3).

"Another important maxim is" says Justice Story "that 'equity aids the vigilant, not those who sleep on their rights.' The policy of the law, as well as equity, is that when one has a claim or demand he ought to prosecute it within a reasonable time, while the facts are yet fresh in the minds of his adversary and the witnesses may be produced before the Court. It would be a great hardship

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(1) *Per Worlverton* C. J. in *Wilson* v. *Wilson*, 41 Or 454 ; cited in *Cunningham* v. *Costell.* 16 Ariz. 479 ; Pomeroy's Equity jurisprudence § 1442.

(2) Pomeroy's Equity Jurisprudence § 1443.

(3) Pomeroy's Equity Jurisdrudence § 1443.

upon the defendant, and inequitable for the plaintiff to claim that he was over-reached and unduly influenced to enter into an unconscionable trade, and wait for years afterwards to make known his claim, and probably those who knew the real facts have since died. It some times happens that one has been defrauded and the real facts are not apparent to him for years afterwards, then he has a reasonable time for the discovery of the fraud to bring his action; but not where he knew of the alleged fraud and acquiesced in the wrongful conduct of another and deliberately refused to assert his rights until sometime afterwards when he sustained an injury. Delay in the assertion of a right, unless satisfactorily explained, even where it should not constitute a positive statutory bar, operates in equity as an evidence of assent, acquiescence or waiver, and especially is such the case in suits to set aside transactions on account of fraud or infancy. Laches and neglect are always discountenanced by a Court of Equity. A Court of Equity, which is never active in relief against stale demands, will always refuse relief where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call into activity this court but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive and does nothing" (1).

The law of British India is also the same. Here also there is a distinction between acquiescence in an act while it is still in progress and mere submission to it when it has been completed. In the first case it may operate as an estoppel if it has induced action infringing a right. In the second case, submision cannot change the part, and the right of action once vested cannot, at all events as a general rule, be divested without an accord and satisfaction, or release under seal. Estoppel by acquiescence has no application to an *expost facto* submission not amounting to ratification and inducing no action or omission and consequently insufficient to constitute what in such would be necessary accord and satisfaction with full knowledge. Acquiescense after a *fait accompli*, if not prolonged beyond the verge of limitation, is no bar to a right of suit already accrued (2) So the only bar to the enforcement of a legal right is the lapse of time required by the statute of limitation to bar the remedy (3). Under the law of limitation, laches even for the whole of the prescribed period less only by a day, can not deprive the plaintiff of his right of action. He may, if so minded, institute his action on that day. In *Pedda muthulaty* v. *N. Timma Reddy* (4) *Justices Holloway & Frere* ruled that "on the whole it may be taken as the law both of courts of law and equity that mere laches short of the period prescribed by the statute of limitation is no bar whatever." So under the plea of the doctrine of laches, the period allowed by the law of limitation cannot be cut down. That the doctrine of laches does not apply to cases to which the law of

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(1) Story's Equity Jurisprudence § 85.

(2) *Fateh Sinji* v. *Bemanji*, 5 Bom. L. R. 274=27 B. 515

(3) *Seshamma* v. *Subbarayadu*, 18 M. 403 (404); *Venkopadhyaya* v. *Kavari*, 2 M. H. C. R. 36; *Pedumathu Laty* v. *Timma*, 2 M. H. C. R. 270 (273).

(4) 2 M. H. C. R. 270

limitation applies has been laid down in a series of cases. (1) So it is clear that mere delay not amounting to assent will not, apart from the statute of limitations, operate as a bar to a claim. In order to make it a bar there must be other circumstances rendering it inequitable to grant relief (2). In *Bright* v. *Legerton* (3) relief was refused on the ground of what the court called "gross laches." In this case the question raised was as to trustees' dealings with cottages between 1828 and 1839. The beneficiary came of age in 1839, and it was proved that accounts were then submitted to him and he did not object. He commenced an action in 1860 with respect to the management of the cottages The three trustees were dead, and apparently the vouchers were lost. The *Lord Chancellor* dismissed the claim and said : "Might such a bill as this be filed at the end of a century by the plaintiff's personal representatives against the personal representatives of the true trustees, if they could be found out? I apprehed that in such a case it is unnecessary to presume the execution of a release, or to resort to any statute of Limitations. A court of Equity will not allow a dormant claim to be set up when means of resisting it, if unfounded, have perished, much less cast a burden of proving such an affirmative as that forty years ago cottage rents were properly collected, when the witnesses who might have proved the fact have long ago been called into another state of existence. It has been beautifully remarked with respect to the emblem of time, who is depicted as carrying a scythe and an hour glass that while with the one he cuts down the evidence which might protect innocence, with the other the metes out the period when innocence can no longer be assailed (4)." In *Re Sharpe* (5) *Lindley L. J.* said : "That staleness of demand as distinguished from the statute of Limitations, and analogy to it may furish a defence in equity to an equitable claim was settled at least as early as *Smith* v. *Clay* (6)" The principles on which the doctrine is based will be found clearly set forth by the Privy Council in *Lindsay Petroleum Co* v. *Hard* (7), and in the judgment of *Lord Blackburn* in *Erlanger* v. *New Sombreso Phosphate Co* (8).

In *Erlanger* v. *New Sombreso Phosphate Co* (8), *Lord Blackburn* said : "A Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use diligence, after there has been such notice or knowledge as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party *in mora*, than a similar change before he was *in mora* should do." In *Lindsay Petroleum Co*

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(1) Vide *Jamnadas* v. *Atmaram*, 2B. 133 per *West J* ; *Tamek chandar* v. *Hurri Sankar*, 22 W. R. 267, per *Justice Kemp* ; *Sheikh Ally Hossain* v. *Sheikh Muzahar Hossain*, 4 C. L. R 577, *per Justice Broughton* ; *Ramphal Shahoo* v. *Misree Lal*, 24 W. R. 97 ; 5 Mad. L. J Vol V. p. 370.

(2) *Re Cross*, 20 Ch. D. 109 ; *Rochefoucould* v. *Boustead*, (1897) 1 Ch. 196 ; *Re Birch*, 27 Ch. D. 622.

(3) 2 De G. F. & J. 606.

(4) Vide 2 White & Tudor's Leading cases on Equity p. 689.

(5) (1892) 1 Ch. 168.

(6) Amb. 645

(7) L. R. 5. P. C. 221, 239.

(8) 3 A. C. 1218, 1279.

v. *Hurd* (1), it is said : "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not using that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of the cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. I have looked in vain for any authority which gives a more distinct and definite rule than this : and I think from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty : but that, I think, is inherent in the nature of the inquiry". In *Rochefoucauld* v. *Bowstead* (2) *Lindley L. J.* said as to the defence of lapse of time : "But as already stated, since 1882 the defendant has done nothing to induce the plaintiff not to sue him, nor to lead her to believe that any claim by her would be recognised. On the other hand the plaintiff has done nothing actively to lead the defendant to suppose that she abandoned any claim she might have against him as her trustee. There is nothing to be said against her, except that she has forborne to sue for twelve years".

There is no special limit of time as to laches ; it depends upon the circumstances of each particular case (3) and this circumstance which, with other circumstances, is to be taken into account (4). And in considering lapse of time it will commence to run from the discovery of the circumstances giving the title to relief (5). In *Premji Jivan* v. *Haji Cassum Juna* (6). *Sargent C. J.* said : "It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended

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(1) L. R. 5 P. C. 221, 239 ; 2 White & Tudor's Leading Cases 690, cited in *Jamnadas* v. *Atmaram*, 2B. 138.

(2) (1897) 1 Ch. 198.

(3) *Gresley* v. *Mously*, 4 Deg & J. p. 95.

(4) *Gregory* v. *Gregory*, Coop 201.

(5) *Carter* v. *Trevelyan*, 11 Cl. & F. 714 ; *Clauri coratie* v. *Henning*, 30 Beav. 175 ; *Vane* v. *Vane*, L. R. 8 Ch. 383.

(6) 20 B. 298 at p. 300.

to forego his right or to an acquiescence in his building on the land—*Ramsden* v. *Dyson* (1); *Plimmer* v. *Mayor & of Wellington*, (2); and see *Dattatraya* v. *Shibdhar* (3). This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building—*Narayan* v. *Bholagir* (4). As delay in bringing a suit, we agree with the Madras High Court that it is not itself sufficient to create an equity in in favour of the person spending money on land and to deprive the owner of his strict rights —*Rama* v. *Raja* (5)." Where a right is extinguished by laches, a continual claim without any active step, in support of it, will not keep alive right which would be otherwise debarred by laches (6).

Now the question is how far the doctrine of laches is applicable in granting the relief of Injunction in British India. So far as issue of injunction by the Civil Courts is concerned, the provisions regulating the granting of such injunctions are mainly (7) to be found in the Specific Relief Act and the Civil Procedure Code. Here the reliefs given by the Court are considered as equitable remedies and as such wide discretionary powers are exercised by the Court in granting injunctions. So now let us consider the effect of laches on the discretionary powers of the Court. *Sir James Fitz James Stephen* in his speech on the bill which became Act I of 1877 observed, that the Indian legislature did not intend to deal with the question of delay in seeking specific reliefs, for the staute of limitation had unlike the English law provided specific periods of limitation for these reliefs. He said : "There was another subject of considerable practical difficulty on which it was almost impossible to lay down rules. That subject was the delay occurring before the institution of a suit. There was no express law limiting the time within which a suit for a specific performance should be instituted in the Court of Chancery. But the Court of Chancery laid down the rule that suitors should come quickly to obtain such a remedy, and it was frequently a very difficult question to decide whether a plaintiff had or had not come into Court in time. Here in India, the Limitation Act provided a period of three years in which a suit for the Specific performance of a contract should be brought, and as it was not proposed to alter the law upon this point, we are able to avoid treating the difficult question what was or was not delay". "It is doubtful how far the Courts will feel bound by these observations when they are pressed to hold that the doctrine of laches has no application to the specific relief treated of in Act No I of 1877 (8) The Statute specifically states under what circumstances specific relief may be granted or refused, but even when the circumstances, which will justify the awarding of such relief exists, a discretion is left to the Court to grant

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(1) L. R. I. H. L. 129 at p. 170.
(2) L. R. 9 App. Cas. 699 (710)
(3) P. J. 1892 p. 348.
(4) 6 B. H. C. R. Rev. A. C. J. 80.
(5) 2 M. H. C. R. 114.
(6) *Tilly* v. *Thomas*, L. R. 3 Ch. 67.
(7) Vide Indian Copy Right Act (III of 1914) s. 6 ; The Indian Patent and Designs Act (II of 1911) s. 31, which also make provisions for issue of injunctions.
(8) The Specific Relief Act ; see *Gopal Krishna Porachure* v. *Sakhoji Rao*, 18B. 183.

or withhold it. It looks very much as if a Court would be justified in refusing the relief on the ground of laches, even though the plaintiff may have sought its help within the period allowed by the statute of limitations. The rule under consideration would apparently be applicable to reliefs which Courts of Common law might grant, where they are discretionary. It has been repeatedly held that a party seeking the assistance of the revisional jurisdiction of the High Court whether on the Civil or on the Criminal side must do so with proper diligence. It is difficult to lay down rules as to what shall be regarded as laches ; this would depend on the circumstances of each case, aud does not depend entirely on the period of time that has elapsed. If for instance a party entitled to specific relief allows his opponent to spend money in making repairs or improvements or allows third parties to deal with him with respect to the properties concerned, he may be fixed with laches, even though a comparatively short time only may have elapsed ; in other cases where the defendant cannot show that the plaintiff's laches has injured him a longer delay might be excused. On the whole the tendency of the Courts is to discourage the plea of laches, unless some body has been demnified by it, and as in this country the period of limitation enacted by the statute is generally very short, there is less need for the application of his maxim." (1) "An important limitation" says *Dr. Pomeroy* "upon the general rule as to the effect of delay has been established by a considerable preponderance of authoriy. Where an injunction is asked in support of a strict legal right, the party is entitled to it if his legal right is established ; mere delay and acquiescence will not, therefore, defeat the remedy unless it has continued so long as to defeat the right. This rule has had frequent application where injunction has been sought against the pollution (2) or diversion of water, or against the infringement of a patent or a trade-mark (3)" (4).

In *Uda Begum* v. *Imamuddin* (5) the Court consisting of *Mr. Justice Turner* and *Mr. Justice Oldfield* said : "The rule as expanded by the authorities we have quoted (6) is obviously founded on a highly equitable principle, and we see no reason why on fitting occasions it should not be applied in this country. No doubt a distinction must be made between these cases in which a suitor seeks some relief in which, if he proves his case, the Court is bound to grant him, and the cases in which he seeks releif which the court has discretion to grant or refuse. When a suitor has a right to demand relief, no doubt a stronger case must be made out against him than such mere tardiness in seeking a remedy which must justify a Court in refusing relief when it has a discretion to grant or refuse it. With this qualification we assent to the dictum of the

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(1) 5 Mad L. J. pp. 217, 218.

(2) *Goldsmith* v. *Tunbridge*, L. R. 1 Eq. 161.

(3) *Fullwood* v. *Fullwood*, L. R. 9 Ch. D. 176.

(4) Pomeroy's Equity jurisprudence § 1445.

(5) I. A. 82 at p. 86.

(6) *Cairncross* v. *Lorimer*, 1 Macq. H. L. Cas. 829 ; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129.

Madras High Court in a case decided subsequently to *Rama Rau* v. *Raja Rau* (1) to the effect that on the whole it may be taken as the law of both of Courts of law and equity that mere laches, short of the period prescribed by the statute of limitation, is no bar whatever to the enforcement of a right absolutely vested in the plaintiffs at the period of the suit."—*Peddamuthulaty* v. *N. Timma Reddy* (2), but when there is more than mere laches, where there is conduct or language inducing a reasonable belief that a right is forgone, the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled in this country, as in other countries, to plead acquiescence, and the plea if sufficiently proved ought to be held a good answer to an action although the plaintiff may have brought the suit within the period prescribed by the law of limitation."

In New York it has been determined that the doctrine of acquiescence or laches as a defence to an equity action is limited to actions of an equitable nature exclusively, or to those where the legal right has expired or the party has lost his right of property by prescription or adverse possession ; and that the mere laches of a party not amounting to an estoppel is no defence where the Courts are called upon to sustain a legal right upon grounds of equity and to afford relief by injunction for that purpose (3). Where the fact of nuisance is free from doubt, a delay of several months will not bar relief by preliminary injunction (4). In England the rule is otherwise. Though it may not amount to proof of acquiescences delay may disentitle a party to summary interference of the Court by interlocutory injunction, whatever his right may prove to be at the final hearing (5). But the English rule is, that delay in taking proceeding is not material so long as matters remain in *status quo* (6). And in other cases it is decided that where a plaintiff seeks an injunction in aid of his legal right, relief will not be refused on the ground of mere delay on his part, unless he is barred by the statute of Limitation (7). "Mere acquiescence." said *Lord Cranworth* in *Rocdale Canal Co.* v. *King* (8) "(if by acquiescence is to be understood only the abstaining from legal proceddings) is unimportant. Where one party invades the right of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless indeed he continues inactive so long as

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(1) 2 M. H. C. R. 114 (116)

(2) 2 M. H. C. R. 273

(3) *Syracuse Salt Co.* v. *Rome etc., R. Co*, 22 N. Y. Supp. 321 ; H. C. Joyce on Injunctions § 43

(4) *Megis* v. *Lister*, 23 N. J. Eq. 200.

(5) *Attorney Gen.* v. *Sheffield Gas Co.* 3 De G. M & G 394 ; *Great Western R. Co.* v. *Oxford*, etc. *R. Co*, 3 De G M & G. 363 ; *Ware* v. *Regent Canal Co*, 3 De G & J. 212, 230 ; *Salisbury* v. *Metropolitan R. Co.* 18 W. R. 484 ; *Grant* v. *Fynney*, 8 Ch. 8 ; *Att. Gen.* v. *South Staffordshire*, (1909) 25 T. L. R. 40 ; H. C. Joyce's Injunctions § 44 ; Kerr on Injunction 23.

(6) *Rochdale Canal Co*, v. *King*, 2 Sim. N. S. 78 ; *Gale* v. *Abbott*, 8 Jur. N. S. 987 ; *Archbold* v. *Scully*, 9 H. L. C. 388.

(7) *Fullwood*, v. *Fullwood*, 9 Ch. D. 176 ; *Archbold* v. *Scully* 9 H. L. C. 383 ; *Rowland* v. *Mitchell*, 75 L. T. 65 ; *Hogg* v. *Scott*, 18 Eq. 444 ; *Morphy* v. *Crean* (1915) 1 Ir. 120 ; *Morpeth Corporation* v. *Northumberland. Former's* (1921) 2 Ch. 163 ; *Dominion Coal* v. *Maskinonge*, (1922) 2 K. B. 142.

(8) 2 Sim. N. S. 89 ; Kerr. on Inj. 23.

to bring the case within the statute of limitation." In *Ware* v. *Regent's Canal Co.* (1) *Lord Chancellor Chelmsford*, in speaking of the effect of delay in a suit for an injunction said: "Upon the question whether I am to grant the injunction, I cannot avoid being influenced by the delay which has occurred in the institution of proceedings by the plaintiff, which though not amonting to absolute proof of acquiescence, yet is calculated to throw considerable doubt upon the reality of his alleged injury, and compels me to weigh the amount of inconvenience which he will sustain by my refusal of this particular remedy against the serious consequences which must result to the Company from an order which will oblige them to alter the state and condition of their works." If the parties complaining of an interruption in their enjoyment of an easement are guilty of laches (in this case one year and a quarter), and fail to institute proceedings to stop it until the new building has been completed, the Court will not grant an injunction to restrain the interruption, but will leave them to their remedy at law (2). The Court will not grant an interlocutory injunction if the plaintiff, having sufficient notice of the defendant's intention to commit the act sought to be restrained, is guilty of unreasonable delay in applying to the Court (3). An injunction, although the facts in support of it are sufficient will not be granted unless the application is made speedily (4). But a plaintiff's right to an interlocutory injunction is not barred by laches, when he has for. borne in a reasonable hope of an accommodation, and the defendant has not incurred expenses or injury through the delay (5). In *Benode Coomaree* v. *Soudaminey* (6), *Petharam C. J.* remarked: "I think inaction is evidence of acquiescence." Acquiescence or forbearance, in the absence of explanatory circumstances, may be an impediment to the assertion of a plaintiff's right (7). A delay of fourteen months by a plaintiff in taking steps to prevent the continuance of a breach of a restrictive covenant will not amount to such acquiescence as to disentitle him to an injunction (8). Where there has been delay in the assertion of a legal right, and the damage sustained is slight, the Court will not grant an injunction (9). Where plaintiff knew of infringement of patent in August, and wrote to defendant complaining in November, but did not file his bill till the following July, interlocutory injunction was refused on the ground of delay (10). Injunction to restrain breach of covenant in restraint of trade was refused to plaintiff, who had for two years delayed to take proceedings (11). For delay injunction was refused in case of piracy of publication (12).

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(1) 3 De G & J. 212, 230.

(2) *Cooper* v. *Habbuck*, 7 Jur. N. S. 457; Joyce on Injunctions p. 458; See also *Krishnachandra* v, *Hemchandra*, 21 C. L. J. 469

(3) *Salisbury* v. *Metropolitan Ry. Co.* 39 L. J. Ch. 429.

(4) *Issacson* v. *Thompson*, 20 W. R. 196; *Clover* v. *Roydon*, 17 L. R. Eqr. 190; *Gaskin* v. *Balls*, 13 L. R. Ch. D. 342; *Goodson* v. *Richardson*, 43 L. J. Ch. 790.

(5) *Lee* v. *Haley* 181.

(6) 16 C. 252 (261).

(7) *Jamna das* v. *Vrijbhukan*, 2 B. 133 (137).

(8) *Northumberland* v. *Bowman*, 56 L. T. 773.

(9) *Wintle* v. *Bristol*, 6 L. T. 20.

(10) *Bovil* v. *Crate*, L R. 1 Eq. 388; see also *Bridson* v. *Benecke* 12 Beav. 1.

(11) *Scarisbrick* v. *Tunbridge*, 3 Jur. 14.

(12) *Lewis* v. *Chapman*, 3 Beav. 133.

In cases of temporary injunction a plaintiff must also be able to show that he has not been guilty of improper delay in applying to the Court, for delay not amounting to acquiescence may deprive him of the right to an interlocutory injunction (1). The essence of an application for an interlocutory injunction is that it should be made with promptness. Improper delay although it does not amount to acquiescence may deprive a plaintiff of his right to such a remedy (2). Laches disentiles a person to the discretionary relief of an injunction (3). Where a person against whom suits were instituted neglected to defend them and, after decrees had been passed, failed to take proper steps to get a retrial of the cases and allowed the remedies open to him to become barred by limitation, he could not thereafter be granted an injunction preventing the decree-holder from executing the decrees (4). Improper delay, although it does not amount to acquiescence deprives a plaintiff of his right to an interlocutory injunction. (5)

Court must confine itself strictly to the point it is called upon to decide.—In dealing with an interlocutory application, the Court will confine itself strictly to the point which it is called upon to decide, and will express its opinion on the case only so far as is necessary to show the grounds upon which the interlocutory application is disposed of (6). Where a party applies for the aid of the Court, the application for an injunction is made either during the progress of the suit or at the hearing, and in both cases great latitude and discretion are allowed to the Court in dealing, with the applications. When the application is for an interlocutory injunction, several courses are open. The Court may at once grant an injunction simpliciter without more—a course which, though perfectly competent to the Court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual and more wholesome practice, in such a case, of either granting an injunction until the plaintiff has established his legal title, or of requiring him first to establish his legal title, and suspending the grant of injunction until the result of the legal investigation has been ascertained, the defendant in the meantime keeping an account. Which of these several courses ought to be taken must depend entirely upon the discretion of the Court, according to the case made. And when the cause comes to a hearing the Court has also a large latitude left to it, and a case might then arise in

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(1) Halsbury Vol. 17 p. 221 citing. *Hilton* v. *Granvidle*, Cr. & Ph. 283, 292 ; *South Eastern* v. *Martin*, 18 L. J. Ch. 103 ; *Bridson* v. *Benecke*, 12 Beav. 1 ; *M'Lure* v. *Ripley*, 2 Mac & G. 274 ; *A. G.* v. *Sheffield Gas Co.*, 3 De M. & G. 304 ; *Great Western Ry.* v. *Oxford*, 3 De G. M & G. 341 ; *Issacson* v. *Thompson*, 41 L. J. Ch. 101 ; *Turner* v. *Misfield*, 39 Beav. 390.

(2) *Yoshimi* v. *Dwarkadas*, 29 S. L. R. 335=139 Ind. Cas. 490.

(3) *Yasuf Ali* v. *Muhamad Din* A. I. R. 1927 Lah. 718=104 Ind. Cas. 563=28 P. L. R. 590.

(4) *Roshan Lal* v. *Raja Bhanpratap Singh*, 2 C. P. L. R. 75.

(5) *Yoshimi Boshaka* v. *Dwarka*, A. I. R. 1933 Sind. 26 ; See also *N. W. Ry. Administration* v. *N. W. Ry. Union*, A. I. R. 1933 Lah. 203.

(6) Halsbury Vol. 17 p. 221 citing *Skinner's Co.* v. *Irish Society*, 1 My & Cr. 162, 164 ; see also *Woodridge* v. *Bellamy*, (1911) 1 Ch. 338=80 L. J. Ch. 272.

which, even at that stage, the Court might be of opinion that the injunction might properly be granted without having recourse to a trial of legal right. The conduct and dealing of the parties, the frame of the pleadings, the nature of the patent right and of the evidence by which it is established—these and other circumstances might confine to produce such a result, although this is certainly not very likely to happen, and probably there is not a case in which it has happened (1).

Whether Injunction is to be granted on ground not put forward by plaintiff.—If an injunction is applied for upon a distinct ground which fails, it will not in general, be granted upon another ground which has not been put forward in the circumstances of the case (2). Where a plaintiff alleges and proves, in a case for injunction a peculiar and specific injury, the order which he obtains gives him an extended right in general terms to restrain any injury of the same kind ; but where the peculiar and specific injury is distinctly stated upon the pleadings, and where the words used describe another peculiar and specific injury proposed to be proved, the plaintiff is not entitled to the relief (3). If a bill state that an injury by the defendant will, by a certain mode of operation, be inflicted upon the plaintiff, and then after giving notice of motive for an injunction, the mode of operation is changed and another adopted, the wholesome arrangement is to amend the bill, and general words in a motion for a injunction are justified by establishing a specific case of injury (4).

Balance of convenience—The Court in granting an *ad interim* injunction, will first see that there is a *bona fide* contention between the parties, and then on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience if the injunction do not issue, bearing in mind the principles of retaining immoveable property in the *statu quo* (5). In *Ruplal Kettry* v. *Mahima Chandra Roy* (6). *Norman J.* said : "(In granting temporary injuuction) it appears to me that I must be guided by the question of convenience or inconvenience, which was the principle in the case of *Bacon* v. *Jones* (7) and I, therefore, grant the injunction. Great injury might result to the plaintiffs if I did not interfere, and a great fraud may be committed on the purchaser. I think no injury can result to the defendant by my granting this injunction." In *Anath Nath De* v. *Mackintosh*, (8). *Phear J.* said : "And even if this application were to be decided merely by reference to the balance of inconvenience which, on the one hand, is to be looked for as the result to Mackintosh of his being kept out of possession, and on the other would be caused to the

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(1) *Per Lord Cottenham L. C.* in *Bacon* v *Jones*, 4 My & Cr. 433 ; *Motly* v. *Downman*, 3 My & Cr. 1 ; *Mayor of Cardiff* v. *Cardiff Water-works*, 4 De G & J. 596.

(2) *Castelli* v. *Cook*, 7 Hare, 89.

(3) *Hertz* v. *Union Bank of London*, 1 Jur. N. S. 127.

(4) Ibid.

(5) *Gomes* v. *Carter*, 1 Ind. Jur. N. S. 411 ; *Trimback Rao* v. *Sampat Rao*, A. I. R. 1933 Nag. 153 : "In the granting of injunctions the question of the balance of convenience of the parties is also a matter for consideration."

(6) 5 B. L. R. 274.

(7) 4 M & Cr. 433.

(8) 6 P. L. R. 571. The facts of the case are give at p. 88.

plaintiff's family, it seems to me that I ought to oblige Makintosh to bear the burden until the decision of the suit for partition, because whatever injury he may sustain by reason of the injunction can be fully repaired by money, whereas the plaintiff's grievance could not be." Where there is a *bonafide* contention to be determined between the parties and the balance of convenience is that execution sale should be stayed, a temporary injunction to prevent the sale should be passed (1). Where pending the disposal of an appeal by the High Court the party had filed a suit in the lower court and there upon an application was made to the High Court for an injunction restraining the party from proceeding with the suit till the disposal of the appeal. *Held* that the injunction could be granted if the balance of convenience was in favour of such a course (2). In granting an injunction the court must look at the balance of convenience (3). So upon an interlocutory injunction, the court should take into account the balance of convenience; and if, on the one hand, irreparable injury may be caused by withholding the injunction, while on the other hand, any injury occasioned by the injunction can be compensated by damages, the Court will grant the injunction upon the plaintiff undertaking to abide any order as to damages that may afterwards be made in the suit (4). Injunction to restrain the defendants from entering into an agreement with another railway company, which would be a violation of or inconsistent with a subsisting agreement between the plaintiffs and defendants, refused; the inconvenience to arise from granting the injunction being greater than the inconvenience to arise from refusing it (5). In all cases the court must consider which of the two parties was likely to sustain more injuries (6). Where on motion for an interlocutory injunction the rights of the parties, are doubtful on the evidence, the court will act on the consideration of the comparative injury which may arise from granting or withholding the injunction (7). Upon an interlocutory motion to restrain the defendant from diverting the flow of water in a river, the court, upon the balance of convenience refused an injunction until the plaintiff should have established his right at law (8). "In the exercise of its discretion, the court may consider the injury to be done to the adverse party by its action; and if the questions involved are grave and difficult, and the injury to the moving party will be immediate, certain, and great if relief is denied, a preliminary injunction may issue. On the other hand, where the injury to the complainant will not be irreparable from a refusal, while

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(1) *Nawal Kishore* v. *Santosh*, A.I.R. 1930 Lah. 108=123 Ind. Cas 527.

(2) *Muhamada* v. *Jhanda*, 31 P.L.R. 550=129 Ind. Cas. 889=A. I. R. 1931 Lah. 65.

(3) *Att. Gen.* v. *Darking*, 20 L. R. Ch. D. 595; *Read* v. *Richardson*, 45 L. T. 579.

(4) *Cork Corporation* v *Roomey*, 7 L. R. Ir. 191.

(5) *Shrewsbury & Chester Ry* v. *Shrewsbury & Birmingham Ry.* 1 Sim. N. S. 410.

(6) *Clowes* v. *Beck*, 20 L. J. Ch. 505.

(7) *Garret* v. *Baustead*, 11 Jur. N. S. 591

(8) *William* v. *Heath*, 1 L. T. 267; see also *Newson* v. *Pender*, 27 Ch. D. 43; *Ryde Commissioners* v. *Isle of Wight*, 30 Beav. 616; *Hadley* v. *London Bank*, 12 L. T. N. S. 745.

the defendants might suffer great injury for which they will be without adequate remedy from granting of the writ, it will be refused" (1). In granting an injunction the court is bound to consider the amount of injury which may be thereby inflicted on strangers to the suit and third parties (2). The grant of an injunction to restrain a person from doing a particular thing is an act dependent on the descretion of the court, and in exercising that discretion a court of equity will consider whether the doing of the thing sought to be restrained must produce an injury to the party seeking an injunction; whether that injury can be remedied or atoned for, and, if capable of being atoned for by damages, whether those damages must be sought in successive suits, or could be obtained once for all (3). If more inconvenience would arise from the interference of the court than from its abstaining from interference, it will not grant an injunction (4). Upon an application for *interim* interference, it is a question whether, on a balance of convenience to the one party or to the other, it is or is not expedient (5). Where the opinion of the Court is not clearly for or against a plaintiff, and there is no danger of irreparable or very serious mischief it will be governed by the balance of inconvenience, in granting or refusing an injunction (6). If an injunction would inflict great injury on a defendant, and a delay in granting it would cause little or no loss to the plaintiff, the court will not grant it on an interlocutory application (7). Where the stoppage of buildings in the course of construction, on the ground that they would materially obstruct the access of light to ancient windows, will manifestly occasion serious loss to one side largely in excess of any inconvenience which would be caused to the other side by their temporary progress, the court will not grant an interlocutory injunction to restrain the erection of the buildings (8). Although it is difficult to determine what is the best mode of keeping matters *in statu quo* until the question of infringement is finally decided at the hearing of the action, the court will not ordinarily stop a going trade, or do anything in which there would be a difficulty in giving compensation to one side or the other, yet if the court is satisfied that merely to put a defendant on terms of keeping an account might be a clumsy and inefficient mode of recompensing the plaintiff, if the plaintiff

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(1) Pomeroy on Equity Jurisprudence § 1685 Kerr on Injunction p 25 citing *Greenhalgh* v. *Manchester Ry*, 3 M. & C. 784 ; *Hilton* v. *Lord Granville*, Cr. & Ph. 297 ; *Plipton* v. *Spiller*, 4 Ch. D. 286 ; *Elwes* v. *Payne*, 12 Ch. D. 468 ; *Mitchell* v. *Henry*, 15 Ch. D. 191 ; *Carmichael* v. *Evans*, (1901) 1 Ch. 492 ; *Arnott* v. *Whitby*, 73 L. J P. 64; *Crisp* v. *Holden*, 54 S. J. 784 ; see also *Child* v. *Douglas*, 5 D. M. & G. 741 ; *Subba Naidu* v. *Haji Badsha*, 26 M. 168 (175) : "All I say with regard to this case is that on the evidence as it now stands, I am not satisfied that the balance of convenience is not in favour of the injunction in the form in which it was issued."

(2) *Mayt horn* v. *Palmer* 11 L.T.N.S. 261.

(3) *Doherty* v. *All man*, 3 L.R, App. Cas. 709 ; *Cooke* v, *Forbes*, 37 L. J. Ch. 178 ; *Dolphus* v. *Pickford*, 1 W. R. (Eng) 220.

(4) *Hodgson* v, *Powis* (Earl) 1 De G. M. & G. 6 ; 12 Beav. 392.

(5) *Shrewsburry and Chester Ry* v. *Shrewsburry & Birmingham Ry. Co.* 1 Sim. (N. S.) 410.

(6) *Cory* v. *Yar mouth and Norwich Ry*, 3 Hare 693.

(7) *Wells* v. *Attenborough*, 19 W. R. (Eng) 465.

(8) *Mackey* v, *Scotish Widows Funds* Ir. R. 10 Eq. 113.

should turn out to be right, it will grant an *interim* injunction to restrain the manufacture or sale of an article said to be an infringement of a patent, putting the plaintiff to abide by any order as to damages should he turn out to be in the wrong ; the more so, it would seem, where the trade is new, and the defendant is likely to have many customers, against whom, if the injunction were refused, the plaintiff, if in the right, would be forced to commence a multitude of suits; but if the defendant is an old seller, the court will, it would seem act the other way, as the granting an injunction would be too great a hardship upon him (1). The right of the court to interfere by injunction not merely to restrain parties from doing acts, but also from entering into contracts, pending litigation that might embarrass the plaintiff in his suit, must be guided by a discretion not to exercise it, where it sees that on the balance of convenience and inconvenience between *interim* interference and *non interim* interference, the balance greatly preponderating in favour of the defendant and against the plaintiff (2).

A Court of equity will, where the necessity of the case requires it, interfere by injunction, during litigation, not only to preserve property in *statu quo*, but sometimes, also, to prevent the defendant from affecting it by contracts or conveyances or other acts ; but this latter interference is by no means a matter of course (3). When the court is called on to interfere to preserve property *pendente lite*, it is apprehended there are two points on which the court must satisfy itself. First, it must satisfy itself not that the plaintiff has certainly a right, but that he has a fair question to raise as to the existence of such a right (4) ; and it is conceived that even where it is made out that there is a point to be decided which the plaintiff is fairly raising, still there is a further and second question, namely, whether *interim* interference on a balance of convenience or inconvenience to the one party and to the other, is or is not expedient. Where the alternative is interference or probable destruction of the property, there, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But when, on the other hand, the only evil to result from non-interference is that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the court will be far more ready to listen to any suggestion of the defendant shewing that interference during litigation will prejudice his rights (5).

Upon interlocutory applications, the Court will have regard to the balance of mischief likely to result from interfering or refusing to interfere (6). But

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(1) *Plimpton* v. *Speller*, 25 W. R. (Eng) 152.

(2) Joyce's Injunction pp. 53—54 ; *Shrewsburry* v. *Shrewsburry*, 1 Sim N. S. 410.

(3) *Shrewsburry* v. *Shrewsburry*, *Supra* ; *Spiller* v. *Spiller*, 3 Swan. 556.

(4) *Shreweburry* v. *Shrewsburry*, 1 Sim N. S, 410 ; *Great Western Ry.* v. *Birmingham Ry*, 2 Phil 597, 602, 603.

(5) *Shrewsburry Ry. Co.* v. *Shrewsburry Ry. Co.*, 1 Sim. N. S. 410 ; Joyce's Doctrines p. 55.

(6) *Filden* v. *Lancashire & York Shire Ry.* Co. 2 De G & Sm. 531 ; *Begg Dunlop* v. *Satish Chandra*, 29 C. L. . 584 =23 C. W. N. 677=46 C. 1001. "In granting an *interim* injunction the court

there is no limit to the practice of a Court of Equity with regard to interlocutory applications, so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause. Whether they are or are not to be granted must of course, depend upon the special circumstances of the case (1). There Court will not, upon interlocutory motion, restrain a small excess in the hieght of a building in violation of a contract or an Act of Parliament where no irreparable injury arises from such excess (2). The Court will not by an interlocutory injunction restrain an act the validity of which, as between parties to the suit, is matter of doubt, and for which if wrongful, the plaintiff can obtain adequate compensation in damages at the hearing of the cause, while the injunction, if granted, would inflict serious injury on the party sought to be restrained. A Court of Equity, on an interlocutory motion for an injunction acts according to the justice of the case, as ascertained upon the evidence before it and according to the comparative injury which may arise from granting or withholding the injunction (3). If the Court considers that a party will not be damnified by the proceedings sought to be restrained remaining in *statu quo* until the hearing of the cause, it will not grant an interlocutory injunction where the principal part of the arrangement sought to be restrained has been carried out (4). If the Court cannot compel a defendant--either a company or an individual to do that which is necessary to enable a plaintiff to take advantage of an injunction restraining the defendant from doing an act, it will not grant either an interlocutory or final injunction, since it would be inoperative (5). Thus if the act which is necessary, is continuous, it is not the practice of the Court to compel by injunction either a company or an individual to do such an act—for instance, one that requires the continuous employment of people (6). An injunction *pendenet lite* should not be granted on light grounds, but in such cases should await the full proof upon the final hearing (7). It is a matter of discretion for a Court of Equity whether it will or not interfere by *interim* order respecting the property of a litigant. If the property is *in medio* (in the actual enjoyment of no one), the Court will interfere for the benefit of all concerned (8). The leading principle which ought, generally speaking, to be the guide of the Court, and to limit its discretion in granting interlocutory injunctions, at least where no very special

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should see on which side in the event of obtaining a successful result in the suit will be the balance of convenience if the injunction do not issue, bearing in mind the importance of retaining immovable property in *statu quo.*" See also *Firm of Monohar Lal* v. *Firm of Jai Narain*, 2 Lah. L. J. 283=55 Ind. Cas. 403.

(1) *Smith* v. *Peters*, L. R. 20 Eq. 511, 513 ; Joyce's Doctrines p. 55.

(2) *Warden, etc. of Dover Harbour* v. *South Eastern Ry* Co, 9 Hare, 493.

(3) *Munro* v. *Wivenhoe* & *Brightling sea* Ry 11 Jur. N. S. 612=4 De G. E. G. J & S. 723.

(4) Joyce's Doctrines citing *Bishop* v. *Scott*, 7 L. T. (N. S.) 570.

(5) Joyce's Doctrines citing *The Powell Duffryn Steam coal* v. *The Taff vale Railway Co.* L. R. 9 Ch. 331, 335.

(6) *Ibid.*

(7) *Redfield* v. *Middleton*, 7 Bows 649 (Am).

(8) Joyce's Doctrine L. 56 ; *Owen* v. *Homan*. 4 H. L. C. 997.

circumstances occur, is that only such a restraint should be imposed as may suffice to stop the mischief complained of ; and where it is to stay further injury, to keep things as they are for the present (1). But in matters of great importance, which can only be properly determined at the hearing, the Court is in favour of restraining destructive operation until the hearing (2).

The burden lies upon the plaintiff to show that if injunction be not granted, his inconvenience would exceed the inconvenience to be suffered by the defendant. He must make out a case of comparative inconvenience entitling him to the interference of the Court (3). "In balancing the comparative convenience or inconvenience" says *Mr. Kerr* "for granting or with holding an injunction, the Court will take into consideration what means it has of putting a party, who may be ultimately successful, in the position he could have stood if his legal rights had not been interfered with" (4).

There are undoubtedly many cases where relative convenience or inconvenience to the parties will be considered in passing orders upon applications for this remedy. But the parties asking for such consideration should be required to show that the conditions constituting the inconvenience did not result from his own deliberate or negligent acts or conduct (5). "In granting or refusing to grant a temporary injunction a Court has a wide discretion under Order 39, rule *2*, C. P. Code. The exercise of that discreation should be in a judicial manner, depending upon the circumstances of each case. No hard and fast rule can be laid down for the guidance of the Courts as regards the exercise of such discretion. If a Court grants or refuses to grant a temporary injunction on the ground of balance of convenience, it is not correct to say that the discretion has been exercised otherwise than judicially only because the Court of revision thinks that it would have passed a different order in the circumstances of the case" (6)

Where equally efficacious remedy is otherwise obtainable—whether injunction should issue.—An injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust (7). The availability of an effective remedy in a different form takes away the right to an injunction (8). This rule is generally recognized, though strict adherence to it is difficult in practice, that the existence of an adequate remedy at law bars relief in equity by injunction (9). Since the creation of equity jurisdiction arose out

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(1) Ibid p. 57 ; *Blackmore* v. *Glamarganshire*, 1 Myl & K. 154, 185.

(2) *Att. Gen* v. *Great Eastern Ry*, 25 L. T. N. S. 867 ; Joyce's Doctrines p 57.

(3) Kerr on Injunctions p. 25 citing *Child* v. *Dauglas*, 5 De G. M & G. 741 (742).

(4) Kerr on Injunctions 26, citing *Sanxter* v. *Foster*. Cr. & Ph. 302 : *Rigby* v. *Great Western Ry.*, 2 Ph. 44 ; *East Lancashire Ry.* v. *Hattersley*, 8 Ha. 94 ; *Arnott* v. *Whitby*, 73 J. P. 64 ; *Gaskel* v. *Somersetshire*, 84 J. P. 93.

(5) Lewi's & Speliing § 29.

(6) *District Board of Furrukhabad* v. *Ikhlaque Hossain* A. I R. 1932 All. 86 (90) *1932* A. L. J. 792.

(7) Specific Relief Act s. 56 (i)

(8) Banerjee's Specific Relief Act Appx. 190.

(9) Lewis & spelling on Injunction § 24

of the inability of courts of law, because of the inflexibility of their rules, and want of powers to adapt judgments to the special circumstances of the cases, to reach and do complete and full justice in many cases, it becomes a corollary and cardinal rule of equity not to entertain jurisdiction of cases where there is an adequate remedy at law, or to grant relief unless for the purpose of preventing serious or irreparable injury. But to bar the equitable remedy by injunction, the legal or other remedy should be reasonably practical and direct in affording relief. It is no answer to the application for the equitable relief that there is another remedy, unless it be made to appear that the other remedy, is plain, adequate, and as efficient to the ends of justice and its prompt administration as is the remedy in equity. Referable to this principle was the view that, if in order to avail himself of the legal remedy a party must go into a foreign jurisdiction, it could not be regarded as an adequate remedy. The adequacy of the remedy at law is one of the broad questions, not admitting of exact definitions or delimitations, with which the court is often confronted. And for the purpose of deciding whether or not the remedy at law will afford complete justice the court will take into consideration all the circumstances of the cases, and conduct of the parties (1).

Among the legal remedies that come first to mind is the action for damages. But it would not be practicable to discuss that separately and fully under this head as a distinct subject, nor is it necessary. The subject is naturally aligned among the grounds for relief, the inadequency of the suit for damages being one of the most frequent grounds. Some of the other and more distinctive actions and special proceedings which usually present purely legal aspects will be here briefly noticed, more specific discussion being deferred until we come to the various subject matters wherein the relief by injunction is applied, for instance, relating to actions and other legal proceedings, relating to conveyances and incumbrances, relating to contracts, etc. Injunction has been often refused because of the existence of the legal remedy, mandamus. It is a general rule that an injunction in mandatory form will not issue to perform the function of mandumus, where the latter remedy is available. The legal remedy that will bar injunction may consist of means of redress before a private quasi-judicial tribunal. It sometimes appears that the plaintiff has adequate means of redress in his own hands. Where that is made to appear in the course of proceedings, injunction will be refused. In order, however, for the means in plaintiff's hands to bar injunction, it must appear that the means can be resorted to peaceably; and it was held no objection that complainant had the right to abate a nuisance or remove an obstruction, or otherwise redress his own grievance by force (2). So an injunction cannot be granted when equally 'efficacious relief can certainly be

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(1) Lewis & Spelling on Injunction § 24

(2) Lewis & Spelling on Injunctions § 25.

obtained by any usual mode of proceeding (1). The defendant encroached on an abutment (*dhora*) of the wall of the plaintiff, which stood on a piece of ground belonging to the plaintiff. The wall divided the properties belonging to the parties. The lower Appellate Court awarded compensation for this encroachment, on the ground that there was merely a technical encroachment on the part of the defendant because only a foot or so of the plaintiff's ground was covered thereby. The court in holding that the relief by way of injunction in such a case is the proper remedy said : "No doubt section 54 of the Specific Relief Act lays down in effect that perpetual injunction shall not be granted where the Court finds that the invasion by one man of another man's right to property is such that pecuniary compensation can afford adequate relief. But where a man builds on another man's property against the will of the latter or without his consent, the invasion is practically one where pecuniary compensations can not be regarded as adequate relief. The owner is in such a case, not only deprived of the property but he is also deprived permanently of such user of it as he is entitled to make. How are the damages to be estimated in such a case and how can it be said that an award of compensation can do justice to the owner who loses the property, and all opportunity besides of using it for purposes which he may consider profitable, or beneficial to himself? The principle upon which such cases are to be decided was enunciated by *Lord Selborne L. C.* in *Goodson* v. *Richardson* (2). where he said : "I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of continuing trespass, which is in law a series of trespasses from time to time to the gain and profit of the trespasser, without the consent of the owner of the land ; and it appears to me as such to be a proper subject for an injunction. And there he distinguished between such cases and cases of ancient lights and covenants. In the former one man appropriates to himself and uses another man's property ; in the latter one man does something upon his own property which exposes him to an action by another man. The Courts lean towards compensation in the latter class of cases because the wrong is done by the wrong doer upon his own property. It would not have been a wrong but for the fact that his right of free user as owner happens to be subject to the right required by another man for the enjoyment of his property and restricting the absolute right of property of the former. In such a case when anything is done in violation of a right limiting another man's right of ownership, the Court naturally has to consider whether violation can be compensated by damages. But it is a different thing when a man illegally builds upon another man's land or builds in such a way

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(1) *Noyna Messir* v. *Rupikan*, 9 C. 609 (611) ; *Ram Kissen* v. *Pooran* 31 C. L. J. 259 ; see also *Raja* v. *Krishna bhat*, 3 B. 29, 32 ; *Dhunjibhoy* v. *Lisboa*, 13 B. 252 ; *Ghansham* v. *Moraba*, 18 B. 474 ; *Boyson* v. *Deane*, 22 M. 251 ; *Yaru* v. *Sonaulla*, 19 A. 259.

(2) L. R. 9 Ch. 221 (224) ; see also *Jethalal* v. *Lal bhai*, 28 B. 298, 303, 304 ; *Surendra* v. *Hari Mohan*, 31 C. 174.

as to over hang a portion of it. There to use the words of *James L. J.* in *Goodson* v. *Richardson* (1), he is taking that which was not his for the purpose of a profit to himself against the will of the real owner. That is taking another man's property improperly, both morally as well as legally: Relief by way of compensation in such a case is tantamount to allowing a trespasser to purchase another man's property against that man's will. On no principle of law or equity is that allowable and the current of decisions whether here or in England is opposed to it" (2).

The Surat Municipality served under section 82, clause (3) of the Bombay District Municipal Act (III of 1901) a notice of demand upon the plaintiff for house tax due by him The plaintiff instead of proceeding under section 86 of the Act instituted a suit in the Civil Court for an injunction to restrain the Municipality from recovering the house tax from him. The Lower Court rejected the claim on the ground that, as the plaintiff had omitted to appeal to a Magistrate under section 86 of the Act, his suit was premature. *Held*, that the injunction prayed for in this case could not be granted. By section 56 of the Specific Relief Act an injunction cannot be granted where efficacious relief can be obtained by any other usual mode of proceeding. Section 86 of Bombay Act III of 1901 gave a remedy to the plaintiff, but instead of resorting to it he filed this suit for an injunction. It was discretionary for a Court to grant an injunction and that discretion must be exercised judicially with extreme caution and only in very clear cases. This was not a case of this kind (3). So an injunction will not be granted where the plaintiff being out of possession of a piece of land is at liberty to bring a suit for possession. (4)

Grant of Temporary Injunction on terms.—Order XXXIX rules 2 (2) lays down: "The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit." So the Court may often by imposing terms on one party, as the condition of either granting or with holding the injunction, secure the other party from damage in the event of his proving ultimately to have the legal right (5). The power to impose such conditions is founded upon and arises from the discretion which the Court has in such cases, to grant or not to grant, the injunction applied for. It is a power inherent in the Court as a Court of equity, and has been exercised from time immemorial. The

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(1) Supra.

(2) See *Apaji* v. *Apa*, 26 B. 735: "Repeated violation of an established legal right cannot in ordinary cases be adequately met by damages nor can these damages be satisfactorily ascertained".

(3) *Chunilal* v. *Surat Municipality*, 37 B. 403.

(4) *Kankarabai* v. *Multu*, 13 M. 445; *Jakarlall* v. *Nandalall*. 18 C. W. N. 545=24 Ind. Cas. 199.

(5) Kerr on injunction p. 26. It is almost universally the practice, on granting an interlocutory injunction, to require an under taking to be answerable in damages. *Chapell* v. *Davidson*, 8 De G M & G 1. *Wake field* v *Buccleugh*, 12 L. T. 628; *Teggin valley* v. *South wood*, 19 W R. (Eng.) 690; *Graham* v. *Campbell*, 7 Ch D. 490; *Juck* v. *Silver* 1 Johns 218; *Adam son* v. *Wilson*. 10 L. T. 24; *Smith* v. *Day*, 21 Ch. D. 421 (C. A; *Howard* v. *Press Printers Ltd*, (1904) 74 L. J. Ch. 100 C. A.

older authorities refer to numerous instances in which it has been exercised. *Chief Baron Gilbert* in his *Forum Romanum* p. 196, repeated in *Bacon's abridgment*, title Injunction C, speaking of the course where an answer is put in, denying the equity of the bill, followed by a rule *nisi* to dissolve the injunction says : "The plaintiff must show cause either upon the merits, or upon filing of exceptions ; if upon the merits, the court may put what terms they please upon him, as bringing in the money, or paying it to the party, subject to the order of the court, or giving judgment with a release of errors, and consenting to bring no writ of error, or to give security to abide the order on hearing, or the like." In *Morquis of Down shire* v. *Lady Sandys* (1), *Lord Eldon* said if there was a real doubt on the subject of controversy, he would direct an issue, "taking care that if in the result of such a direction the defendant should be prejudiced by not being permitted to cut in the meantime trees claimed to be ornamental, the plaintiff should under take to pay the value if the decision is against him.' In a similar case (2), in 1825, the same judge made an order that the plaintiff should go before the master and give such security as would in master's judgment secure to the defendants the value of all the trees which they should be prevented from cutting by the injunction, in case it should finally turn out in the judgment of the court that they ought not to have been enjoined in equity (3). So also in other cases the court may require the plaintiff to give an undertaking to bear damages in case the suit be decided in favour of the defendant and the injunction be held to have been granted wrongly (4). In England undertakings were required from the applicant not only for the purpose of compensating defendant but also to enable the court to punish the plaintiff where he unfairly presented his case. At first the practice was to require the undertaking, where the application was *exparte* (5). In *Smith* v. *Day* (6), *Jessel M. R.* said : "The undertaking was invented by *Lord Justice Knight Bruce* when Vice-Chancellor, and was originally inserted only in *ex-parte* orders for injunctions. Its object was, so to say, to protect the court as well as the defendant from improper applications for injunctions. If the evidence in support of the application suppressed or mis-represented facts the court was enabled not only to punish the plaintiff but to compensate the defendant. By degrees the practice was extended to all cases of interlocutory injunction (7). The reason for this extension was that though when the application was disposed

(1) 6 Ves Jr. 107.

(2) *Wombwell* v. *Belasyse*, 6 Ves. Jr, 110, note.

(3) *Russel* v. *Farley*, 105 U. S. 433 (438) ; H. C. Joyce on Injunctions § 158.

(4) Kerr on Injunctions p, 27; *Chappel* v. *Davidson*, 8 De G M & G 1 ; *Graham* v. *Campbell*, 7 Ch. D. 490 ; *Promotha* v. *Jogannath*, 17 C. L. J. 427 = 16 Ind. Cas. 359 ; *Anathnath* v. *Mackintosh*, 6 B. L. R 571, 574; *Moran* v *River Steam Navigation* 14 B. L. R 352 ; *Ratanji* v. *Edulji*, 8 B. H. C. G 181, 184 ; *Chandernath* v. *Sri Gobind* 6 C. W. N, 308 ; *Madras Ry. Co.* v *Rust*, 14 M. 18.

(5) H. C. Joyce on Injunctions § 159 ; Kerr on Injunctions p. 27.

(6) L. R. 21 Ch. D. 421.

(7) See also *Chappell* v. *Davidson*, 8 De G M & G 1 ; *Tuck* v. *Silver*. John. 218 ; *Fenner* v. *Wilson* (1893) 2 Ch. 658 ; *Att. Gen.* v. *Albany* (1896) 2 Ch. 699 ; *Howard* v. *Press Printers*, (1905) 74 L. J Ch. 103, 104.

of on notice, there was not the same opportunity for concealment or mis representation, still owing to the shortness of time allowed, it was often difficult for the defendant to get up his case properly, and as the evidence was taken by affidavit, and generally without cross examination, it was impossible to decide on which side the truth lay. The court, therefore, required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression." In England, an undertaking has been styled "the price of an injunction" (1). Such an undertaking should not be confined to the damages that may be sustained only by the party enjoined, but should extend to all the defendants asking for it (2). In *Promotha Nath Roy* v. *Jogannath Kishore* (3) such injunction was granted upon terms as to security and upon undertaking given by the plaintiff to compensate the defendant for any loss that might result to him in the event of the dismissal of the suit. In delivering the judgement *Mr. Justice Mookerjee* said : "We make this order in accordence with the principle recognised in the cases of *Chander Nath Pal* v. *Sree Gobind Chowdhury* (4), *Shadi Ram* v. *Abdul* (5) *Howard* v. *Press Printers* (6) and *Chappel* v. *Davidson* (7). We direct accordingly that in addition to the security already furnished by the appellant, he do furnish security to the extent of Rs. 1,000. If this order is carried out, we further direct that a temporary injunction be granted restraining the defendant from dealing with the subject matter of the litigation in any manner for six months from this date. We also direct the Subordinate Judge to take up the suit for disposal as speedily as possible. If upon the expiry of six months, it transpires that the hearing of the suit has not been completed by reason of any fault on the part of the defendant, or for any reason for which the plaintiff is not to blame, the plaintiff will be at liberty to apply to this court for continuance of the injunction for a further period."

The court however has no power to compel a party applying for an injunction to give an undertaking as to damages, but if the applicant refuses to give the undertaking in a case in which the court considers it ought to be given, the order for an injunction will not be made, or if pronounced will not be drawn up (8). Where an *inter im* injunction has been granted, upon an undertaking as to damages, and the bill is subsequently dismissed, the court has jurisdiction to make an order for the assessment of the damages, by a jury or otherwise. The ground of the jurisdiction is, that the party who gives the undertaking puts himself in the power of the court ; not in the suit alone but actually and wholly independant of the suit ; the undertaking being an

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(1) *Tucker* v. *New Burnswick Trading Co.* (1890) 44 Ch. D. 249.
(2) Ibid.
(3) 17 C. L. J. 427 = 16 Ind. Cas, 359.
(4) 6 C. W. N. 308,
(5) 1 A. L. J 527.
(6) 74 L. J. Ch. 100,
(7) 8 De G. M. & G. 1,
(8) Kerr on Injunctions citing *Tucker* v. *New Burnswich*, 44 Ch. D. 249. 252 ; *Howard* v. *Press*, 74 L. J. Ch. 103 104 ; *Chandra Nath* v. *Sri Gobind*, 6 C. W. N. 308. Under special circumstances, the court has discretion to dispense with the undertaking. *Att Gen* v. *Albany Hotel*, (1896) 2 Ch. 696 (C. A.) ; *Fenner* v. *Wilson*, (1893) 2 Ch. 656.

absolute one that he will be liable, in a particular event, for any damages that may be sustained (1). Where a plaintiff obtains an interlocutory injunction, upon giving an undertaking in damages, the defendant is entitled to the benefit of the undertaking even though it should afterwards be decided that the injunction was wrongly granted, owing to the mistake of the court itself (2). This rule is applicable whether the mistake was in point of law or in point of fact. In such a case the court has no discretion to refuse an enquiry as to damages unless the damages allaged would be too remote if the defendant were suing in respect of them upon a breach of contract (3). The ordinary undertaking as to damages where the plaintiff obtains an injunction on an *ex-parte* motion is properly given by the plaintiff's counsel, although the plaintiff is a limited Company (4). In *Anglo Danubian Co. Rogerson*, (5) it was held that the court would not grant an injunction upon the application, *ex-parte* of a limited company, except upon undertaking of some responsible person to be answerable in damages. But in a later case (6) it has been held that where a corporation obtains an *interim* injunction the court in a proper case, allow the usual undertaking in damages to be given by the corporation itself, and not require the undertaking to be given by some responsible person on behalf of the corporation ; and the same rule applies where the plaintiff is a local board.

The court will not in favour of the crown, depart from the established practice, therefore in the case of an action by the crown to construct certain tramways, the court refused to grant an *interim* injunction against the defendants unless the crown should consent to be bound by the usual undertaking as to damages (7). But the rule is otherwise where the Attorney General is suing on behalf of the crown (8). Whenever an undertaking to the court is given in lieu of an interlocutory order, there will be inserted in the order a cross undertaking in damages by the applicant, unless the contrary is agreed and expressed at the time (9).

Now the question is at what time the application for an inquiry as to damages ought to be made (10). The court is not bound to grant an enquiry

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(1) *Newley* v. *Harrison*, 30 L. J. Ch. 863 ; see also *Newcomer* v. *Coulson*, 47 L. J. Ch. 429. See also *Bengley* v. *Marshall*, 9 L. T. 144 ; *Southworth*, v. *Taylor* 28 Beav. 616 ; *Kino* v. *Rudkin*, 6 Ch. D. 160, 165 ; *Ross* v. *Buxton*, (1888) W. N. 55.

(2) *Giffith* v. *Blake*, 27 Ch. D. 474 (dictum of *Jessel* M. R. in *Smith* v. *Day*, 21 Ch. D. 421 disapproved).

(3) *Hunt* v. *Hunt*, 54 L. J. Ch. 289.

(4) *Manchester and Liverpool Banking Co.* v. *Parkinson*, 60 L. T. 47 ; *Moran* v. *River Steam Navigation*, 14 B.L. R. 352 ; *Chandra nath* v. *Sri Gobinda*, 6 C. W. N, 308.

(5) 10 Jur. N. S. 87.

(6) *East Mosely Local Board* v. *Lambeth Water Works*, 62 L. J. Ch. 82 = (1892) 3 Ch. 289.

(7) *Secretary of State for War* v. *Chlubb*, 43 L. T. 83 ; *A. G.* v. *Albany Hotel*, (1896) 2 Ch. 696 (704) ; Halsbury vol. 17 p. 285.

(8) *A. G.* v. *Albany Hotel*, (1896) 2 Ch. 696.

(9) Halsbury vol. 17, p. 284 citing *Oberrheinische.* v. *Cocks*, (1906) W. N. 127 ; Kerr on Injunctions p. 28. Where before the opening of a motion for an *interim* injunction, the defendant offers out of court an undertaking which is embodied in the order in lieu of an injunction there is no practice under which a cross-undertaking in damages by the plaintiff is to be implied. Such an implication may arise where the defendants' undertaking is given under pressure from court. *Howard* v. *Press Printers*, 74 L. J. Ch. 100.

(10) *Smith* v. *Day*, 21 Ch. D, 421.

as to damages whenever the defendant has sustained some damages by the granting of the injunction ; but it has a discretion, and may refuse any inquiry if the damage is trivial or remote, or if there has been great delay in making the application (1). A plaintiff, undertaking to abide by any order as to damages, obtained an interlocutory injunction to restrain the defendant from proceeding with certain erections but his bill was dismissed at the hearing, the Court refused an application by the defendant at the dismissal of the bill, for an inquiry as to damages sustained by reason of his having been restrained by the injunction for the space of a year, but without prejudice to any application he might make as to damages on the plaintiff's undertaking, upon the production of sufficient evidence to justify an injury (2). Although it cannot be said that under no circumstances ought delay in making the application to be an element to be considered, yet the right to enforce an undertaking as to damages is not lost if the application was not made when the injunction was dissolved or when the action came on for trial ; but all the circumstances of the case must be taken into account (3). When such application is made after the trial it should be made within resonable time (4).

But no injunction will be granted where there is much greater facility of indemnifying the plaintiff than the defendant, according as the one or the other may succeed (5). For the ends of justice if the defendant be willing, instead of grating injunction the Court may require an undertaking from him, not only to keep accounts but also to pay what may be found due to the plaintiff for the injury he may sustain by their continuing the breach of obligation complained of (6). "The terms imposed on the defendants as the condition of with holding the injunction vary with the circumstances and the exigencies of the case. The defendant may be required to do such acts, or execute such works, or to remove any works, or otherwise deal with the same as the Court shall direct, or to enter into an undertaking to refrain from doing in the meantime the acts complained of, or to abide by any order the Court may make as to damages or otherwise, in the event of the legal right being determined in favour of the plaintiff " (7).

In granting injunction the Court may require the plaintiff to give an undertaking to prosecute the suit with due diligence, (8), or if the action has reference to the payment of money, the Court may as a condition of granting an injunc-

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(1) *Ibid.*
(2) *Butt* v. *Imperial Gas Light*, 14 L. T. 349.
(3) *Griffith* v. *Blake*, 27 Ch. D. 74 (*Smith* v. *Day*, 21 Ch. D. 421 dissented from).
(4) *Newly* v. *Harrison*, 3 De G. F & J. 287 (C. A) ; *Smith* v. *Day*, 21 Ch. D. 421 ; *Re, Wood Exparte Hall*, 23 Ch. D. 644 ; *Re Hailstone* v. *Caster*, (1910) 102 L. T. 877.
(5) *Rigby* v. *Great Western Ry. Co.*, 2 Ph. 44.
(6) *Rigby* v. *Great Western Ry*, 19 L. J. N. S. Ch. 470 ; see also *Cramford* v. *Stock post*, 1 De G & J. 326 ; *Prabu das* v. *Law Reporter*, A. I. R. 1933 Lah. 448.
(7) Kerr on Injunctions p. 26.
(8) *Newson* v. *Pender*, 27 Ch. D. 43 (63).

ition, require the money to be paid in Court (1). The order of the Court should be so framed that the successful party may not be deprived of the benefit he is entitled to (2).

Duration of the temporary Injunction.—An injunction granted *pen dente lite*, until the disposal of the suit or until further orders, will end in any case on the disposal of the suit or on any earlier date, on which further orders may be passed, the reference to further order not applying to anything after the disposal of the suit (3). Such injunctions are granted at any period of the suit, and are regulated by the Civil Procedure Code (4). In some cases injunction has been granted even after the passing of the decree (5). If a bill praying an injunction is dismissed, an injunction granted (on the merits or otherwise) on that bill falls with it, and no express motion or order is necessary to dissolve the injunction (6). The dismissal of a bill for an injunction does not prejudice the right of the plaintiff to file a new bill, founded on a new or altered state of circumstances (7) or upon new facts (8).

"In the case of *Wilson Church* (9) where an action had been dismissed by a Divisional Court, it was held by *Sir George Jessel M. R.* with the concurrence of *Brett* and *Cotton* L. J. J. that that Court had no jurisdiction to entertain an application for an injunction to prevent funds in the hands of the trustees from being parted with pending an appeal, and that such an application could be made to the Court of appeal. In a later case of *Otto* v. *Lindford* (10), where an action had been dismissed with cost, it was held by the Court, consisting of the same Judges who had decided the former case, that the Divisional Court had jurisdiction pending an appeal to stay proceedings for costs under the order of dismissal, and that that question differed entirely from the question which had been determined in the previous case of *Wilson* v. *Church* (9). The practical result of these two cases is to establish the rule, that when an action has been dismissed with costs, the Court of first instance can, pending an appeal, stay proceedings for costs, under the order of dismissal, but that it cannot, pending an appeal, restore and maintain by a further order the state of things which existed previous to the dismissal to the action. In this country the power which the English Courts have of staying proceedings for costs under an order

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(1) *Whit-worth* v. *Rhodes*, 20 L. J. Ch. 105 ; *Shaw* v. *Jersy*, 4 C. P. D. 359 C A ; *Jones* v. *Pacaya Rubber*, (1911) 1 K. B. 455 ; Halsbury Vol. 17 p. 222 ; Kerr on Injunction p. 28.

(2) *East Lanca shire* v. *Hattersly*, 8 Hare, 72, 94.

(3) *Ayisa Umma* v. *Abdulla* 1924 M. W. N. 636 ; *Madho* v. *Draupadi*, 43A. 383=19 A. L. J. 174=61 Ind. Cas. 417 ; *Bolton* v. *London School Board*, 7 Ch. D. 766 ; *Chalvadi* v. *Polari*, 31 M. 71.

(4) Section 53 of the Specific Relief Act.

(5) *Doyal Chand* v. *Bhorub Nath Khettry*, Cor. 117.

(6) *Green* v. *Pulsford* 2 Beav. 70 ; *Hanman* v. *South London*, 2 Mer. 63 ; *Day* v. *Sme*, 3 V & B. 171.

(7) *Mayor* of *Liverpool* v. *Chorley Water Works*, 2 De G M & G. 852 ; *Castelli* v. *Cook*, 7 Hare, 89, 99 ; Joyce on Injunction p. 1304

(8) *Att. Gen.* v. *Sheffield Gas Co.* 3 De G M & G. 340, 341 ; Joyce on Injunction p. 1304 ; see also *Bande Ali* v. *Gokul Misser*, 34A. 172 ; *Darbo* v. *Kesho Rai*, 2 A. 356 (F B) ; *Sarsuti* v. *Behari*, 5A 512 ; *Mohonlal* v. *Bilaso*, 14A 512.

(9) L. R. 11 Ch. D. 576.

(10) L. R. 18 Ch. D. 394.

of dismissal is given by s. 544=(Order 41 rule 5) of the Civil Procedure Code. No doubt in the case of *Polini* v. *Gray* (1), the Court of Appeal, consisting of the same Judges who decided the other cases to which I have referred, assisted by *Lord Justice James*, though it dismissed the suit which has been brought for establishing the claimant's right to share in a fund, yet, on a subsequent application, made an order for preserving the fund pending an appeal to the House of Lords. There are in that case circumstances which serve to distinguish it from the preceding case of *Wilson* v. *Church*, one of the circumstances being that in order to enable an application to be made for an *interim* injunction, the Court stayed the drawing up of the order of dismissal. But apart from this, it is, I think, sufficient to say that in the latter case of *Otto* v. *Lindford* the case of *Wilson* v. *Church* is expressly referred to and is treated as a continuing authority. Reading, therefore, the case of *Polini* v *Gray* with the latter case of *Otto* v. *Lindford* the proper conclusion is that the jurisdiction exercised by the Appeal Court in the former case must be taken to be a jurisdiction of an exceptional and limited character, and one which confined to the Appeal Court in matters which are appealed or intended to be appealed to the House of Lords: See *Hamill* v. *Lillev* (2). No procedure exists under which an application for an *interim* injunction can be made to the House of Lords direct. The jurisdiction exercised by the Appeal Court in *Polini* v. *Gray* in respect of an application which could not be made to the higher tribunal was therefore one strictly of necessity. The other cases which have been cited in support of this application, of which *Brewer* v. *York* (3) may be referred to as an example, deal with the power of the Court to stay execution of its own order, and have, I think, no bearing on the present question.

"A point has also been made of the fact in this case that no appeal has as yet been filed, and that the filing of the appeal has been purposely delayed in order to admit of the present application being made to this Court. In *Wilson* v. *Church* it is true that an appeal would seem to have been filed, which was followed by an application to the Appellate Court for an injunction. But this distinction appears to me to be immaterial. The decision in *Wilson* v. *Church* proceeded on the ground that the Court of first instance had no power to interfere, not because an appeal has been filed, but because the suit had been dismissed. It appears to me that under the Civil Procedure Code, once a suit has been dismissed, the Court dismissing it is *functus officio*, except that it may stay execution of its own decree or order for costs. Its jurisdiction extends no further in regard to a suit which has ceased to be a pending suit. This view is, I think, supported by the Indian cases which have been cited, viz. *Moheeuddin* v. *Ahmed Hossein* (4), and *Gossain Money Puree* v *Guru Pershad Singh* (5). The result is that the application must be refused with cost." (6)

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(1) 12 Ch. D. 438.
(2) L. R. 19 Q. B. D. 83.
(3) L. R. 20 Ch. D. 669.
(4) 14 W. R. 384.
(5) 11 C. 146.
(6) *Per Sale J.* in *Yaminud-Dowlah* v. *Ahmed Ali*, 21 C. 561.

The power of a Court to attach property and to appoint a receiver extends only to the better management or custody of any property which is in dispute, and ceases when the suit comes to an end. An injunction in respect of the property cannot be maintained after a claim is dismissed or pending an appeal (1). In the above case *Jackson J.* said : "Section 96 (= s. 95 of Act V of 1908) shows that, if the claim of the plaintiff is dismissed, and it shall appear that there was no probable ground for instituting the suit, the Court may award compensation to the plaintiff. If it had been contemplated that an injunction or an attachment might subsist pending an appeal, or until the period of lodging an appeal had elapsed, the Court would not probably have authority given it to grant compensation under that section. The Court does not give power to the Court to attach property or to maintain an injunction in respect of property until the appeal shall have been lodged, or after the appeal has been admitted during the pending of the appeal." So when an appeal is taken from a final decree or order dismissing a suit for injunction, the inferior Court has no power over the cause and cannot grant an injunction therein, pending the appeal (2).

Injunction pending appeal—There was a time in England when the mere presenting of an appeal to the House of Lords suspended, until the decision of the appeal, the whole jurisdiction of the Chancellor (3). In 1772 it was held that the chancellor's jurisdiction was suspended only as to the matter appealed from (4) ; and in 1807 the Lords decided that an appeal did not operate as a stay, even on the point appealed from, without an express order of the appellate Court, or unless the chancellor thought proper to suspend the proceedings wholly or in part, pending the appeal (5). In *Gallaway* v. *Mayor etc. of London* (6) it was held that where a bill seeking an injunction has been dismissed at the hearing, the jurisdiction of the Court is gone, and that no order can be made to bind the parties, pending an appeal to the House of Lords. In such a case the inferior Court has no power over the cause and cannot grant an injunction therein pending the appeal (7). As regards the want of power of the Lower Court, *Sawyer J.* said (8) : "There was no longer any case pending in which any order could be made. The Court therefore has no further jurisdiction in the case except to execute the decree for costs, when the *supersedeas* is removed, if it should be removed or till the decree is reversed and the cause thereby reopened, upon the receipt of the mandate from the Appellate Court. To issue a restraining order would be to exercise a new, original jurisdiction, without any suit pending in which it could be

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(1) *Moheeuddeen* v. *Ahmed Hossein*, 14 W. R. 384.
(2) H. C. Joyce on Injunction § 407.
(3) *Heart* v. *Albany*, 3 Paige, 381, 383.
(4) *Lord Pomfret* v. *Smith*, Palmer's Pr. H. p. 9.
(5) *Burke* v. *Browne*, 15 Ves. 184 ; *Hugnenin* v. *Baseley*, 15 Ves. 180 ; *Warden* v. *Morris*, 9 Ves. 316.
(6) 3 De G E. G. J. & S. 59.
(7) *Kalyanbai* v. *Ghansham*, 5 B 29, 31 ; *Yaminud-Dowlah* v. *Ahmed Ali*, 21 C. 561 ; *Moheeuddin* v. *Ahmed*, 14 W. R. 384 ; *Ram* v. *Pitam*, 10A 506, 512, *Madho* v. *Draupadi*, 43A. 383 ; *Gossain Money Puree* v. *Gour Pershad*, 11 C. 146.
(8) *Eureka etc Mining Co.* v *Richmond Min Co.*, 5 Sawyer, 21.

issued. *Galloway* v. *Mayor, etc.* 3 Deg. J. & S. 60." So if an appeal has been preferred against the decree, the Court of appeal may grant a temporary injunction (1).

The mere fact that an appeal is pending is not a ground for refusing an injunction to restrain the violation of a legal right, though it may influence the decision of the Court as to the date at which the injunction should commence (2). Where a business of a solicitor had been carried on by a succession of firms, in a particular house for thirty years, and eventually the plaintiff and defendant, who were the last continuing partners, dissolved partnership, and the plaintiff filed a bill against the defendant and obtained a decree, which he immediately enrolled, declaring that the defendant had no interest in the house, and restraining him from entering it; and the defendant, being about to appeal to the House of Lords against the decree, moved to suspend the injunction pending the appeal: *Lord Justices Wood* and *Selwyn* held (reversing a decision of *Vice-Chancellor Sir J. Stuart*), that the case was one in which irreparable injury might be done to the defendant; and the defendant undertaking to proceed with the appeal with due deligence, and to abide by any order as to damages which the Court might make, the Court suspended the injunction pending the appeal (3): *Lord Justice Sir W. Page wood* said: "The usual course is to stay proceedings pending an appeal, only when the proceedings would cause irreparable injury to the appellant. Mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party, the benefit of his decree." (4) A Court may order an account, when an injunction is stayed pending an appeal (5). "The appellate Court has the same power in respect of granting an injunction which the Court of original jurisdiction has. If therefore, the party whose suit has been dismissed desire to have any measure taken for the better management of the property which he claims, he will be at liberty to apply to the Appellate Court who has authority to make an order." (6).

In *Gossain Money Puree* v. *Guru Pershad Singh*, (7), *Gossain Money Puree* brought a suit and obtain a decree against *Chucka singh* on a mortgage bond in the court of a subordinate Judge, which decree was confirmed by the High Court on appeal. He then applied for execution. In the execution proceedings the sons of *Chucka Singh* intervened claiming a portion of the properties attached; this claim was dismissed, and the sons of *Chucka Singh*, brought a regular suit before the same Subordinate Judge to have their rights to the

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(1) *Gossain Money* v. *Guru Pershad*, 11C. 146, 149; *Chando Bibi*, in the matter of 26A. 311; *Moheeuddin* v. *Ahmed*, 14 W. R. 384; *Kripa* v. *Ram*, 10A 80; *Kanai Ram* v. *Bidya* 1 A 549, 551 note.

(2) Kerr on Injunctions p. 29 citing *Att. Gen.* v. *Bradford, Canal Co.* L. R. 2 Eq. 71.

(3) *Walford* v. *Walford*, L. R. 3 Ch. 812; Joyce on Injunction p. 1320.

(4) See also *Hewat* v. *Nolan*, Ir. R. 4 Eq. 405; *Andrews* v. *Abertillery Urban Council* (1911) 2 Ch. 414; *Polini* v. *Gray*, 12 Ch. D. 438; *Wilson* v. *Church*, 12 Ch. D. 454.

(5) *Kaye* v. *Chubb & Sons*, (1886) 4 R. P. C 23; Halsbury Vol 17 p. 202.

(6) *Per Jackson J.* in *Moheeooddin* v. *Ahmed Hossain*, 14 W. R. 384.

(7) 11 C. 146.

property declared, and obtained an *interim* injunction restraining *Gossain Money Puree* from executing his decree pending the decision of their suit. This suit was dismissed, and the sons of *Chucka singh* appealed to the High Court. *Gossain Monepuree* again applied for execution of his mortgage decree, whereupon the sons of *Chucka singh* applied to the original court for a further injunction restraining *Gossain Money Puree* from executing his decree pending their appeal to the High Court ; this application was granted. On appeal to the High Court against this order of the lower court, the court consisting of *Sir Richard. Girth C.J.* and *Mr. Justice Macpherson* observed : "The rule was obtained upon the ground (amongst others) that the subordinate Judge had no right, under the circumstances to grant the injunction, in as much as he had decided against the claim of the plaintiff in the second suit, and had nothing to do with the appeal to this court. It has now been contended on behalf of the plaintiff that by analogy to s 546 of the Code of Civil Procedure (1) the subordinate Judge, if he considered it right and equitable. had jurisdiction to stay execution in the other suit, until the appeal to this court has been heard. We think however, that section 546 has nothing to do with the question before us. That section only relates to staying proceedings in execution by the court which passed the decree in which proceedings are pending. That court has a right under certain circumstances and subject to certain conditions, to stay the execution of its own decrees while these decrees are under appeal.

"But here the lower court has taken upon itself in this suit to stay the execution of a decree, which has been pronounced by the High Court in another suit. The Subordinate Judge had in point of law no power to deal with the proceedings in that other suit at all. He had a right, whilst the questions in this suit were awaiting trial, to restrain the defendants by an *interim* injunction from enforcing his decree in the former suit. That he might *do so by an order upon the defendants personally*. But as soon as those questions were decided against the plaintiff, the Subordinate Judge had no right, we think, to restrain the defendant further, upon the mere possibility of the appellate court reversing his decree, and it is clear that he had no right to do so under the section of the code upon which he appears to have acted.

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(1) Act XIV of 1882. Section 546 of Act XIV of 1882 corresponds to Order 41, r. 6 of Act V of 1908. Order 41, rule 5 lays down : "(*i*) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree ; But the Appellate court may for sufficient cause order stay of execution of such decree.

(*ii*) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(*iii*) No order for stay of execution shall be made under sub-rule (*i*) or sub-rule (*ii*) unless the court making it is satisfied—(a) that substantial loss may result to the party applying for stay of execution unless the order is made ; (b) that the application has been made without unreasonable delay ; and (c) the security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

"(*iv*) Notwithstanding anything contained in sub-rule (3), the court may make an *exparte* order for stay of execution pending the hearing of the application."

"If any court has a right to grant an injunction now, we presume it would be the court of appeal. But it is no part of our present duty to decide whether any court has such a power or still less that,, having the power, it ought to exercise it. All that we now say is, that the court below, having made a decree against the plaintiffs, had no right, in aid of the plaintiffs, to restrain the defendant from proceeding in the other suit."

The appellate court in exercising powers under Order XXXIX, rule 1, cannot be too careful as to the mode in which they permit the machinery of the courts to be used for the purpose of enabling a plaintiff in one suit to delay the decree holder in another from obtaining the fruits of his judgment by executing his decree in ordinary course against the property of his judgment debtor. At the same time it is most desirable to guard as far as possible against a multiplication of suits, and it is presumed that this was one of the objects the Legislature had in view in passing rule 1 of Order XXXIX of the Code of Civil Procedure in its present shape, where if the decree holder is allowed to proceed with the sale of the rights, and interests of his judgment debtor, many complications are likely to arise which would probably result in further litigation in some shape or other, whereas if he is restrained from doing so until after the appeal in the appellate court has been disposed of, no practical injury would result to any one, a temporary injunction by the appellate court should be granted upon the applicant executing a bond with sureties by way of security (1). So on an appeal from an order of the lower court dissolving an injunction, the court of appeal will usually make an order in the nature of temporary injunction, restraining the parties and the subject mater in *statu quo* until the final hearing of the appeal, when the whole matter in controversy is the continuance of the injunction, or when it appears that such an order is necessary to prevent great and irreparable mischief to the rights of the appellant (2).

It would seem that in England under the old chancery regime, whether the complainant should be permitted to enforce his decree awarding an injunction, notwithstanding the defendant's appeal, rests in the discretion of the court (3). By the practice of the English Court of equity, an appeal from a decree in equity, either introlocutory or final, does not stay proceedings in the court below or prevent the issuing of process without a special order for that purpose (4).

In *Chandidat Jha* v, *Padmanand Singh* (5), an order of the lower court for appointment of a receiver under section 503 of the Civil Procedure Code (Act XIV of 1882) was set aside by the appellate Court, and an order for a temporary injunction, under section 492 of the Code, was granted.

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(1) *Krishna Doyal* v. *Rani Kishori*, 10 A. 80.

(2) Spelling on Injunctions and other Extraordinary Remedies § 1144.

(3) H. C. Joyce on Injunction § 404.

(4) *Hugnenin* v. *Baseley*, 15 Ves. 180, 184 ; *Way* v. *Foy*, 18 Ves. 452 ; *Waldo* v. *Caley*, 16 Ves. 206 ; *Wilan* v. *Wilan*, 16 Ves. 216.

(5) 22 C. 459.

CHAPTER IV.

Perpetual Injunction.

Perpetual Injunction—A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit ; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff (1). It is granted to prevent the breach of an obbligation existing in favour of the applicant, whether expressly or by implication (2). The right to an injunction is primary (3). Like temporary injunction it is not limited in duration (4). If a plaintiff applies for an injunction in respect of a violation of a right, and the existence of that right, or the fact of its violation is denied, he must establish his right at law, but having done that, he is except under special circumstances, such as laches, or where the interference with his right is trivial, entitled to an injunction to prevent recurrence of violation (5). So final injunction is granted when the rights of the parties are determined. A perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. When such obligation arises from contract, the Court will be guided by the rules and provisions contained in Chapter II of the Specific Relief Act which deals with specific performance of contract. When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely) :—

(*a*) Where the defendant is trustee of the property for the plaintiff ; (6)

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(1) Specific Relief Act s. 53.
(2) Ibid s. 54.
(3) Banerjee's T. L. L. p. 601.
(4) Woodroffe's Injunction p 22.
(5) *Imperial Gas Co.* v. *Broad bent*, 7 H. L. C. 611 ; *Spottiswoode* v. *Clark* 2 Ph. 154 ; *Motley* v. *Dowman* 3 My & Cr. 1, 14, 17 ; *Bramwell* v. *Halcombe* 3 My & Cr. 737 ; *Norton* v. *Nicholls*, 4 K & J 475 ; *Martin* v. *Price*, (1894) 1 Ch. 276 (285) ; *Shelfer* v. *City of London Electric Co*, (1895) 1 Ch. 314.

(6) Specific Relief Act s. 54, clause (*a*). *Illustration* (*b*) : "A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach." (*c*) : "The Directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the share holders may sue for an injunction to restrain them." (*d*) : "The Directors of a fire and life insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them." (*e*) : "A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets."(*f*) : 'A, a trustee for B, is about to make an imprudent sale of a small part of the trust property. B may sue for an injunction to restrain the sale even though compensation in money would have afforded him adequate relief." (*g*) : "A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children. A, then contracts to sell the estate to C. B, or any of his children may sue for an injunction to restrain the sale" (*h*) : 'In the course of A's employment as a vakil certain papers belonging to his client, B, come into his possession. A, threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing." (*i*) : "A is B's medical adviser. He demands money of B, which B declines to pay. A then threatens to make known the effect of B's

(*b*) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion. (1) ;

(*c*) Where the invasion is such that pecuniary compensation would not afford adequate relief ; (2)

(*d*) Where it is probable that pecuniary compensation cannot be got for the invasion (3).

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communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing." (*l*) A, B and C are partners the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership property. B and C may without seeking a dissolution of the partnership, sue for an injunction to restrain A. from doing the act." (*z*) "A carries on a manufactory and B is his assistant. In the course of his business A imparts to B a secret process of value. B afterwards demands money of A., threatening, in case of refusal, to disclose the process to C., a rival manufacturer, A may sue for an injunction to restrain B from disclosing the process."

(1) Specific Relief Act s. 54 ; clause (b) : *Illustration* (a) "A lets certain lands to B and B contracts to dig sands or gravel thereout. A may sue for an injunction to restrain B from digging in violation of his contract." (m) : A, a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir expectant may sue for an injunction to restrain her."(n): A, B and C are members of an undivided Hindu family. A cuts timber growing on the family property and threatens to destroy part of the family house and to sell some of the famtly utensils. B and C may sue for an injunction to restrain him." (r): "A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's mine and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing." (s) : "A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for an injunction restraining A from making the noise."(t) : "A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution"(u) :"A, infringes B's patent. If the court is satisfied that the patent is valid and:has been infringed, B may obtain an injunction to restrain the infringement. (v). "A. pirates B's copyright. B may obtain aa injunction to restrain the piracy unless the work of which copy right is claimed is libellous or obescene." (w) : "A, improperly uses the trademark of B. B may obtain an injunction to restrain the user provided that B's use of trade mark is honest." (x). "A, a tradesman, holds out B, as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing." (y) : 'A is a very eminent man, writes letters on family topics to B. After the death of A and B, C, who is B's residuary legatee, proposes to make money by publishing A's letters. D, who is A's executor, has a property in the letters, and may sue for an injunction to restrain C from publishing them." See also illustrations (h), (i), (l) and (z) given under clause (a) supra.

(2) Specific Relief Act s. 54, cl. (c). *Illustration* (j) "A, the owner of two adjoining houses, lets one to B, and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an iniunction to restrain them from so doing" (k) : "A lets certain arable lands to B for purpose of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B, threatens to sow the lands with seed injurious thereto and requiring many years to eradicate A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use then in a husband like manner.

(3) Specific Relief Act s. 54 cl. (d) ; *Illustration* (o) : "A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the official Assignee and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass."

(*e*) Where injunction is necessary to prevent a multiplicity of judicial proceedings (1).

But an injunction cannot be granted—

(*a*) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedincs (2).

(*b*) to stay proceedings in a court not subordinate to that from which the injunction is sought (3);

(*c*) to restrain persons from applying to any legislative body (4);

(*d*) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government (5),

(*e*) to stay proceedings in any criminal matter (6);

(*f*) to prevent the breach of a contract, the performance of which would not be specifically enforced (7);

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(1) Specific Relief Act s. 54, clause (e). *Illustration* (p): "The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.' (q): "A in an administration suit to which a creditor B is not a party obtains a decree for the administration of C's assets. B proceeds against C's estate for his debt. A may sue for an injunction to restrain B." See also *Karnadhar Haldar* v, *Hari Prosad Roy Chowdhury*, 14 C. W. N. 879 (881) = 38 C. 731 = 12 C. L. J. 86 per *Jenkins C. J*: "But in my opinion clause (e) which prescribes as one of the conditions entitling the Plaintiff to an injunction that such relief is necessary to prevent a multiplicity of judicial proceedings, has no application for the simple reason that there was no ground to apprehend any such multiplicity...It is not as though the Plaintiffs here would have to bring repeated suits or to make repeated applications or to take repeated proceedings for the purpose of establishing or safe guarding their rights or of preventing the acquisition of rights by the Defendant."

(2) Specific Relief Act s. 56 clause (a)

(3) Ibid clause (b)

(4) Ibid clause (c)

(5) Ibid clause (d)

(6) Ibid clause (e)

(7) Ibid clause (f)

"Notwithstanding section 56 clause (f), when a contract comprises an affirmative agreement, to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement: provided that the applicant has not failed to perform the contract so far as it is binding on him." Vide Section 57 of the Specific Relief Act. Illustrations: (a) A contracts to sell to B for Rs. 1,000 the goodwill of a certain business unconnected with business premises, and further agrees not to carry on that business in Calcutta. B pays A the Rs. 1,000 but A carries on the business in Calcutta. The Court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta" (b): "A contracts to sell to B, the good will of a business. A then sets up a similar business close by B's sbop, and solicits his old customers to deal with him. This is contrary to his implied contract, and B may obtain an injunction to restrain A from soliciting the customers, and from doing any act whereby their good will may be withdrawn from B." (c): 'A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing but he is entitled to an injunction restraining A from singing at any other place of public entertainment" (d): "B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival

(g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance (1) ;

(h) to prevent a continuing breach in which the applicant has acquisced (2) ;

(i) when equally efficacious relief can certainly be obtained by any other mode of proceeding, except in the case of breach of trust (3) ;

(j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the court (4) ;

(k) where the applicant has no personal interest in the matter (5) ;

Section 54 of the Specific Relief Act confers jurisdiction on the court to issue an injunction not in respect of every breach of an obligation whether statutory or other wise, but only in respect of a breach of an obligation existing in favour of an applicant (6). Before an injunction can be granted, an applicant for the injunction must establish a legal right and then show an actual or threatened invasion of that legal right by the particular person against whom he wishes to claim an injunction. Evidence must be adduced which justifies the Court in thinking that there is a real substantial likelihood that the wrongful act complained of or apprehended will be repeated or done, unless restrained by the Court (7). Absolute ownership is not essential condition for obtaining an injunction. Any person in the enjoyment of a right may apply for an injunction. Any person in the enjoyment of a right may apply for an injunction if that enjoyment is interfered with by a person without title. When in a suit for an injunction with a prayer for compensation the Court is of opinion that the injury can be adequately compensated in money, it is bound to pass the amount of that compensation and should not refer the parties to a fresh litigation (8). In *Ram Kissen* v. *Pooran Mull* (9) *Mr. Justice Mookherjee* said : "Now as was pointed out by *Sir Arther Wilson* in the case of *Tituram Mukherjee* v. *Cohen* (10). "The right to an injunction depends in India, upon statute and is governed by the provisions of Chapters IX and X of the Act. Chapter IX is headed 'Of Injunctions Generally.' Section 52, the first of the sections contained in Chapter IX, states that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual. Section 53 next defines the injunctions as of two classes. The second paragraph, which is devoted to perpetual injunction, lays down that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the

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house as clerk" (e) : 'A contracts with B that in consideration of Rs. 1,000 to be paid to him by B, on a day fixed, he will not set up a certain business within a specified distance. B fails to pay the money. A cannot be restrained from carrying on the business within the specified distance."

(1) Specific Relief Act s. 56 clause (g)
(2) Specific Relief Act s. 56 (h)
(3) Specific Relief Act s, 56 clause (i)
(4) Ibid clause (j)
(5) Ibib clanse (k)

(6) *Daily Gazette Press* v *Karachi Municipality*, A. I. R. 1930 Sind. 57.

(7) *Mahomed* v. *Chandan*, 63 Ind. Cas. 727.

(8) *Buta Khan* v. *Kame Khan*, 60 Ind. Cas. 870.

(9) 31 C. L. J. 259 (269) (This is an appeal by the defendant in a suit for a perpetual injunction to restrain arbitration proceeding before the Bengal Chamber of Commerce).

(10) 33 C. 203=32 I. A. 185=2 C. L. J. 408.

suit. The defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an act, which would be contrary to the rights of the plaintiff. This provision consequently defines the mode in which a perpetual injunction can be granted and its restraining effect on the defendant when it has been granted. The next chapter is headed 'Of Perpetual Injunctions' and opens with section 54, which defines when perpetual injunctions can be granted. The first paragraph of the section lays down that, subject to the other provisions contained in, or referred to by this chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. The next two paragraphs deal with two distinct classes of cases, namely, first, the case when the obligation arises from contract, and secondly, the case when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property. In the former class of cases, the principle is formulated that the Court shall be guided by the rules and provisions contained in the second chapter of the statute. In the latter class of cases, it is stated that the Court may grant a perpetual injunction in the specific categories of events. Mr. Bose for the respondents has not seriously contended that the prayer for injunction in the present litigation can be brought within the scope of section 54. This is fairly clear from the opening and controlling paragraphs of the section, which provides that in order to entitle a litigant to a perpetual injunction, he must establish that the injunction is required to prevent a breach of an 'obligation'. The term obligation as defined in s. 3 is to include every duty enforceable by law, so that when a legal duty is imposed on one person in respect to another, that other is invested with the corresponding legal right. The first paragraph of the section thus establishes the broad and general rule that given the breach of an existing legal right which is vested in the applicant, the breach thereof may be restrained by injunction. This is an elementary principle, for as *Lord Kingsdown* said in *Imperial Gas Light and Coke Co.* v. *Broadbent* (1), when a plaintiff applies for an injunction to restrain a violation of an alleged right before he gets an injunction to prevent the recurrence of its violation. We accordingly invited the learned counsel for the respondents to formulate the precise obligation of which there had been a breach in the case before us. But he was unable to show that there was any legal right of the plaintiffs which had been violated or had been threatened with violation by the defendant. Consequently, it is plain that no injunction can be claimed under section 54. Mr. Bose was there upon constrained to invoke the assistance of the second paragraph of section 53 : he argued in substance that the right to an injunction must be determined by reference to the provisions of section 53 and that the provisions of section 54 should be treated as merely illustrative. We are of opinion that there is no foundation for this contention. Sections 54 and 56 are read together, as supplementing each other. The former defines the circum-stances under which a perpetual injunction may

(1) 7 H. L. C. 600.

be granted; the latter enumerates the cases where the injunction must not be granted. It would, in our opinion, be an erroneous construction of the statute to hold that the right to an injunction should be determined independently of the provisions of sections 54 and 56, by reference to the terms of section 53"(1).

Perpetual injunction can be granted to prevent the breach of an obligation whether express or implied, and not to prevent a multiplicity of suits and the further harrassment of the plaintiff in connection therewith (2). An injunction may be granted to prevent not merely the recurrence but also the occurrence of the injury. Where the threatened act of the defendant is of such a character that it must inevitably result in injury to the plaintiff, the latter will be entitled to an injunction restraining the former from doing such an act, even though no damage has actually accrued. If, after commencement of the action the damages occurred, the plaintiff may be allowed to amend his plaint by stating the nature and extent of the injuries suffered (3) Under the English law, the right to an injunction is a *prima facie* right, and any person who has sustained material injury is entitled to it. Under the Indian Act, an injunction is not to be given when the remedy in damages can be considered adequate (4).

Injunction may be granted to prevent breach of obligation.— Perpetual Injunction is granted at the hearing upon the merits of the suit, to prevent the breach of an obligation existing in favour of the applicant (5), whether expressly or by implication (6). So in favour of the applicant there must be some obligation recognized by law. "Section 3 of the Specific Relief Act states that the term 'obligation' includes every duty enforceable by law. We need not attempt an exposition of the full significance of the term obligation. But obligation may be taken to be a tie or bond which constrains a person to do or suffer something (6); it implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances; but in order that it may be enforced by a court, it must be a legal obligation and not merely moral, social or religious (7). So the obligations which do not possess or cannot be reduced to money value, may be moral or social or religious but they are not legal (8). Refusal to grant a perpetual injunction to the plaintiffs to restrain the execution of a decree for the removal of a *nim* tree obtained by defendant No. 1 against defendant No. 2, on the ground that the tree is a sacred one, duly consecrated and worshipped by orthodox Hindu people of the locality and that its removal would be

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(1) See also *Holland Bombay Trading Co.* v. *Essar das.* 84 Ind. Cas. 282=17 S. L. R. 320=A. I. R. 1925 Sind 175.

(2) *Gur Pershad* v. *Khuda Baksh,* 8 Ind. Cas. 687.

(3) *Bindabassini* v. *Jannabi,* 23 C. 260.

(4) *Boyson* v. *Deane,* 22 M. 251.

(5) The word 'applicant" means plaintiff who prays for an injunction. A perpetual injunction cannot be had upon an application, as distinguished from a suit. Vide s. 53; Banerjee's T. L. L. for 1906 p. 151 but see *Kesho Presad* v. *Srinivas,* 38 C. 719=13 C L. J. 394.

(6) Just. Inst. III, 13.

(7) *Per Mookerjee J.* in *Bhudeb* v. *Kalachand,* 34 C. L. J. 315 (318).

(8) Pothier obligation 1; Savigny obligation Ch 1, ss. 2-4; Anson, Contract, pp. 6—10; T. L. L. (1906) 2nd Ed. p. 19.

an invasion of their religion and would offend their religious sentiments, will not lead to a breach of obligation that is, of a duty enforceable by law which the plaintiff could compel the defendant to perform, within the meaning of section 54 of the Specific Relief Act (1).

English lawyers frequently use the term obligation as correlative to a right *in personam* and not a right *in rem* (2). But the Indian Legislature uses the term in its wider juristic sense which comprises duties arising either *ex contractu* or *ex delicto* (3). So torts of every kind may also be restrained by injunction (4). Right and obligation or duty (5) are correlative terms. Obligation includes every duty enforceable by law. Legal duty is created by the presence of legal rights ; I owe legal duties to my neighbour in so far as I come or may come into contact with his legal rights. In some cases this duty is self-evident and self-explanatory ; in other cases explanation may be needed. An act or omission may of it-self, be a breach of legal duty, as when I enter another man's premises without his permission or the permission of the law, or where in like manner I take possession of another man's property, or strike another man. In such cases the idea of legal duty needs no comment, unless it be to say that it makes no difference whether or not I know whose rights I am infringing, or that I have no thought of infringing any one's rights. I am not acting upon my own rights, or upon any permission, and I must therefore in a case of this kind be invading another's rights ; that is to say, a legal duty rested upon me in the matter. But the act or omission may not, of it-self, be a breach of legal duty ; something else may be required to create liability. That something else must not be brought about by the intention of the one who acts or omits is plain ; the duty again is self evident. There may however be a duty though the something else be brought about without intention. On what footing ? The answer must be, on the ground that the danger is observed or observable, and that the impending harm might be avoided (6). Perpetual injunction can be granted to prevent the breach of an obligation whether express or implied (7). Section 54 requires that the obligation in respect of which an injunction is granted, should arise either from contract or from a right of property (8).

Subject matter of Perpetual Injunction—The right to an Injunction in British India depends upon statute and is mainly governed by the provi-

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(1) *Bhudeb Mukherjee* v *Kalachand Malik*, 34 C. L J 315.

(2) T. L. L. (1906) *2nd* Ed, p. 19 ; Pollock. Cont. 4 ; Markby, *Elem. Law* s. 137 ; *Foster* v. *Wheeler*, 36 Ch. D. 695.

(3) T. L. L. (1906) 2nd Ed. p. 19 ; 1 Austin. Jur. 90-8.

(4) Woodroff's Injunction p. 289.

(5) Strictly speaking, 'obligation' and 'duty' are not synonymous. Langdell thus discriminates between them : "All duties originate in commands of the State ; while obligations originate either in a contract between the parties, or in something which has been done or has happened to the gain of the one and to the loss of the other, and under such circumstances as make it unjust for the one to retain the gain, or the other to suffer the loss." Eq. Jur. 224 ; T. L. L. (1906) p. 3.

(6) Biglow on Torts p. 12.

(7) *Gur Pershad* v. *Khuda Baksh*, 8 Ind. Cas. 687.

(8) *Balkrishna* v. *Gobinda*, 5 N. L. R. 67 = 2 Ind. Cas. 241.

sions of the Specific Relief Act (1). Section 53 of the Specific Relief Act defines the mode in which a perpetual injunction can be granted and its restraining effect on the defendant when it has been granted. Section 54 entitles a party to an injunction to prevent the breach of an obligation existing in his favour or where the other party invades or threatens to invade the plaintiff's right to or enjoyment of property and then only in certain cases (2). In order to entitle a litigant to a perpetual injunction, he must establish that the injunction is required to prevent a breach of an obligation. The term "obligation" according to section 3 of the Specific Relief Act includes every duty enforcable by law, so that when a legal duty is imposed in one person in respect of another, that other is invested with the corresponding legal right. The first paragraph of section 54, establiahes the broad and general rule that given the breach of an existing legal right which is vested in the applicant, the breach thereof may be restrained by injunction (3). Sections 54 and 56 of the Specific Relief Act are to be read together as supplementing each other. The former defines the circumstances under which perpetual injunctions may be granted ; the latter enumerates the cases where an injunction must not be granted (3). So it is clear that under section 54 of the Specific Relief Act a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. Obligation may be a tie or bond which constrains a person to do or suffer something ; it implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances ; but in order that it may be enforced by a court, it must be a legal obligation, and not merely moral, social or religious (4).

Fundamental principle of issuing Injunction—In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side. The general principle may be stated as follows : Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, a violation of that right will be prohibited, unless there are other considerations of policy or expediency which forbid a resort to the prohibitive remedy. The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognised by law, and would be applied to every case of intended violation, were it not for certain reasons of expendiency and policy which control and limit its exercise. This jurisdiction of equity to

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(1) *Tituram* v. *Cohen*, 33C. 203=32 I. A. 185=2 C. L. J. 408.

(2) *Holland and Bombay Trading Co.* v. *Essardas*, 84 Ind. Cas. 282=17 S. L. R. 32.

(3) *Ram Kissen* v. *Pooran*, 31 C. L. J. 259=47 C. 733=56 Ind. Cas. 571.

(4) *Bhudeb* v. *Kalachand*, 34 C. L. J. 315.

prevent the commission of wrong is, however, modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not interfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to equitable remedy of injunction (1). To courts governed by the Specific Relief Act the question of an injunction or no injunction presents itself in a different light to what is does to the English courts, and hence English decisions have no application. An Indian court has a discretion ; it may (not shall) issue an injunction against a threatened infringement of easement rights of light and air when the injury is such that pecuniary compensation would not afford adequate relief (2). Where a trespass of a continuing nature has been committed by the defendant but has been discontinued before suit is brought, the court will not interfere by injunction to restrain the defendant from continuing such trespass, merely because the plaintiff entertains vague apprehensions that the trespass may be recommenced (3). A satisfactory proof that the defendant threatens the commission of a wrong is sufficient ground to justify the issue of an injunction. But there should be an imminent risk of substantial damage (4).

Injunction in cases when defendant invades or threatens to invade the plaintiff's right.—Acts which can have no injurious result, though irregular and unauthorized, constitute no ground for relief by injunction ; the injury being inflicted or threatened must appear to the satisfaction of the Court, to be substantial and positive (5). Where a plaintiff has established his legal right and the fact of its infringement and that further infringement is threatend to a material extent, he is entitled to an injunction to restrain such threatened infringement upon the ordinary legal principles upon which the Court acts in granting injunction (6). In any case in which a case for an

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(1) Pomeroy's Equity Jurisprudence § 1338. "The writ of Injunction is peculiar to Court of Equity, although there are some cases when Courts of law may exereise analogous powers such as by writ of prohibition and estrepment in cases of waste. The cases however to which these legal processes are applicable are so few and so utterly inadequate for the purposes of justice, that the processes themselves have fallen into disuse, and almost all the remedial justice of this sort is now administered through the instrumentality of Courts of Equity. The jurisdiction in these Courts then has its true origin in the fact that there is no remedy at all at law, or the remedy is imperfect and inadequate. The jurisdiction was for a long time most pertinaciously resisted by the Court of Common law, especially when it was applied by an injunction to stay suits and judgments in these courts. But it was firmly established in the reign of King James the First upon an express appeal to that monarch, and it is now in constant and unquestioned exercise."

(2) *Mahomed Auzam* v. *Jagannath*, 3 Rang. 230=89 Ind . Cas. 800=A. I. R. 1925. Rang. 327.

(3) *Chabildas* v. *Municipal Corporation of Bombay*, 8 B. H. C. O. C. 85.

(4) *Nathu* v. *Shevsa*. 89 Ind. Cas 636.

(5) Spelling on Injunctions and other Extraordinary Remedies § 12.

(6) Halsbury's Vol. XVII p. 209 citing *Martin* v. *Price*, (1894) 1 Ch. 276, Per *Lindley L. J* ; followed in *Shelfer* v. *City of London Electric Light Co.*, (1895) 1 Ch. 287.

injunction has been made out, if the plaintiff by his acts or *laches* has disentitled himself to an injunction the Court may award damages in its place (1). The Court has jurisdiction by injunction on danger of irreparable injury to property (2). But in *Earl of Ripon* v. *Hobart* (3), the Court refused an injunction, at the instance of parliamentary commissioners for cleansing and improving the river Witham and its navigation and the drainage of the adjacent lands, against the erection and use of a steam engine, by parliamentary trustees, for draining a particular district, the injunction being applied for on the ground of probable damage to the banks of the river, into which an increased body of water was thereby expected to be thrown, and also on the ground of apprehended injury to the drainage of the lands within the jurisdiction of the commissioners; the *Lord Chancellor, Lord Brougham* observing, that "in the present case, till the event happened no man can take upon himself to say with confidence, upon such evidence as was there brought forward, whether or not mischief would happen from any given change of machinery, so long at least as that change does not go to a length so great as to be extravagant, and to which no one supposes the defendant could think of proceeding" (4). So also in *Hanies* v. *Taylor* (5) the Court refused an injunction to restrain the erection of gas works, in the vicinity of the plaintiff's residence, it being uncertain whether upon the completion of the works, the manufacture of gas would prove a nuisance. But the Court will interfere to restrain apprehended injury where it is clear that the act intended to be committed would injure or destroy a clear legal right (6). A Court will not interfere *quia timet* in a case of merely prospective injury and alleged nuisance but the actual existence of the nuisance must be proved (7). In an action to restrain the obstruction of ancient lights, where the right of the plaintiff to relief rests mainly upon damages not suffered at the time, but likely to accrue within a reasonable time, the Court will nevertheless grant an injunction to enforce that right, and will not give compensation by way of damages (8). The plaintiff, as manager of an omnibus company, became, under the provisions of the statutes and rules for the regulation of metropolitan stage-carriages, the licensee of their vehicles, having ceased to be such manager. *Held* that he was entitled to an injunction to restrain the company from continuing to use his name upon the number plates affixed to their carriages (9).

To warrant the Court in granting or continuing an injunction, it must be reasonably satisfied that there is an intention on the part of the defendant

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(1) *Shelfer* v. *City of London Electric Light Co.*, (1895) 1 Ch. 287 per *A. L. Smith L. J*:

(2) *Crowder* v. *Tincler*, 90 Ves 617. 622.

(3) 3 My & K. 169.

(4) Joyce on Injunction p. 118.

(5) 2 Ph. 209.

(6) *Herz* v. *Union Bank of London* 2 Giff. 686; see also *Hepburn* v. *London*, 2 H & M. 345.

(7) *Att Gen* v. *Kingston upon Thames* 11 Jur. N. S. 596.

(8) *Dicker* v. *Popham*, 63 L. T. 379. In cases of this character the possible future application of a plaintiff's premises must be considered in granting injunction.

(9) *Hodges* v. *London Tramways Omnibus Co.* 12 Q.B.D. 105=50 L.T. 262.

to do the acts sought to be restrained, or at least that there is probable ground for believing that, unless the injunction is granted, there is danger of such acts being done ; and it is not a sufficient ground for granting an injunction that if there is no such intention it will do the defendant no harm (1). The Court will not interfere to restrain future acts of a wrong-doer unless it is plain that they will be of a wrongful nature (2). But the Court has jurisdiction by injunction to protect property from an act threatened, which, if completed, would give right of action and an injunction will be granted if the person threatened is free from blame, and shows that an action for damages would be no adequate redress (3). In order to obtain an injunction restraining a threatened act on this ground that if done, it will be a violation of some legal right, the plaintiff must show that the act must result in a violation of such right (4). Where the defendant contended that he had the right to do the thing complained of, and had refused to give an undertaking, the inference was that there would be a repetition of the nuisance : and therefore the plaintiffs were justified in bringing an action, and were entitled to an injunction (5). But an injunction will not be granted unless the plaintiff makes out a strong case of probability that the apprehended mischief will in fact arise (6). Unless an actual injury results to a private individual himself from the excessive exercise of the powers of a company he is not entitled to an injunction (7). The Court will not interefere to restrain future acts of a wrong-doer, unless it is plain that they will be of a wrongful nature (8). The Court will grant an injunction to restrain the infringement of a legal right by a company acting under statutory powers when the plaintiff's rights will not be adequately protected or vindicated by damages (9). In dealing with the question of remedy by injunction or damages in such a case, the Court ought to take care to prevent undertakers with statutory powers from exceeding those powers ; and under pretence and colour thereof in effect expropriating landowners whose lands are out side their real scope (10) In England in an action by the Attorney General complaining a breach of a public statute by a public body the Court is not bound, on proof of the breach, to grant an injunction, but may allow the defendants a reasonable time within which to comply with the statute (11).

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(1) *Dunn* v. *Bryan*, Ir. R. 7 Eq. 143.
(2) *Albert* v. *Leaf*, 3 N. R. 455.
(3) *Austrian Emperor* v. *Kossuth*, 3 De. G. F, & J. 217.
(4) *Pattison* v. *Gilford*, 43 L. J. Ch. 524.
(5) *Phillips* v. *Thomas*, 62 L. T. 793.
(6) *Att Gen* v. *Manchester Corpora-*, 62 L. J. Ch. 459=(1893) 2 Ch. 87.
(7) *Ware* v. *Fullwood*, 47 L. J. Ch. 459=9 Ch. D. 176.
(8) *Adel bert* v. *Leaf*, 3 N. R. 455
(9) *Jordeson* v. *Sultan*, (1899) 2 Ch. 217 ; *Martin* v. *Price*, (1894) 1 Ch. 276 ; *Shelfor* v. *City of London Electric Lighting Co*, (1895) 1 Ch. 287.
(10) *Per Rigby L. J.* in *Jordeson* v. *Sultan*, (1899) 2 Ch. 217.
(11) *Att Gen* v. *Birmingham, Tame* etc. (1912) A. C. 788=82 L. J. Ch. 45 ; see also *Att. Gen* v. *Denby*, (1925) 1 Ch. 608=94 L. J. Ch. 41 ; *Att Gen* v. *Grand Junction Canal*, 78 L. J. Ch. 681 ; *Att Gen.* v. *Wimble don House*, (1904) 2 Ch. 34, 42.

Necessity of injury as well as damage—"Mere inconvenience is not enough to entitle a party to an injunction. There must be violation of a legal right (1) and the violation must be of a substantial character (2)". So in considering whether an injunction should be granted, the amount of the injury sustained is material (3). Injunction is refused where no irreparable injury is shown (4). The Court will not grant injunction to restrain parties from proceeding to deal with property whose right, if it exists, depends upon the construction of a doubtful statute, where the granting of the injunction would for ever deprive them of an opportunity of exercising the right, especially if no probable mischief is to be apprehended from allowing them to proceed (5). The plaintiff must satisfy the Court that he has sustained substantial damage from the violation of a legal right to entitle him to an injunction (6). The Court will not interefere to prevent trivial trespasses (7). Injunction will be refused where no damage is shown (8). No injunction will be granted if the remedy lies in plaintiff's power (9).

Where there exists no standard for ascertaining the actual damage caused or likely to be caused—By the provision enacted in s. 54 of the Specific Relief Act the Legislature should not be taken to have intended to lay down that a person should not get an injunction granted to him unless his property would be practically destroyed if the injunction were not granted. So, where the defendant built a wall practically reducing the quantity of light and air passing through the window of the plaintiff under easement thereto aquired by the latter, and the obstruction was to such an extent as to prevent the plaintiff from carrying on his business in his premises, plaintiff was granted an injunction on the ground that there had been substantial and wrongful injury to his rights, the courts not allowing the objection raised that it had no jurisdiction to grant the injunction, because it could have awarded damages (10). For the grant of injunction it must be proved that damage will be irreparable, because if the danger is not proved to be so imminent that no one can doubt that if the remedy is delayed the damage will be suffered, it must be shown that if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action (11).

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(1) *Day* v. *Browrigg*, (1878) 10 Ch. D. 294 C. A; *Street* v. *Union Bank of Spain*, 30 Ch. D. 156.

(2) *Llanduduo* v. *Woods*, (1899) 2 Ch. 705; *Halsbary* vol. 17 p. 208.

(3) *Cooper* v. *Crabtree*, 51 L. J. Ch. 544.

(4) *Southampton* v. *Birmingham*, 2 Jur. 1012; *North* v. *Bolton*, 3 Rail Cas. 345; *Sainter* v. *Ferguson*, 1 Mac & G. 286; *Hiltan* v. *Granville*, 4 Beav. 130.

(5) *Att Gen* v. *Liverpool Corporation* 1 Myl & C. 171.

(6) *Holyoke* v. *Shrewsbury and Birmingham Ry*, 5 Rail Cas. 421.

(7) *Saunders* v. *Smith*, 3 Myl & C. 711.

(8) *Inagram* v. *Morecraft*, 33 Beav 49.

(9) *Elliman* v. *Carrington*, (1901) 2 Ch. 275, 279; Halsbury vol. 17 p. 208.

(10) *Yaro* v. *Sonaullah*, 19 A, 259= A. W. N. 1897, 43; *Kadarbhai* v. *Rahim bhai*, 13 B. 674.

(11) *Pandurang* v. *Baija*, A. I. R, 1925 Nag. 21=8 N. L. J. 14.

Where the invasion of right is such that pecuniary compensation would not afford adequate relief—Where the defendants threaten to invade the enjoyment of property by the plaintiffs, and the invasion is such that pecuniary compensation would not afford adequate relief, the plaintiffs have a right to obtain a perpetual injunction under section 54 of the Specific Relief Act (1). A lets certain lands to B and B contracts not to dig sand or gravel thereout. A may sue for an injunction to restrain B from digging in violation of his contract (2). A the owner of two adjoining houses, lets one to B, and afterwards lets the other to C. A and C begin to make such alterations in the house let to C, as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing (3). A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seeds injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husbandlike manner (4). The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declatory decree that the land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them (5).

It is the very first principle of injunction law that *prima facie* the Court will not grant injunction to restrain an actionable wrong for which damages are the proper remedy (6).

Where it is probable that pecuniary compensation cannot be got for the invasion—Injunction was granted to restrain a pauper defendant from committing acts of trespass, on the ground that a right of action for damages against a pauper did not constitute an adequate remedy (7).

Issue of no injunction—where equally efficacious relief can certainly be obtained by any other usual mode of proceeding—Sections 54 and 56 of the Specific Relief Act are to be read together as supplementing each other. The former defines the circumstances under which perpetual injunctions may be granted, the latter enumerates the cases where an injunction must not be granted. The right to an injunction cannot be determined independently of the provisions of sections 54 and 56 by reference to the terms of section 53. An injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode

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(1) *Kalidas* v. *Jivram*, 15 B. 309; *Dhunjibhoy* v. *Lisboa*, 13 B. 252.
(2) Section 54 ill. (a).
(3) Section 54 ill (j).:
(4) Section 54 ill. (k).
(5) Specific Relief Act s, 54 ill. (*h*).
(6) Halsbury vol. 17 page 207 citing *London and Blackwell Rail Co.* v. *Cross*, 31 Ch. D. 354.
(7) *Hodgson* v. *Duce*, 4 W. R. 576.

of proceeding (except in the case of breach of trust) (1). Where it does not appear that the remedy at law is inadequate, or that the party aggrieved is entitled to more speedy relief than that which can be obtained by the ordinary process of courts of law, an injunction will be refused (2). And where a positive statutory remedy exists for the redress of particular grievances, equity will not assume jurisdiction of the questions involved. Nor will such courts enjoin proceedings to enforce such statutory remedy. Such interference would place the judicial above the legislative power (3). The Surat city Municipality served, under section 82, clause (3) of the Bombay District Municipal Act (III of 1901), a notice of demand upon the plaintiff for house tax due by him. The plaintiff instead of proceeding under section 86 of the Act instituted a suit in a civil Court for an injunction to restrain the municipality from recovering the house tax from him. The lower courts rejected the claim on the ground that, as the plaintiff had omitted to appeal to a Magistrate under section 86 of the Act, his suit was premature. *Held* that section 86 was permissive merely, and that it did not make it incumbent in every case upon a party complaining of an illegal levy of tax by a Municipality to appeal against the action of the Municipality to a Magistrate before suing in a Civil Court. But held also (confirming the decree) that the injunction prayed for in this case can not be granted. By section 56 of the Specific Relief Act an injunction cannot be granted where efficacious relief can be obtained by any other usual mode of proceeding. Section 86 of the Bombay Act III of 1901 gave a remedy to the plaintiff, but instead of resorting to it he filed this suit for an injunction. It was discretionary for a Court to grant an injunction and that descretion must be exercised judicially with extreme caution and only in very clear cases. This was not a case of that kind (4). Where a land has been let out for agricultural purposes generally, the erection of an indigo factory on any part of such land renders it unfit for the "purposes of the tenancy" and the landlord is entitled to a permenant injunction restraining the tenant from erecting the factory (5). In delivering the judgment the Court observed : "The argument in favour of the respondents upon the point is this : that if the erection of an indigo factory renders the land unfit for the purposes of the tenancy, the plaintiff is under section 25, clause (*a*) of the Bengal Tenancy Act, entitled to eject the tenant, and that is a more complete remedy than a remedy by way of injunction. And if that is so, the Court should not entertain a suit for the less complete remedy. We are of opinion that this contention has several answers to it. One of them is this : the landlord may not want to eject the tenant, but may be content to have the land prevented from being changed prejudicially to his interest or being rendered unfit for the purpose of the tenancy, and there is no reason why

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(1) *Ram Kissen* v. *Pooran* 31 C. L. J. 259 (265. 266) ; *Noyna Missir* v. *Rupikon*, 9 C. 609 (611).

(2) *Mullen* v. *Jennings*, 1 Stockt 192 ; Spelling on Injunctions etc. § 13.

(3) Spelling on Injunctions § 13.

(4) *Chunilal Thakordas Modi* v. *The Surat Municipality*, 27 B. 403.

(5) *Surendranarain* v. *Hari Mohan*, 31 C. 174.

he should not be allowed to claim this lesser remedy. Then in the next place the plaintiff here is a co-sharer landlord, and unless his other co-sharers joined, he could not, regard being had to the provisions of section 188 of the Bengal Tenancy Act, maintain a suit for ejectment of the tenant. There is nothing in section 54 of the Specific Relief Act to show that on the contrary, illustration (k) of that section, if not quite in point, shows that the Legislature did not intend to exclude cases like the present from the scope of section 54."

No Injunction where the applicant has no personal interest in the matter.—Section 56(k), Specific Relief Act, states that an injunction cannot be granted where the applicant has no personal interest in the matter. So where in the pleading the plaintiff purported to be the N.W. Ry. Union, Lahore, through two Vice-Presidents who were named and the plaint stated that the plaintiffs were the Vice-Presidents of the N. W. Ry. Union Lahore : *Held* that *prima facie* the proper plaintiff was not before the Court (1).

Conduct of the applicant or agent.—An injunction cannot be granted when the conduct of the applicant or his agent has been such as to disentitle him to the assistance of the Court (2). "That rule rests on the maxim that he who seeks equity must do equity and implies that a plaintiff seeking an injunction must come with clean hands. With reference to this point, it is laid down in Kerr on Injunctions, on the authority of the cases therein cited, that he who asks for an injunction, must be able to satisfy the Court that his own acts and dealings in the matter have been fair and honest and free from any trait of fraud or illegality, and that if, in his dealings with the person against whom he seeks relief or with third parties, he has acted in an unfair or inequitable manner, he cannot have relief (3rd Ed. page 16) (3)". The above case is based on the principle laid down by *Lord Eldon* in *Rundell* v. *Murray* (4) that a Court frequently refuses an injunction, where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application (5). Injunction should be refused as it is an equitable remedy and plaintiff does not come into Court with clean hands (6). So the party seeking relief must not be himself at fault (7). Where an act will be fraud upon the public, a Court of equity will not permit it. The defendant agreed to edit a guide book for the plaintiff, who was to publish it with a title page showing the name of a third person a well-known editor of such books, as the editor ; the Court held that the title-page was calculated to deceive the public, and refused specific performance to the plaintiff (8). The conduct of a party seeking equitable relief must not be blameable (9) or dilatory (10) to induce the

(1) *N. W. Ry.* v. *N. W. Ry* A. I. R. 1933 Lah. 203.

(2) S. 56 Clause (j) ; *Becharam* v. *Binode* A. I. R. 1928. Cal. 510.

(3) Per *Subbramania J.* in *Senichettiar* v. *Santhanatham Chettiar*, 20 M. 58 (67)

(4) Jacob, 311, 316.

(5) *Saunders* v. *Smith*, 3 Myl & C. 711 ; See also *Nayana* v *Rupikan*, 9 C. 611.

(6) *Kazim* v. *Ram Sarup*, A. I. R. 1929 All. 877.

(7) Spelling Inj. § 26

(8) T. L. p. 1906 p. 244 citing *Port* v. *Marsh*, 1880) 16 Ch. D. 395 ; Cf. *Oldham* v. *James*, 15 Ir. Ch. R. 81.

(9) *Baseter* v. *West*, 28 L. J. Ch. 189.

(10) *Gray* v. *Chaplin*, 2 Russ. 126, 147.

Court to hold its hands. The plaintiff is not entitled to any relief where the contract is tainted with illegality (1).

Acquiescence.—"The principles of the Court with respect to delay and acquiescence applicable to the case of interlocutory injunctions hold also in the case of applications for perpetual injunctions (2)." But in a suit for an injunction, a stronger case of acquiescence is necessary to cause the suit to be dismissed at the hearing, than that which will suffice to prevent the plaintiff from obtaining an interlocutory injunction (3). In that case Vice Chancellor *Sir W. P. Wood* refused the injunction in the original Court. But the Lords Justices held, differing from the Vice-Chancellor on the point of acquiescence, that there had been no such acquiescence as would have deprived the plaintiff of his right of relief at the hearing of the cause, and that a delay of five weeks after knowledge of an intention to build so as to obstruct ancient lights was not, under the circumstances, such acquiescence as to dis-entitle the plaintiff to relief, and, *semble*, a stronger case of acquiescence is requisite to debar a plaintiff from relief at the hearing of a cause than to dis-entitle him to an interlocutory injunction (4). The reason being that at the hearing of the cause it is the duty of the Court to decide upon the rights of the parties, and the dismissal of the action on the ground of acquiescence amounts to a decision that a right, which once existed, is absolutely and for ever lost (5). So at the hearing of a cause a much greater degree of acquiescence must be shown to deprive parties of their rights than would be a sufficient defence to an interlocutory application ; a decree amounting, in fact, not only to positive license, but to an implication of an actual grant (6).. "It must not be overlooked" says *Mr. Drewry* "that the general principle of these cases is not mere laches, but fraudulent dealing or acquiescence. And therefore in such cases it is put upon the plaintiff to prove, not merely to raise a probable conjecture, but to show upon highly probable grounds a case of bad faith and bad conscience against the defendant (7)." Such acquiescence destroys remedial rights and renders transaction impeachable (8). But the term acquiescence is sometimes used improperly. It differs from confirmation on the one side, and from the mere delay on the other. While confirmation implies a deliberate act, intended

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(1) *Davies* v. *Makua*, 29 Ch. D. 596.

(2) Kerr on Injunction p. 34 ; *Re Brittain*, 4 L. J. 50 ; Halsbury Vol. 17, p. 210.

(3) *Johnson* v. *Wyatt*, 33 L. J. Ch. 394 =9 Jur. N. S. 1333.

(4) Joyce on Injunction 429 ; Kerr on Injunction 34 ; *Dunlop* v. *Dunlop Rubber* (1920) 1 Ir. 292 ; *Patchings* v. *Dubbins*, Kay 1 ; *Child* v. *Douglas*, 5 De & M & G 739 ; *Turner* v. *Misfield*, 39 Beav. 390 ; *Hogg* v. *Scott*, L. R. 18 Eq. 444 ; *Price* v. *Bala*, 50 L. T. 787.

(5) Halsbury Vol. 17 page 210 citing *Johnson* v. *Wyatt*, *supra* ; *Gordon* v. *Cheltenham and Great Western Union Rail Co.*, (1842) 5 Beav. 229 per *Lord Langdale M. R.* at p. 233 : There is distinction between the effect of acquiescence, upon a motion for an injunction and on a demurrer ; in the former case acquiescence merely prevents the special protection by injunction, but in the latter it must be such as to disentitle the plaintiff to any relief whatever. Joyce on Injunction p. 1034.

(6) *Patchin* v. *Dubbins*. 1 Kay. 1.

(7) Drewry on Injunction p. 38 citing *Dawn* v. *Splenier*, 7 ves. 235. Per *Lord Eldon*.

(8) Pomeroy's Equity Jurisprudence § 965.

to renew and ratify a transaction known to be voidable, acquiescence is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognising the transaction as existing and intended, in some extent at least, to carry into effect, and to obtain or claim the benefits resulting from it" (1). A man who, possessing a full knowledge of his right, has lain by and has by his conduct encouraged others to expend moneys in contravention of the rights for which he afterwards contends, cannot come to Court for relief by perpetual injunction, however clear his right or whatever may be the value of the right, but must rest satisfied with such damages as would be awarded by the tribunal (2)

"Acquiescence is an important factor in determining equitable rights and remedies, in obedience to the maxims: He who seeks equity must do equity, and he who comes into equity must come with clean hands. Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel—may produce a *quasi* estoppel—upon the rights of remedy. This form of *quasi* estoppel does not cut off the party's title, nor his remedy at law; it simply bases his right to equitable relief, and leaves him to his legal action alone. In order that this effect may be produced, the acquiescence must be with the knowledge of the wrongful acts themselves, and of their injurious consequences; it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrongdoer to enforce the peculiar remedies of equity against him, after he has been suffered to go on unmolested, and his conduct apparently acquisced in. It follows that what will amount to a sufficient acquiescence in any particular case must largely depend upon its own special circumstances. The equitable remedy to which this *quasi* estoppel by acquiescence must frequently apply is that of injunction, preliminary or final, when sought by a proprietor to restrain a defendant from interference with easements, from committing nuisances, from trespasses, or other like acts in derogation of the plaintiff's proprietory rights. This effect of delay is subject to the important limitation that it is properly confined to claims for purely equitable remedies to which the party has no strict legal right. Where an injunction is asked in support of a legal right, the party is entitled to it if his legal right is established; mere delay and acquiescence will not, therefore, defeat the remedy, unless it has continued so long as to defeat the right itself (3). The same rule applies, and for the same reasons, to a party seeking equitable relief against fraud, such as the surrender or cancellation of securities, the annulling of a transaction, and the like. Upon obtaining knowledge of the facts, he should com-

(1) Ibid.

(2) Kerr on Injunction 34; Halsbury Vol. 17 p. 210; Drewry p. 35; *Daun* v. *Spurrier*, 7 Ves. 231; *Parrot* v. *Palmer* 3 My & K. 632, 640; *Rochdale* v. *King*, 2 Sim. N. S. 88; *Davies* v. *Sear*, L. R. 7 Eq. 427; *Wood* v. *Sutcliff*, 2 Sim. N. S. 163; *Hogg* v. *Scott* L. R. 18 Eq. 44; *Wilmot* v. *Barber*, 15 Ch. D. 106.

(3) *Fullwood* v. *Fullwood*, L. R. 9 Ch. 126; *Gaunt* v. *Fynney* L. R. 8 Ch. 8.

mence the proceedings for relief as soon as reasonably possible. Acquiescence consisting of unnecessary delay after such knowledge will defeat equitable relief.

"Acquiscence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property real or personal, a right of contract. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rests upon the principle : If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. A most important application includes all cases where an owner of property A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, as by expending money upon it, making improvements, erecting buildings, and the like Of course, it is essential that B should be acting in ignorance of the real condition of the title, and in the supposition that he was rightful in his own dealing (1)".

No person, however, can be deprived of his equitable remedy on the ground of acquiescence, unless it is shown that he had knowledge of his rights (2) "As one cannot acquiesce," said *Green V. C.* "in the performance of an act of which he is ignorant, so one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded, excepting always, that his want of knowledge is not the result of his ignorance." (3)

Delay—Mere lapse of time is not, in general, a sufficient ground in equity for the refusal of relief (4). A mere delay, however, is not sufficient to deprive a party of injunctive relief but the failure to act must be with a knowledge of conditions that would amount to an acquiescence in the doing of the thing subsequently complained of (5). But an injunction will be refused to a complainant who has intentionally delayed his application until he has obtained an inequitable advantage of the defendant (6). And in particular should delay and laches operate as an estoppel where the rights of innocent third persons have intervened (7). In that case (7) the Court observed ; "Accepting the case as presented, the plaintiff must have been cognizant for many years of the grievances of which he complains. A variety of remedies were open to him. It does not appear that he ever in any way took steps to arrest or seek redress on account of the same, nor is any cause assigned or explanation given for such delay. This is singular and suggestive of a want of good faith. In the meantime rights of third persons—so far as appears innocent persons—have

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(1) Pomeroy's Equity Jurisprudence §§ 816 817, 818.

(2) T. L. L. 1906, 381 ; *Gopalnarain Mudomutty*, 14 B. L. R. 35.

(3) T. L. L. 1906 p. 381 citing *Hall* v. *Olterson*, (1894) 52 N. J. Eq. 522.

(4) T. L. L. for 1906 p. 375 ; *Vernon* v. *Stephens*, 21 P. Wims. 66 ; *Kedarnath* v. *Mamubai*, 16 C. W. N. 247 ; *Kissen Gopal* v. *Kali Prosonna*, 33 C. 633.

(5) *Adam* v. *Birmingham Realty Co.* 45 So. 891.

(6) *Traphagen* v. *Jersey*, 29 N. J. Eq. 206.

(7) *Moore* v. *Silver Valley*, 104 N. C. 534.

supervened. The plaintiff is clearly chargeable with gross laches and upon well settled principles of equity he cannot now be allowed to prejudice such rights."

"The doctrine of laches" says *Sir Barnes Peacock* (1) "in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to waivers of it, or where, by his conduct and neglect, he has, perhaps, not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time is most material. But in every case, if an argument against relief which otherwise would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice and injustice in taking one course or the other." (2)

"So for as laches is a defence" Says *Lord Wensleydale* "I take it that where there is a statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute." (3) An amount of acquiescence, not sufficient to bar the action, may be sufficient to induce the Court to give damages instead of an injunction (4). A plaintiff may by his acquiescence preclude himself from recovering damages (5).

CHAPTER V.

Mandatory Injunction.

Mandatory Injunction-definition of—A mandatory injunction may be defined as one which commands the doing of some positive act by the defendant, sometimes changing the status of parties. Usually however a mandatory injunction does not extend so far as to change the status of parties but only restores the plaintiff to his original situation (6). A mandatory injunction may be

(1) *Lindsay Petroleum* v. *Hard*, (1873) 5 P. C. 221, 239 40.

(2) T. L. L. 1906 p. 376.

(3) *Archbold* v. *Scully*, (1861) 9 H. L. C. 360, 383; T. L. L. 1906 p. 376; *Kunhammad* v. *Narayan*, 12 M. 322 323; *Fullwood* v. *Fullwood*, 9 Ch. D. 176; *Anchor Trust* v. *Bell*, (1926) 1 Ch. 805=95 L. J. Ch. 564, 573; *Dominion Coal* v. *Maskionage*, 91 L. J. K. B. 679; *London* v. *Bull* 47 L. T. 413, 416; *Morpath cor* v. *Northumber land*, (1921) 2 Ch. 163; Kerr. Inj. 351.

(4) Halsbury Vol. 17 p. 213; *Sayers* v. *Collyer*, 28 Ch. D. 103; *Ranchhod* v. *Lalhe*, 10 B. H. C. 95, 97; *Ahmed bhai* v. *Munshi*, 16 B. 533, 535.

(5) Halsbury Vol. 17 p. 231; *Kelsey* v. *Doad*, 52 L. J. Ch. 34.

(6) Vide s. 55 of the Specific Relief Act. "When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of and also to compel performance of the requisite Act."

in the alternative form, but it must command something to be done, and with such positiveness as not to leave compliance with the mandate wholly at the pleasure of the persons enjoined (1). In England in earlier times, the Court of Chancery would not ordinarily on motion issue a mandatory injunction commanding an act to be done (2), but in some cases introduced a mandatory clause restraining order requiring defendant to remove the erection complained of on the ground that the effected the act he was restrained from doing by continuing such erection (3). And in a later case

(1) H. C. Joyce on Injunction § 98.

(2) "In Drewry Injunctions p. 260, it is laid down. It seems settled that equity has not jurisdiction to compel on motion, the performance of any substantial act. In 3 Dan. Chan. Prac. 1767, it is said: It is to be observed that the Court will not, by injunction granted on interlocutory application, direct the defendant to pull down a building which was clearly a nuisance to the plaintiff. *Lord Hardwicke*, in an anonymous cause 1 Ves. Jur. 140, restrained the further digging of a ditch, but refused on motion before answer, to order the part dug to be filled up. In *Hooper* v. *Boderick*, 11 Sim. 47, a preliminary injunction to restrain a tenant from discontinuing to keep an inn was dissolved on the ground that it was mandatory, the same as if he was commanded to keep an inn. In *Blackmore* v. *Glamorganshire*, etc *Co.* 1 Myl & K. 154, *Lord Brougham* after a review of the cases (p. 183) and quoting with approbation what *Lord Hardwicke* said in *Ryder* v. *Bentham*, that 'he had never known an order to pull down on motion and but rarely by decree refused so much of the injunction prayed for as directed the defendant Powell to fill up the collateral pond. The cases of *East India Co*, v. *Vincent*, 2 AtK. 83; *Spencer* v. *London*, *etc*, R. Co. 8 Sim 193, and of *Durell* v. *Pritchard*, L, R. 1 Ch. App. 244 are to the same effect. And in the last case *Lord Romilly* held that the Court upon final hearing, could not issue a mandatory injunction directing a wall to be taken down, yet the Lords Justices, on appeal, held that it had the power but that in the case before them it should not be exercised, and dismissed the appeal." *Rogers Locomotive* v. *Erie R. Co*, 20 N. J. Eqr. 379, 388.

(3) "In *Robinson* v. *Lord Byron* 1 Bro. C. C. 588 which is referred to as the vading case for mandatory injunction, *Lord Thurlow* ordered an injunction to restrain defendant from using his dams and other erections, so as to prevent the water from flowing to the complainants' mill in such quantities as it had ordinarily done before April 1785. The effect of this may have been to compel the removal of the part erected after 1785,.....In *Lane* v. *Nandigate*, 10 ves. 192, the object of the injunction was to compel the restoring of a stop-gate which was wrongfully removed. *Lord Eldon* would not order it to be restored but restrained the preventing the use of the water by complainant by the removal of a stop gate which was equivalent to an order to restore it, and was so intended. In *Rankin* v. *Huskesson*, 4 Sim. 13, the Court restrained the defendant from permitting an erection to remain; simply removing that by which the defendant continued the nuisance to be restrained. In *Mixborough* v. *Bower*, 7 Beav. 127, *Lord Langdale* ordered an injunction to restrain permitting the communication complained of (by which complainant's mine was floaded) to remain open. The injunction was to prevent the flooding of the mine by restraining or removing the means by which the defendant continued to do it. In the *North of England R. Co.* v. *Cearence R. Co.* 1 Coll. 507, the injunction prayed for was against maintaining a wall and after the rights of the parties had been referred to and settled in the Court of Exchequer *V. C. Brice* hesitated to grant the injunction, though he held, at p. 521, that mandatory injunction might be granted; yet he referred the case to *Lord Ch. Lynhurst.* who it is stated, granted the injunction in nearly the terms of the prayer; but whether it included this mandatory part does not distinctly appear. The case established the right of the complainant to build a bridge over the railway of the defendant, and to rest the supports of the scaffolding on the soil; and the mandatory prayer was that defendants should remove a wall placed on their grounds to hinder it. In *Greatrex* v. *Greatrex*, 1 Deg. & S. 692, the injunction was against preventing the plaintiffs from having access to the books of the firm, and against removing them from or keeping them at any other place than the place of

in England it is decided that a mandatory injunction, the object of which is to procure the removal of buildings should not restrain the owners from allowing them to remain but should in express terms direct their removal (1). So even in England where the jurisdiction to grant mandatory injunction was formerly questioned (2) is now granted as a matter of fact (3) and in a positive form (4). In *Attorney General* v. *Grand Junction Canal Co*, (5) *Joyce J.* said: "Now what relief is asked? Paragraph 4 of the claim at the foot of the statement of claim is plainly for a mandntory injunction in a form which is distinctly the decision of the court of appeal in *Jackson* v. *Normandy Brick Co*, (6), applies, where *Lord Lindley* (then Master of the Rolls) said with regard to orders sought to be obtained in the form of a short paragraph put in the statement of claim 'in future it would be better for the Court to say in plain terms what it means, and in direct words to order the buildings' as they were in that case 'to be pulled down and removed." In British India since the passing of the Specific Relief Act, the mandatory injunction is always in the direct form (7)

Now in England and in America the power of Courts of equity to issue the injunction in mandatory form is universelly recognized, and almost interminable illustration of its exercise could be given. But ordinarily mandatory injunction will not be granted until the final hearing on the merits (8), unless on a showing of a clear right and a case of necessity of extreme hardship. And with rare exceptions the mandatory form will not be decreed for other purposes than to restore and maintain a condition that has been wrongfully changed (9). The Court exercises its jurisdiction by granting mandatory

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the business of partnership, as the defendant had removed the books; this was equivalent to an order to restore them, but yet it did not command any act to be done. In *Hervey* v. *Smith* 1 Kay & J. 389, the injury was covering with tiles the chimneys from the butler's pantry of the complainant; *Lord Hatherly*, on the authority of *Robinson* v *Lord Byron*, granted an injunction the effect of which was and was intended to be to compel the defendant to remove the titles; but he declined to adopt the mandatory form, but restrained the defendant from doing any act to prevent the smoke from arising *Ibid*; H. C. Joyce § 98.

(1) *Jackson* v. *Normanby Brick Co.* 68 L. J. Ch. 407.

(2) *Lane* v. *Newgate*, 10 Ves. 192; *Blackmore* v. *Glamorganshire*, 1 M & K. 184; Kerr on Injunction 4 .

(3) *Hervy* v. *Smith*, 1 K & J. 392; *Smith* v. *Smith*, 20 Eq. 504; *Herman Logg* v. *Beau*, 26 Ch. D. 314; *Puddephat* v. *Leith*, (1916) 1 Ch. 202.

(4) *Jackson* v. *Normanby Brick Co.*, (1899) 1 Ch. 438; *Guiness* v. *Fitzsimons*, (1884) 13 L. R. Ir. 71; *Bidwell* v. *Holden* (1890) 63 L. T. 104; *Davies* v. *Gas Light and Coke Co.* (1909) 1 Ch. 708 C. A; *Att. Gen.* v. *Grand Junction Canal Co*, (1909) 2 Ch. 516=78 L. J. Ch. 684; *Kenarai* v. *Cory Bros* (1922) 1 Ch. 265: (1922) 2 Ch. 1=91 L. J. Ch. 452; Kerr on Injunction p. 40.

(5) (1909) 2 Ch. 516=78 L. J. Ch. 684.

(6) (1899) 1 Ch. 438=68 L. J. Ch. 407.

(7) Vide s. 55 Specific Relief Act and the illustrations given therein. In *Ratnaji* v. *Edalji*, 8 B. H. C. O. C. J. 181, 196 *Sargent* J. following old procedure granted mandatory injunction in indirect form.

(8) As regards mandatory Injunction on Introductory application, vide *Lane* v. *Newdigate*, 10 ves. 192; *Collison* v. *Warren*, (1901) 1 Ch. 815; 16 Bom, L. R. 506; 41 C. 436; 41 M. 208.

(9) Lewis & Spelling on Injunctions § 22.

injunction with the greatest possible care and in cases where the remedy by damages is inadequate for the purpose of justice (1).

But strictly speaking there is no real distinction between the conditions under which the Court grants mandatory and those under which it grants other injunctions (2) where the Court is satisfied that a wrong has been wilfully done, and that there has been no delay or acquiescence on the part of the plaintiff, an injunction will be granted as readily in a mandatory form as in any other (3). Although injunctions should be issued with care and caution, still it is

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(1) *Isenbury* v. *East India House*, 3 De G. J. & Sm. 263 ; *Colls* v. *Home*, (1904) A. C. 193, 212 ; *Kine* v. *Jolly*, (1905) 1 Ch. 504 ; *Petty* v. *Parsons*, (1914) 1 Ch. 722.

(2) *Smith* v. *Smith*, 44 L. J. Ch. 630 ; *Lawrence* v. *Horton*, 59 L. J. Ch. 440.

(3) *Smith* v. *Smith*, 44 L. J. Ch. 630 ; *Shiel* v. *Godfrey & Co*, (1893) W. N. 115. *Dent* v. *Auction Mort Co.* L. R. 2 Eq. 238. (where an injunction both preventive and mandatory was granted). "And in *Johnson* v. *Wyatt* the question before the Court involved the right to an injunction of either description. It is clear, I think, therefore, that the learned Judges had the remedy by mandatory in injunction contemplation when they laid the principle upon which the Court interferes." Per *Sargent* J in *Ratnaji Bottle wallah* v. *Edalji Bottolwallah*, 8 B. H. C. O. C. J 181 (187). In *Johnson* v. *Wyatt*, 33 L. J. Ch. 394, before the Lord Justice, the *Lord Justice Turner* says : "I think that at all events a plaintiff coming to this Court for its interference in a case of this nature is bound to show that the obstruction in such as will render the house occupied by him if not of less value, less fit, or the least substantially less comfortable, for the purposes of occupation." In *Isenburg* v *East India House Estate Company*, 33 L. J. Ch. 392, *Lord Westbury* said : "The remedy given by the Common Law for a grievance of this description is an action for damages—that action is liable to be resorted to so long as the cause of damage continues. Upon that ground, and by reason also of the damage in many cases not admitting of being estimated in money, this Court has assumed jurisdiction. Now this jurisdiction, so far as it pertakes of the nature of a preventive remedy—that is, prohibition of further damage, or an intended damage—is a jurisdiction that may be exercised without difficulty, and rests upon the clearest principles. But there has been superadded to that the power of the Court to grant what has been denominated a 'mandatory injunction', that is an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint was made. The exercise of that power is one that must be attended with the greatest possible caution. I think, without intending to lay down any rule, that it is confined to cases where the injury done to the plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum—" that is, according to his Lordship's remarks in *Jackson* v. *Duke of New castle*, 33 L. J. Ch. 698, "when the interference with the light and air renders it in a material degree unsuitable for the purposes to which it is applied." In *Durell* v. *Pritchard*, L. R. 1 Ch. App. 244 *Lord Justice Turner* says : "The authorities upon this subject lead, I think to these conclusions, that every case of this nature must depend upon its own circumstances, and this Court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld." "The language used by *Lord Westbury* and *Lord Justice Turner* is undoubtedly somewhat stronger than that employed by the learned Judges in the more recent decisions, 1866, of *Dent* v. *Auction Mort Co.* (L. R. 2 Eq, 238), *Marten* v. *Headon* (L. R. 2. Eq. 425) and *Straight* v. *Burn* (L. R. 5 Ch. App. 163) and shows doubtless that the tendency of the decisions is towards a less sparing exercise of the jurisdiction than formerly prevailed and that too on the ground that the interference with light and air is not merely a nuisance, but an interference with that which, as V. C. *Kindersley* says in *Marten* v. *Hendon*, is, a matter of principle, just as much part of the property of a man as his land or his house. and just as much entitled to protection as any other property." Per Sargent J in *Ratanji* v. *Edalji*, 8 B. H. C. D. C. J. 181 (189).

a mistake to suppose that extra care and caution are required where the form of injunction is mandatory (1). A mandatory injunction is a most exceptional remedy and one which is never to be applied except with the greatest safeguard for the prevention of waste as well as injustice (2). In granting a mandatory injunction when there is no proof of substantial damage, the Court will consider whether the defendant insists on their right to carry on the works objected to ; that is, whether they insist not only on maintaining the wrong which they have committed but on a right to do an increasing wrong in the future (3).

Mandatory injunction is not granted unless the defendants have done an act which has caused injury, and has given a right of action to a private individual (4). When a mandatory injunction is granted under s. 55 of the Specific Relief Act two elements have to be taken into consideration ; in the first place the court has to determine what acts are necessary in order to prevent the breach of obligation whether arising out of contract or tort, in the second place, the requisite acts must be such as the Court is capable of enforcing (5). Although the remedy by mandatory injunction is always in the judicial discretion of the court, and the circumstances of each case may be taken into consideration, still as a general rule, and in the absence of special circumstances, if the injured man comes into court on the first opportunity after the building has been commenced or on the first opportunity after he has seen that they will interfere with his rights, an injunction is granted. On the other hand, however, there may be circumstances which will lead the court to refuse the injunction. When a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building has been finished, and then asks the court to have it removed, a mandatory injunction will not generally be granted though there might be cases where it would be. Mere notice not to continue the obstruction not followed by legal proceedings is not sufficient for granting such relief (6).

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(1) *Smith* v. *Smith*. *ubi supra*.

(2) *Jagabandhu* v. *Rajmohan*, 78 Ind. Cas. 599.

(3) *Att Gen* v. *Acton Local Board*, 52 L. J. Ch, 108=22 Ch. D. 231.

(4) *Glosop* v. *Heston Local Board*, 49 L. J. Ch. 89.

(5) *Lakshmi* v. *Tara Prosann,o* 31 C. 944=8 C. W, N. 710. A mandatory injunction is granted where there is a breach of an agreement. *Ranchhod* v. *Lallu*, 10 B. H. C. R. 95. In a suit for mandatory injunction it is necessary to prove special injury or substantial damage before such a suit can lie, *Bhagwan Singh*, v. *Hari Singh* 109 Ind. Cas. 568=A. I. R. 1929 Lah. 73.

(6) *Benode Coomaree* v. *Saudaminy* 16 C. 252 ; see also *Ulagapha* v. *Chidamboran*, 29 M. 497 ; *Haji Syed* v. *Gulab Rai*, 20 A. 345. *Jamnadas* v. *Atmaran*, 2 B. 133 ; *Premji Jivan* v. *Haji Casseem* 20 B. 298 ; 'It is well established law in England that if a stranger builds on the land of another although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forgo his right or to an acquiescence in his building on the land. This is also the law in India, with the exception that the party buildlng on the land of another is allowed to remove the building." *Narayan* v. *Bhalagir*, 6 B. H. C. R. A. C. J. 80. "In this case *Sargent C. J.* did not follow *Benode Coomari* v. *Soudaminy* 16 C. 252 ; see also *Seth Lal* v. *Choudhuri*, 2 N. L. R. 4 ; *Abdu*

The granting or refusal of mandatory injunction is always a matter for the discretion of the Court which is asked to grant such an injunction (1),

There is no authority for the proposition that where the infringement of the right of privacy complained of can be adequately remedied by any means short of a total demolition of the constructions complained of, the Indian Courts, in the exercise of their powers as a Court of Equity, are under a legal compulsion to direct a complete demolition of the building, and nothing short of it, Section 55 of the Specific Relief Act, clearly negatives such a proposition. It only intended that the invasion of the right of privacy should be prevented and completely put an end to, even if it be without the complete removal of the new structure (2). Where one person has committed a wrongful act thereby invading the rights of another, he cannot in ordinary circumstances ask the court to sanction his wrongful act and allow him to pay monetary compensation to the person whose right he has infringed. If the act complained of is a continuing wrong, the person wronged is ordinarily entitled to an injunction against the person who has injured him. But there are certain exceptions to this rule : if the injury to the plaintiff's legal right is small and is one which can be adequately compensated by a small money payment, and the case is one in which it

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Hossain v, *Ram chandra*. 38 C. 688= 16 C. W. N. 313=12 Ind. Cas. 459 ; *Ardeshir* v. *Aimai*, A. I. R. 1929 Bom. 94 : "A mandatory injunction should be granted to pull down even a substantial building erected on a portion of a public high way after notice from plaintiff." 'Upon a motion for an interlocutory injunction to restrain an interference with light and air, the defendant gave an undertaking to pull down any building thereafter erected or proceeded with, and to abide by any order as to damages ; where upon the court made no order upon the motion. The defendant subsequently completed the buildings. At the trial of the action, when a mandatory injunction was asked for, it was proved that the defendants' buildings obstructed the plaintiffs' ancient lights. *Held* that it was a proper csse for the court to grant a mandatory injunction, and not to award damages in lieu thereof *Greenwood* v, *Hornsey*, 55 L. J. Ch. 519=33 Ch, D. 491. In *Rewa* v. *Virjvallabh*, 6 Bom. L. R. 41 *Jenkins C. J.* said ; "Now it is well established as a rule by which courts are guided in reference to the granting of mandatory injunction that though it is within the power of a court to grant a mandatory injunction even if the building complained of has been completed, still the Court is reluc ant to make an order for the removal of a building already finished at some considerable cost and trouble unless it be clear that material damage would otherwise ensue. It is by reference to this rule that the point before us should be decided, and we are under the impression that these considerations were not closely present on the minds of the Lower Court when they dealt with this part of the case."

(1) *Shibsaran* v. *Amir*, A. W. N. 1900, 191. The fact that the plaintiff has given notice of objection to what is threatened before it has been carried out does not make the injunction a thing of course. *Shamnagger Jute* v. *Ram Narain*, 14 C. 189 (200).

(2) *Fazal Huq* v. *Fazal Huq* A. I R. 1928 All. 201=26 A. L. J. 49=107 Ind. Cas. 584 ; see also *Bihari* v. *Ajnas*, 6 W. R. 86 ; *Abdul Hakim* v. *Ganesh Dutt*, 12 C. 323 ; *Bala* v. *Maharup*, 20 B. 788 ; "Where the findings of the lower Court showed that the plaintiff was entitled to have his right of privacy observed, the High Court granted a mandatory order compelling the defendant to permanently close the door or window complained of" *Lachmi Prasad* v. *Jamna Prasad*, 10 A. 162=A. W. N. 1887, 295 ; see also *Goor Das* v. *Monohor*, 2 Agra. 269. A mandatory injunction to preserve a right to light and air will not be granted unless there has been a substantial, material or serious infringement of the right. *Beadal* v. *Perry*, 19 L. T. 760=17 W. R. 185.

would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given, especially when the plaintiff delays to protest against the injury to bring a suit. There may be cases in which though the above named requirements exist the defendant, by his conduct, as for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiffs' rights, disentitles himself from asking that damages may be assessed in substitution for an injunction (1).

Before a suit for mandatory injunction can be filed there must be an obligation on the part of the defendant to perform certain acts. Where therefore it is not alleged that the other party has committed a breach of any obligation on his part and the case is merely one of trespass, the plaintiff's remedy is to file a suit for possession of the land and a suit for mandatory injunction cannot be filed without suing for possession of land (2).

Relief by way of mandatory injunction is confined to cases of probability of extreme or very serious damage (3). In a suit for injunction against a co-owner relating to the erection of structures on the joint property, if the property is not partible, there is no occasion for the plaintiff to show any special damage. It is sufficient for him to show that he has been deprived of the user of the property as it stood originally (5).

The fact that a building which obstructs ancient lights has been completed before writ issued, will not prevent the granting of mandatory injunction for its removal. The material point for consideration is the state of the new building when the plaintiff first complains (4).

The Court in granting or refusing to grant a mandatory injunction, will consider how far if granted it would affect the defendant. But in the first place, the court must consider the plaintiff's position, whose rights have been interfered with and is bound to protect his rights unless by so doing

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(1) *Dawson* v. *Princess*, 6 R. 456=112 Ind. Cas. 431=A. I. R. 1928 Rang 268 ; *Shelpher* v. *City of London Electric Light* (1895) 1 Ch. D. 287 ; *Abdul* v. *Ram*, 38 C. 687=16 C. W. N. 313 ; *Behari lal* v. *Sheolal*, 3 N. L. R. 114. The defendant in an action to restrain him from building so as to darken the plaintiff's lights, upon receiving notice of motion for injunction, put on a number of extra men, and by working day and night ran up his wall to a height of nearly forty feet before receiving notice that an *ex parte interim* injunction had been granted. It appeared to be a question of some nicety whether the lights were ancient lights. *Held*, that as the defendant had endeavoured to anticipate the action of the Court by hurrying on his building, what he had erected ought to be at once pulled down, without regard to the ultimate result of the action. *Daniel* v. *Ferguson* (1891) 2 Ch. 27.

(2) *Ewin Shank* v. *U. Po Nyun* 5 Rang. 404=104 Ind. Cas. 139=A. I. R. 1927 Rang. 257.

(3) *Darnell* v. *Pritchard*, 35 L. J. Ch. 223 ; *Spraling* v. *Clarson*, 17 W. R. (Eng.) 518 ; *Kelk* v. *Pearson*, (1871) 6 Ch. App. 809 ; *Smith* v. *Smith*, L. R, 20 Eq 500 ;

(4) *Yusuf Ali* v. *Mahomed Din*, 104 Ind. Cas. 563=28 P. L. R. 590=A. I. R. 1927 Lah. 718.

(5) *Lawrence* v. *Horton*, 59 L. J. Ch. 440 ; *Goodson* v. *Richardson*, 43 L. J. Ch. 790 ; *Smith* v. *Smith*, 44 L. J. Ch. 630 ; *Durell* v. *Pritchard*, 35 L. J. Ch. 223 ; *Kelk* v. *Pearson* 6 Ch. 813 ; *Morris* v. *Grant*, 24 W. R. Eng. 55 ; *Att Gen* v. *Parish*, (1913) 2 Ch. 444 ; *London County Council* v. *Hulter*, (1925) 1 Ch. 626= 95 L. J. Ch. 1 ; *Shiel* v. *Godfrey* (1893) W. N. 115.

it should inflict such hardship upon the defendant as would amount to injustice (1). The assistance afforded by the Court of Chancery by way of mandatory and prohibitory injunction in aid of specific performancee is a jurisdiction the exercise of which is eminently discretionary, and ought to be guided and measured by what substantial justice requires as between parties (2). Where serious injury will be inflicted upon property which is the subject of an action unless the defendant continues to act in a particular manner, which he can do with comparatively little trouble and risk, but which the plaintiff cannot do at all, as where a colliery will be drowned unless the person in possession under an agreement for a lease continues to pump, the interim preservation of the property will be secured by the issue of a mandatory injunction, restraining the defendant from ceasing to act in that particular manner—e. g. to pump out the colliery'' (3).

In order to obtain a mandatory injunction, the right, to restrain the violation of which, the injunction is asked for, must be clearly made out ; also that there is a present want to use that right, with which the obstruction complained of is an interference (4). When the Court is asked to interfere by injunction to restrain the obstruction of light and air to a dominant tenement, the question to be determined is—is the obstruction such as seriously to interfere with the comfort or enjoyment of the owners of the dominant tenement, or such as to cause a material injury to it—an injury which cannot be completely compensated by damages. The Court will in such cases interfere, as well by mandatory as by preventive injunction, provided that in the circumstances of the case there is nothing inequitable in putting in force the former remedy. The Court will look not merely to the use to which rooms, in a dwelling house from which light is obstructed, are actually put at the time of the obstruction, but also to the use to which they may be put for all reasonable purposes of occupation (5).

In *Magan lal* v. *Chhota lal* (6) the plaintiff sued to restrain the defendants from erecting a certain door. The plaint also contained a prayer for "such other relief as the Court might think fit." After filing the plaint the plaintiff applied for an *interim* injunction pending the hearing of the suit, which however, was refused. The defendants thereupon erected the door, and at the hearing contented that in as much as the plaint prayed only to prevent the erection of the door and not for its removal when erected, the plaintiff could not obtain the latter relief in this suit, but must file a fresh suit. The lower Court dismissed the suit, holding that on the erection of the door a new and different cause of action had issued for which a fresh suit must be filed. On appeal the High Court in reversing the judgment of the lower courts said : "We

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(1) *Myers* v. *Catterson*, 59 L. J. Ch. 315=43 Ch. D. 470.
(2) *Low* v. *Innes*, 4 De G. J. & S. 286.
(3) *Strelley* v. *Pearson*, 49 L. J. Ch. 406.
(4) *Bradburn* v. *Morris*, 3 Ch. D. 812
(5) *Ratnaji* v. *Edalji*, 8 B. H. C. O. C. J. 181.
(6) 26 B. 136.

cannot agree with that view which the lower courts have taken of the plaintiff's claim. The suit was rightly framed in the light of the circumstances which existed when it was brought. But it was the defendants' subsequent conduct which rendered it necessary that the plaintiff should be given, as prayed for in his plaint, such other relief as the court might think fit. The plaintiff was entitled under the circumstances to a mandatory injunction, if he proved the right alleged in his plaint. We therefore, reverse the decree and remand the case for a rehearing and disposal on the merits by the Court of first instance. If the Court thinks that the plaintiff has made out a case for a mandatory injunction it should grant it."

Where a plaintiff sued the defendant for a perpetual injunction restraining him from building a house on a parcel of land alleged to be within the plaintiff's *putni* and let out to the defendant as a mere tenant at will, and the court below had granted a temporary injunction *pendente lite*. *Held* on appeal that the temporray injunction must be maintained upon the plaintiff undertaking to indemnify the defendant in the event of the dismissal of his action. *Held further*, that in such a case matters should be allowed to remain as far as possible in *statu quo*, and that the defendant must not be placed in a position to say afterwards upon the basis of his own act that on equitable considerations demolition should not be insisted upon (1). Where the defendants have thought fit to carry up the wall since the decree of the Court below, notwithstanding an appeal to the High Court, a mandatory injunction was ordered to be issued directing them to remove it (2). Similary in *Gajadhar* v. *Kishori Lal* (3) *Tudball J.* observed: "It is not a case for damages as the plaintiff came into Court at once when the disturbance was threatened and the defendant completed his structure pending the suit at his own peril. The result is that we grant the plaintiff a mandatory injunction directing the lowering of the roof between the western wall of his new room and the plaintiff's eastern wall as laid down above.

In *Glossop* v. *Heston and Isleworth Local Board* (4), the court held that, under the circumstances and in view of the necessary duration of the works contemplated, the delay on the part of the Local Board to carry out their works did not amount to such a refusal as to entitle the plaintiff to a mandatory injunction, and expressed a doubt whether, if there had been such a refusal or any *mala fide* delay, a mandatory injunction to carry out considerable public works would be granted at the suit of a proprietor who would receive benefit from their execution (5).

A mandatory injunction will be granted to remove an obstruction of an easement to light and air where the character of the obstruction is such that

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(1) *Chandra nath* v. *Sri Gobinda*, 6 C. W. N. 308.

(2) *Kadarbhai* v. *Rahimbhai*, 13 B. 674 (677).

(3) 13 A. L. J. 385 (393).

(4) 12 Ch. D. 115.

(5) *Municipal commissioners*, v. *Branson*, 10 M. 201. 210.

its consequence is to darken the plaintiff's house so as to make it uncomfortable and in part useless. In such a case damages would not be an adequate remedy (1). A mandatory injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made therein by time (2). It is not necessary to show an actual damage had been caused in a particular case before a mandatory injunction would issue (3).

A suit would not lie for damages for non-compliance with the mandatory injunction, to compel the performance of which the plaintiff had his remedy in execution (4).

Mandatory Injunction on Interlocutory application—A mandatory injunction can be granted on an interlocutory application as well as at the hearing (5). But the Court is very reluctant upon interlocutory application to grant a mandatory injunction (2). So in England interlocutory mandatory injunction was granted to pull down buildings erected by the defendant after the issue of a writ in an action for an injunction of which the defendant had notice, though he succeeded in evading service of the writ (7). A defendant having after express notice erected a porch in breach of a covenant entered into by him, was upon interlocutory motion ordered to remove the erection, although the same had been completed before the filing of the bill (8). Now the question is whether in British India Courts have the power by virtue of order XXXIX, rule 2 of the Civil Procedure Code, to issue temporary injunction in a mandatory form. This question was answered in the negative by *Beaman J* in *Rasul Karim* v. *Pirubhai Amirbhai* (9), while *Shah J* in the same case could not agree with the opinion of his learned brother. Two other judges of the Bombay High Court took a different view from *Beaman J* in *Champsey Bhimji & Co.* v. *Jumna Flour Mills Co*, (10). The description of temporary injunctions in sec-

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(1) *Muthu Krishna* v. *Somalinga*, 36 M. 11.

(2) *Navroji* v. *Dastur*, 28 B 20.

(3) *Hargulal* v. *Dwarka Prosad*, 1 A. L. J. 239=A. W. N. 1904, 101.

(4) *Jawatri* v. *Emile*, 13 A. 98.

(5) *Halsbury Vol.* 17 p. 223 citing *Robinson* v. *Lord Byron*, 1 Bro. C. C. 588 ; *Lane* v. *Newdigate*, 10 Ves. 192 ; *Hervey* v. *Smith*, 1 K. & J. 389 ; *Bonner* v. *Great Western Ry*, 24 Ch. D. 1, 10 ; *Cohen* v. *Poland*, (1887) W. N. 159; *A. G.* v. *Metropolitan Board of Works*, (1863) 1 Hem. & M. 298, 312, 321 ; *Hermann* v. *Bean*, 26 Ch. D. 314 ; *Collison* v. *Warren* (1901) 1 Ch. 815 ; *Puddephatt* v. *Leith*, (1916) 1 Ch. 202 ; *Bonner* v. *G. W. Ry*. 24 Ch. D. 10,

(6) *Turner* v, *Spooner*, 1 Dr. & Sm. 467 ; *Gale* v. *Abott*, 8 Jur. N. S. 987 ; *Blakemore* v. *Glamorgan shire*, 1 My & K. 154 ; *Johnston* v. *Royal Courts*, (1883) W. N. 5 C A ; *Cuff* v. *London County Land* (1912) 1 Ch. 440 ; *Dover* v. *Dover*, 11 L. G. R. 426 ; Kerr on Injunction p. 41 ; *Anon*, 1 Ves. J. 140.

(7) *Von Goel* v. *Hornsey*, (1895) 2 Ch. 774.

(8) *Morris* v. *Grant*, 24 W. R. 55.

( ) 24 Ind. Cas. 625=38B. 381=16 Bom. L. R. 288.

(10) 28 Ind. Cas. 121=16 Bom. L. R. 566. In 16 Bom. L. R. 288. Beaman J. said : "I greatly doubt whether mofussil Courts of this country has any jurisdiction to grant mandatory injunction before hearing." A court has power to grant a mandatory interim injunction but it should exercise this power only in very exceptional circumstances. *Firm of Haroon Bros* v. *Cowasji Bezonji* 94 Ind. Cas. 840=A I R 1926, Sind 201. A temporary mandatory injunction can be issused by a Court only under its inherent powers, under section 151 C. P. Code. *Gopayya* v. *Ankayya*, 93 Ind. Cas. 566=A I R 1927 Mad. 40.

tion 53, Specific Relief Act, does not exclude injunctions of a mandatory nature and in *Israil* v. *Shamset Rahaman* (1). Upon an application for an *interim* injunction, pending the disposal of a suit, it was ordered that defendant should not only be restrained from the further erection of the building but that he should pull down so much of it as he had erected after he became aware of the institution of the plaintiff's suit (2). So temporary injunction in a mandatory form is granted, where according to the discretion of the court it should be granted at once (3). So the court will, upon an interlocutory application, when no substantial question remains to be tried, grant a mandatory injunction to rebuild a staircase where rooms, together with the use of the stair case, have been demised to the plaintiff, and the lessor has pulled down the stair case (4). Whether or no an injunction is in mandatory form or a true injunction in mandatory form is within the scope of Order XXXIX, it never is if it creates a new set of conditions (5).

"The term mandatory injunction" says Dr. Pomeroy "in strictness, is confined to interlocutory or preliminary injunctions. Where on a final hearing in a case of nuisance, or interference with easements, or continued trespass analogous to nuisance, the relief is granted compelling the defendant to remove his obstructions or erections, and to restore the plaintiff to his original condition, and thereby to end the wrong, the remedy is in fact an ordinary decree for an abatement, and is in no proper sense an injunction of any kind. But in these and similar cases the preliminary injunction, while purporting simply to restrain the wrong, and while negative in its terms (6), may be so framed that it restrains the defendant from permitting his previous wrongful act to operate, and therefore virtually compels him to undo it by removing the obstructions or erections, and by restoring the plaintiff to its former condition. Such an injunction is termed mandatory, and resembles in its effect the restorative interdict of the Roman law. It is used where the injury is immediate, and pressing and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff, since an order directly compelling an abatement of the nuisance, or a removal of the obstructions cannot be made upon interlocutory motion. The rule is fully established, at least by the English decisions, and is not controverted by American authority, that in such cases, where the facts are clearly established and the injury is real, and the plaintiff acted promptly upon his acquiring knowledge of the defendant's proceeding, a preliminary mandatory injunction may be granted, although the act complained of was fully completed before the suit

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(1) 21 Ind. Cas. 861=41 C. 436=18 C. W. N. 176=19 C. L. J. 47.

(2) *Kandaswami* v. *Subramania* 41 Ind. Cas. 384=41 M. 208.

(3) *Allport* v. *Securities Corporation*, 64 L. J. Ch. 491.

(4) *Ibid.* A mandatory injunction in an interlocutory form has been granted where the defendant, with express notice, had committed a clear violation of an express contract. *Morris* v. *Grant* 24 W. R. 55; so also in a case where the act done is a simple and summary one which can be easily remedied. *Hervey* v. *Smith* 1 K. & J. 389. Halsbury Vol. 17 page 234.

(5) *Lahore* v. *Bombay*, 67 Ind. Cas. 742.

(6) Now all injunctions are in direct form.

was commenced. It should be observed however, that no other equitable remedy is more liable to be defeated by acquiescence, or by delay on the plaintiff's part from which acquiescence may be inferred. The cases require of the plaintiffs a promptness in objecting and in taking steps to enforce his objection, upon receiving notice of the defendant's structures or erections which are sought to be restrained, if the circumstances are such that the defendant would be unnecessarily prejudiced by the plaintiff's delay (1)."

Delay or acquiescence—If the plaintiff is guilty of no acquiescence or delay, he will be entitled to a mandatory injunction, though the works complained of may have been completed before the filing of the suit (2). Promptness required of a party seeking for a mandatory injunction but a mere delay which can be accounted for satisfactorily is not a bar, unless by such delay any mischief has been done to the defendant (3). The court will not restrain a company from partially diverting the stream of water of a navigable river, and thereby occasioning by the works the obstruction of a private road, if the plaintiff is held to have had notice of the intended work and has acquiesed for some time as for eighteen months (4). So a delay of seven months, coupled with an offer at one time by the plaintiff to accept a sum as compensation, and the fact that very great damage would be caused to a defendant by an injunction, will disentitle a plaintiff to a mandatory injunction (5). But when the defendant's building which obstructed the access of light and air to the plaintiff's window began in May and the plaintiff instituted his suits in July, held that *prima facie* the plaintiff was entitled to the removal of the obstruction and that it was for the defendant to show that the right had been lost by acquiescence (6).

In *Ghansham* v. *Morobá* (7) *Farran J* said : "The lowering of it to the height of the old sloping roof would be an exercise of the mandatory powers of the court, and out of the scope of the defendant's undertaking. Section 55 of the Specific Relief Act in express terms makes this exercise of our mandatory powers discretionary. The plaintiff complained of the defendant's buildings as soon as the latter began to build : but though he would readily have seen the defendant's building plans, took no legal steps to restrain his building until the ground and first floors had been completed. Prompt action is very essential in these cases, if an injunction is the desired remedy.....I think that it is not a

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(1) Pomeroy's Equity Jurisprudence § 1359.

(2) *Godson* v. *Richardson*, 43 L. J. Ch. 790=L. R. 9 Ch. 221.

(3) *Gale* v. *Abbot*, 8 Jur. N. S. 987 ; *A. G.* v. *Colney Hatch Lunatic Asylum*, 4 Ch. App. 146 ; *Hogg* v. *Scott*, L. R. 18 Eq. 444 ; *Wood house* v. *Newry Navigation* (1898) 1 Ir. 161 ; *Worcester College* v. *Oxford Canal*, 81 L. J. Ch. 1 ; Kerr Inj. 43 ; Halsbury Vol 17 p. 216-

(4) *Illingworth* v. *Manchester and Leeds Ry* Co, 2 Rail Cas. 187.

(5) *Senior* v. *Pawson*, L. R. 3 Eq. 330; see also *Gaunt* v. *Fynney*, 8 Ch. App. 8 ; *Smith* v. *Smith*, 20 Eq. 503 ; *Gaskin* v. *Balls*, 13 Ch. D. 328 ; *Worcester College* v. *Oxford Canal*, 81 L. J. Ch. 1 ; *Rogers* v. *Great Northern Ry.*, 53 J. P. 484 ; *Att. Gen* v. *Grand June Canal*, (1909) 2 Ch. 517=78 L. J. Ch. 681 685.

(6) *Nandkishor* v. *Bhagubhai*, 8 B. 95.

(7) 18 B. 474 (492) ; see also *Benode Comaree Dassee* v. *Soudamineey*, 16 C. 252 ; *Ulagappam Ambalam* v. *Chidambaram*, 29 M. 497 ; *Syed* v. *Gulab*, 20 A. 345.

case in which we should grant a mandatory injunction as to the wall built before suit." Where the tenant of an agricultural holding, constructs a building of a character not suitable to such holding, with the knowledge of the landlord, such landlord is bound not only to object but to take legal steps to stop the progress of the work; and, in default of doing so, the landlord is not entitled to a mandatory injunction for the demolition of the building (1).

If the defendant has acted in a high-handed and unfair manner, the plaintiff is entitled to an injunction. Mere delay is no bar to a legal remedy, unless it amounts to a waiver or an abandonment of the right sought to be enforced, or to acquiesce in the act complained of, and, where there is a vested right or interest in any party, he cannot waive or abandon that right except by an act equivalent to an agreement or a license (2). When a plaintiff co-sharer sought demolition of structure over a party wall, the relief was refused as the suit was brought eight years after the structure was built (3). Where an applicant who was entitled to the benefit of a restrictive covenant, restricting the defendant from opening more windows and mokhases in a wall, silently kept quiet till the building was completed and did not take any step to prevent such cause by injunction but stood by and allowed the construction of the windows and openings without any objection. *Held* that the case was not one in which Court should exercise discretion and the applicant lost the right which he might have had and the Court could not grant him the relief (4).

No general rule can be laid down as to the cases in which a mandatory injunction should be given to a co-sharer who brings a suit for such injunction and who does not sue until sometime after the completion of the building complained of (5). Certain co sharers sued for demolition of some tiled buildings erected by other co-sharers without the consent of the plaintiff on common land. The suit was brought some months after the completion of the buildings, the construction of which the plaintiffs were held to be cognizant of. It was not shown that the plaintiff suffered any special damage from the building, or that the encroachment was such that they would not be compensated for it. Held that this was not a case in which a mandatory injunction should be granted (6). The plaintiff sued (*inter alia*) for the demolition of a building erected on property which has been found to belong jointly to the parties. The suit was instituted about a year and a half after the completion of the building, but the lower appellate court had found that the plaintiff though he lodged no complaint, had from the first, protested against the erection and that the building

(1) *Ulagappan* v. *Chidambaram* 29 M. 497.

(2) *Murarilal* v. *Balkissen*, 95 Ind. Cas. 636=A. I. R, 1926 Nag. 406; see also *Gale* v. *Abbot*, 8 Jur. N. S. 987; *Woodhouse* v. *Newry Navigation* (1898) 1 Ir. R. 161; *Worcester* v. *Oxford Canal*, 81 L. J. Ch. 1.

(3) *Ata Mahomed* v. *Nur Ahmed*, 89 Ind. Cas. 746=A. I. R. 1925 Lah. 642.

(4) *Dhanulal* v. *Bansidhar*. A. I. R. 1929 Pat. 349; see also *Shama Charan* v. *Babulal*, A. W. N. 1904 (70), *Gost* v. *Clark*, 16 W. R. (Eng) 569; *Sparcing* v. *Clarson*, 17 W. R. (Eng) 518.

(5) *Kaushal Singh* v. *Ganesh*, A.W.N. 1901, 53.

(6) *Ganesh* v. *Kaushal*, A. W. N. 1900 55.

blocked one of the lower doors of the plaintiff's house. *Held* that the circumstances of the case did not warrant interference with the mandatory injunction granted by the lower Court in the plaintiff's favour (1). In any instance, in which a case for injunction has been made out, if the plaintiff by acts or laches, disentitled himself to the injunction the court may award damages (2). Where the plaintiff gave notice to the defendant to remove the obstruction caused to the light and air to which the plaintiff was entitled, two days after the completion of the obstruction, held that there had not been such delay on the part of the plaintiff as to disentitle him to the mandatory injunction applied for (3). Where the delay has not prejudiced the defendant in any way, the plaintiff's legal right will continue until it is barred by limitation, and the discretion of the court as to mandatory injunction should not on account of the delay on the part of the plaintiff, be exercised in the defendant's favour (4). Mandatory injunction is an equitable relief and one of the principles on which such relief is granted is that the plaintiff must shew diligence and must not be guilty of laches (5).

Balance of convenience : The Law in India as to the grant of mandatory injunction is laid down in section 55, Specific Relief Act, and according to the wording of that section, the court may in its discretion grant an injunction (6). In granting or withholding an injunction, a Court should in exercise of a judicial discretion weigh the amount of substantial mischief done or threatened to the plaintiff and compare with that which the injunction, if granted, could inflict upon the defendant (7). Where the injury done is capable of being fully and abundantly compensated by a pecuniary sum, while the inconvenience to the other party from granting an injuction would be serious, the Court will not interpose by way of mandatory injunction, but will accord damages by way of compensation for the injury (8). *Sir John Jessel M. R.* in 1875 expressed the opinion that the same caution, neither more nor less, ought to be exercised in granting mandatory injunctions as in granting preventive injunction (9). Where the plaintiff's neighbour re-built his house in such a manner as to completely darken some of the principal rooms of the plaintiff's house, thereby rendering it un.suit-

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(1) *Raja Ram* v. *Moti Ram*, A. W. N. 1906, 221, see also *Haji Syed* v, *Gulab*, 20 A. 345=A. W. N. 1893 (suit was brought after two years of the completion of the building).

(2) *Beharilal* v. *Sheolal*, 3 N. L. R. 114.

(3) *Provabutty* v. *Mohendra*, 7 C. 453.

(4) *Jamnadas* v. *Atmaram*, 2 B. 133.

(5) *Becharam* v. *Benode*, A. I. R 1928 Cal. 410, *Krishna Pillai* v, *Kilasathammal*, 108 Ind. Cas. 69=A. I. R. 1928 Mad. 810; see also *Kazim* v. *Ram*, A.I.R 1929 A. 877.

(6) *Dawson* v. *Princess*, 6 R. 456= 112 Ind. Cas. 431=A. I. R. 1928 R. 268.

(7) *Shamnaggar Jute Factory* v. *Ram Narain*, 14 C. 189; *Kartar Singh* v. *Chhaju*, 108 Ind. Cas. 171.

(8) Kerr on Injunction p. 41 citing *Insenburg* v. *East India House*, 3 De. G. & S. 263 ; *Stanley* v. *Shrewsbury*, 19 Eq. 619 ; *National Provincial*, &c. *Co.* v. *Prudential Assurance Co*, 6 Ch. D. 709 ; *Allen* v. *Seekham*, 11 Ch. D. 798 ; *Selfer* v. *City of London*. (1895) 1 Ch. 322 ; *Cooper* v. *Ladler* (1903) 2 Ch. 341 ; *Coles* v. *Home*, (1904) A. C. 193 ; *Railey* v. *Railey*, *Halifax*, 97 L. T. 278 ; *Kine* v. *Joley* (1905) 1 Ch. 504 ; *Bailey* v. *Holborn* (1914) 1 Ch. 603 ; *Sharp* v. *Harrison*, 91 L. J. Ch. 442 ; *Wills* v. *May*, (1923) 1 Ch. 319.

(9) *Smith* v. *Smith*, L. 20 Eq. 500. *Jessel M. R.* "As to mandatory injunction, their hisory is a curious one."

able for occupation during the day without artificial light, held that the grant of a mere money compensation cannot be an adequate redress for the injury, and the Court should grant a mandatory injunction ordering the defendant to pull down as much of his house as would stop the injury (1). The probability that the defendant will suffer more by the demolition of his house than the plaintiff, if his claim could be reduced to money, would suffer by being awarded merely a money compensation, is no ground for depriving the plaintiff, except under special circumstances, of a mandatory injunction to which he is otherwise legally and equitably entitled. Under the above circumstances, the plaintiff's legal right to relief would continue until it is barred by limitation, and the discretion of the Court as to mandatory injunction should not, on account of his delay in suing, be exercised in the defendant's favour, unless the delay is shown to have in any way prejudiced the latter (2). Where upon a balance of convenience, damages will be an adequate remedy, relief by way of mandatory injunction should not be granted (3).

Cases in which mandatory injunction can be granted—Where one of the co-owners of a *kucha* sought to put up a chabutra which would have the effect of excluding the others from using it and the latter having sued for an injunction the other party denied their title. *Held* that it was a proper case in which an injunction should be granted restraining the erection of chabutra (4). One G owned a house in Ludhiana, P and D erected a house at the back of G's house leaving only a space of five and a half feet between the two buildings in contravention of specific condition of the sale deed under which they purchased the site of the house. G instituted a suit for perpetual injunction claiming demolition on the ground that certain easement, claimed not on the ground of prescription but on an implied grant, had been infringed. *Held*, that it was not a case in which mandatory injunction could be granted (5). L added a gallery to his house which overhung V's open land. When G's gallery was complete V served a notice on L objecting to the encroachment, but L put roof over the gallery. In a suit by V for mandatory injunction, *Held*, in the absence of dishonesty of purpose or knowledge of trespass, the case did not call for a mandatory injunction, but was one where substantial monetary compensation would suffice (6). The court will not enforce against an assignee of a covenant or an affirmative covenant involving the expenditure of money on land, whether such assignee takes with or without notice. In exercise of its discretion as to the grant of a mandatory injunction the court should have regard to principles laid down by courts of England

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(1) *Jackson* v. *Duke of Newcastle* 33 L. J. Ch. 698.

(2) *Lindsay Petroleum* v. *Hurd*, L. R. 5 C. P. 239 ; *Jamnadas* v. *Atmaram*, 2 B. 133.

(3) *V. R. Ry* v. *Gopal Row* 23 Ind. Cas. 785.

(4) *Ali Jan* v. *Mahomed Ali*, 133 Ind. Cas. 872 = 32 P. L. R. 694.

(5) *Dinonath* v. *Ganga*, A. I. R. 1924 Lah. 654.

(6) *Lalji* v. *Vishvanath*, A. I. R. 1929 Bom. 137 = 31 Bom. L. R. 126.

in this connection (1). Contracts to do personal services involving skill and fidelity are not generally protected by means of injunctions, as the order is not easily enforceable (2). Where a defendant's putting up a wall completely obstructed plaintiff's four *moris* in spite of the latter's warnings, the injury is of a serious character which cannot be remedied by damages or by other relief except the demolishing of such part of the wall as obstructed the right (3). Where a lower riparian owner has been enjoying an uninterrupted flow of water for more than 30 years and then the upper riparian owner put up a dam which interfered with plaintiff's supply of water, he is entitled to sue for an injunction for the removal of the dam (4). A co-sharer has a right in every portion of the land and the other co-sharers are not entitled to build on the common land without the consent of the former. Where a co-sharer brings a suit for restraining from building on the common land and the suit is dismissed and the defendant without waiting for the result of any appeal that might be preferred by the plaintiff built on the land, *held* that if the plaintiff succeeded on appeal he was entitled to injunction demolishing the structure erected by the defendant. The defendant could not resist the claim by asking the plaintiff to sue for partition (5). In the case of a joint wall where one of the parties encroached on the other's right by four inches, the proper remedy is not to direct the encroachment to be pulled down but to grant a declaration that the encroachment belonged to other party (6).

As every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land to the detriment of the latter in case of breach of such obligation it is open to the court to grant a mandatory injunction for the removal of the nuisance under s. 55 of the Specific Relief Act (7). Where nuisance and damage are due solely to the overhanging branches of defendant's tree on plaintiff's land, mandatory injunction for removal would afford sufficient protection to the plaintiff. But where injury has been and is likely to be caused by the penetration of the roots into the foundation of the plaintiff's building and wall, a court would under section 55 of the Specific Relief Act, compel the defendent to remove not merely the root but the trees themselves (8).

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(1) *Chaturbhuj* v. *Mansukhram*, 27 Bom. L. R, 73=86 Ind. Cas. 19=A. I. R. 1925 Bom. 183.

(2) *Deotsche* v. *Firm of Pestonji*, 89 Ind. Cas. 321=A. I. R. 1925 Sind. 347.

(3) *Atma Ram* v. *Nanak*, 1923 Lah. 593.

(4) *Bali Ram* v. *Bela Singh* 1923 Lah. 599; *Belbhadra* v. *Barkat*, 11 C. W. N. 85=4 C. L. J. 370.

(5) *Hayat Ali* v. *Tajul Nissa*, 71 Ind. Cas. 557=1923 Lah. 205.

(6) *Daudkhan* v. *Chandulal*. 1923 *Bom*. 370.

(7) *Bhudeb* v. *Kalachand*, 34 C. L J. 315; see also *Lakhi* v. *Tara* 31 C. 944=8 C. W. N. 710.

(8) *Lakhmi* v. *Tara Prosonna*, 31 C. 944=8 C W. N. 710; see also *Hari Krishna* v. *Shankar*, 19 B. 420; *Vishnu Jagannath* v. *Vasanta*, 43 B. 164=20 Bom. L. R. 526=47 Ind. Cas, 629; contra *Ramlal* v. *Dalgorjan*, 5 A. 369 *Somesh* v. *Chunilal*, 44 B. 605=57 Ind. Cas. 544 (where 19B 420 and 20 Bom. L. R. 826 distinguished); *Kempayya* v. *Bettaiya*, 3 Mys L. J. 143.

The Mahomedans have an inherent right to call out the *azan* from the mosque. *Held* that the noises made by the defendants (Hindu) collectively and continuously at the time of calling out the *azan* for the sole purpose of frustrating the object of the call constituted a nuisance and it was no answer to the suit that the little noise made by each of the defendants personally did not amount to a nuisance. The plaintiffs (Mahomedans) were entitled to the injunction prayed for because the nuisance caused by the defendants was not a reasonable exercise of their rights and was an infringement of the rule of "give and take, live and let live" (1).

Where the footings of a wall have been in existence for a great length of time, it is fair to presume that they were placed within the limits of the land belonging to the owner of the wall. Where a trespass by way of building a wall on the footings of plaintiff's wall has been carried, not as the result of long and continuous work, but of work completed quietly and promptly, and where the trespass is one which still continues and will continue so long as the wall is permitted to remain in its present site, and where there has been no delay or acquiesence on the part of the plaintiff who instituted the suit after the completion of the wall. *Held* that the proper remedy is by way of mandatory injunction, and that, in accordance with what is provided in section 55, Specific Relief Act, it will be right to compel the defendant to pull so much of the wall as is an encroachment of the plaintiff's land (2). Where in consequence of the defendant having raised the height of a tank bund and narrowed the sluice, the neighbouring land of the plaintiffs was rendered non liable to submersion than before, and to a great extent in a year of heavy rain. *Held* the plaintiff was entitled to an injunction directing the defendant to adopt such means as would prevent the plaintiff's land from being constantly submerged ; that the injunction should in the first instance, be in general terms, by directing defendant to employ such means, at his option as would effectually prevent the plaintiff's land from being submerged more often or to a greater extent than before, and failing that the defendant should be directed to reduce the height of the tank bund and widen the sluice. A decree directing defendant to make such alterations in the tank as to prevent the plaintiff's land from being flooded more often that it used to be before is vague and inappropriate in the case (3).

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(1) *Jawand Singh* v. *Muhamed*, 38 C. 687.
1 Lah. 140.
(2) *Abdul Hossain* v. *Ram Charan*, Cas. 267.
(3) *Appayya* v *Puvvulu*. 14 Ind.

CHAPTER VI.

Injunctions respecting Judicial and other Proceedings.

Division of the Subjects.—In English text books written before the English Judicature Act, 1873, injunctions were divided into two classes, one to stay proceedings in courts of Law ; the other. to stay wrongful acts of a special nature (not being proceedings in other courts). The first class of injunctions provided a remedy, by means of which a party was prevented from taking advantage of the fact that he was entitled to institute or continue proceedings against another party in a court, not being a court of Equity ; and enabled a party who would not have a defence in such a court, but nevertheless might be entitled to be relieved by a court of equity to stay proceedings in that court, and to obtain a decree of a court of equity upon his right to equitable relief (1). The second class of injunctions provided a remedy for the prevention of the commission, or for stopping, or for the abatement of any act that is contrary to the principles of equity ; that class of injunctions was obtained in a court of equity in those cases where there is no necessity for exercising the power, such a court possessed of restraining proceedings in courts of law and other Courts (2).

As regards injunctions for staying proceedings in courts of common law and in other courts, it may be stated as a general rule, illustrated by an abundance of cases, that wherever a party by fraud, accident, or otherwise, had an advantage by proceeding in a court of ordinary jurisdiction, which must necessarily make the court an instrument of injustice, a court of equity, to prevent a manifest wrong, used to interpose by restraining the party whose conscience is thus bound from using the advantage he had improperly gained (3). Mr. Maddock, in his treatise on Chancery Practice (4), states the doctrine broadly that in most of the cases, of accident, mistake, account or fraud, in which equitable relief is afforded, a party proceeding at law will be restrained. "In short" says the learned writer, "it seems that whatever relief would be given in a court of equity against a legal right, an injunction will be granted to restrain proceedings at law in respect of such legal right" An examination of the cases will show this proposition to be, as a general one, sufficiently correct (5). But this jurisdiction was abolished by section 24, sub-section 5, of the Judicature Act, 1873, replaced by section 41 of the Judicature Act, 1925, by which it was enacted that "no cause or proceeding at any time pending in the High Court or before the Court of Appeal shall be restrained by prohibition or injunction ; but every matter of equity on which an injunction against the prosecution of any

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(1) Eden on Injunctions p. 3 ; Joyce Doctrines p. 2.
(2) Eden on Injunction p. 2 ; Joyce 2.
(3) Lord Red 127.
(4) Vol. I p. 107.
(5) Drewry on Injunctions pp ix ; x.

such cause or proceeding might have been obtained, if this Act had not been passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto : Provided that nothing in the Act shall disable either side of the said courts if it thinks fit so to do from directing a stay of proceedings in any cause or matter pending before it, upon application made to it by motion in a summary way." An action on a promissory note was commenced in the court of Queen's Bench before the Judicature Acts came into operation. After those acts came into operation the defendant issued a writ in the Chancery Division claiming specific performance of a parol agreement for value not to sue, and that the court should direct a stay of proceedings in the action upon motion accordingly in the Chancery Division for a stay of proceedings : *Held*, that the court was in effect asked to grant an injunction or prohibition, which the court had no power to do, and that the alleged agreement was matter for defence. and ought to be pleaded, and gave no ground for a stay of proceedings (1).

Principles on which courts of Equity used to grant injunctions restraining proceedings prior to the passing of the Judicature Act, 1873.—"Whenever a party by fraud. accident. or otherwise" says *Mr. Joyce* "has an advantage in proceeding in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use the advantage ; in such case, to prevent a manifest wrong, courts of equity interpose, by restraining the party whose conscience is thus bound from using the advantage he has improperly gained ; and upon these principles, bills and other applications to restrain proceedings in courts of ordinary jurisdiction are of frequent occurrence (2). An injunction, where its objects is to restrain proceedings in another court, is directed only to the parties ; it neither assumes any superiority over the court in which they are proceeding, nor denies its jurisdiction, but is granted on the sole ground, that from certain equitable circumstances, of which the court that issues it has cognisance, it is against conscience for the party to proceed in the cause (3). The

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(1) *Garbutt* v. *Fawcus*, 45 L. J. Ch. 133 = 1 Ch. D. 155.

(2) Vide Metf Pl. 150, 5th Ed.

(3) Eden Injunct 4 ; *Burpee* v. *Smith* Walker, Ch. 827 (Am) ; *Dhuronidhar* v. *Agra Bank*, 5 C. 86, 96; *Daniel's Chancery Practice*, *3rd Ed.* p. 1218 ; *Kunhamo* v. *Kuti*, 14 M. 167 168 ; *Venkata* v. *Rama*, 18 M.338, 341 ; Drewry on Injunction p. 96 : "The principle on which courts of equity act in restraining the prosecution of judicial proceedings in other courts, is to act on the person proceeding, and not on the court in which such person is proceeding. In the language of an old case, they do not impeach the jurisdiction of the other court, (as in the case of prohibition), where, if the court proceeds, the judge is guilty of a contempt ; but the injunction stays the party from proceeding, and at the same time the court of equity supposes the other court to have jurisdiction, but does not think proper, from some collateral circumstances, to suffer the party to apply and to take benefit of that jurisdiction. (*Sheffield* v. *Duchess of Buckingham* 1 Atk. 628, see p. 630 ; see also *Bunburry* v. *Bunburry*, 3 Jur. 644 the observations of the *Lord Chancellor* p. 648). Upon this principle it seems immaterial where or what the court is in which proceedings are sought to be restrained, provided the party sought to be restrained is amenable to the jurisdiction, and is capable of being acted on by the process of contempt of the Court ; and the extension of the jurisdiction of equity to stay proceedings in other Courts besides courts of common law and in foreign Courts as well as in Courts

injunction, when awarded, does not deny but admits the jurisdiction of the court of common law, and the ground on which it issues it, that is making use of its jurisdiction contrary to equity and conscience (1)"

"One of th plainest cases which can be put of the propriety of granting an injunction to a judgment at law, is where it has been in fact satisfied, and yet the judgment creditor attempts to set it up and enforce it either against the judgment debtor or against some person claiming under him, who is thereby injured in his property or rights. In such cases a Court of law would often be exceedingly embarrassed in giving the proper redress, if it could give it at all. But Courts of Equity deal with it at once, and apply the most complete remedial relief" (2).

The English Judicature Act, 1873, has effected an amalgamation and left but two courses open to a party who may previously have obtained an injunction from the Court of Chancery in restraint of legal proceedings. He may either plead the matter (that might have justified an injunction) as a defence to the action, or make it the ground of application to the Court seized of the action to stay the proceedings therein (3). The result of this legislation is to put a stop in general to injunctions against judicial proceedings, providing instead a power for any division of the High Court to order a stay of its own proceedings, and in applications for this purpose to consider and give weight to those principles of equity which are previously invoked for the purpose of obtaining an injunction (4).

Effect of the passing of the Judicature Act, 1873.—Still there are cases not affected by the Judicature Act in which this equitable procedure may be appealed to. In the first place, it is to be observed that the old jurisdiction remains in force as regards proceedings in all Courts not comprised by the Judicature Act in the High Court of Justice (4). The High Court has also jurisdiction on a proper case being made out to restrain persons within its jurisdiction from prosecuting suits in the Courts of a foreign country (5). So also the Chancery Division may restrain a person within its jurisdiction from

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within the jurisdiction of the Court of Chancery, becomes, when considered in reference to the principle stated, as rational and intelligible, as it is firmly established in practice." Story's Eq. Jur. 14th Ed. § 1995: "A writ of injunction is in no just sense a prohibition to those Courts in the exercise of their jurisdiction. It is not addressed to those Courts. It does not even affect to interfere with them. The process, when its object is to restrain proceedings at law, is directed only to the parties. It neither assumes any superiority over the Court in which those proceedings are had, nor denies its jurisdiction. It is granted on the sole ground that from certain equitable circumstances, of which the Court of equity granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause. The object therefore really is to prevent an unfair use being made of the process of a Court of Law, in order to deprive another party of his just rights, or to subject him to some unjust vexation or injury which is wholly irremediable by a Court of Law."

(1) *Hill* v. *Turner*, 1 Atk. 515, 516; Joyce Doctrines p. 9.

(2) Story's *Equity* Jur. §. 1196.

(3) *Gurbut* v. *Fawcus*, (1876) 1 Ch. D. 155; T. L. L. (1906) 612.

(4) Smith's Principles of Equity p. 728.

(5) Kerr on Injunction p. 596 citing *Mc Henry* v. *Lewis*, 22 Ch. D. 397; *Armstrong* v. *Armstrong*, (1892) p. 98; *Lett* v. *Lett*, (1906) 1 Ir. 618, 635; *Pena*

taking proceedings in Courts out of its jurisdiction—for instance, in Scotland, Ireland, or in the colonies (1). But no more in these cases than formerly in granting injunctions against proceedings in the ordinary Courts of law does equity affect to control, or overrule or examine, the judicial or administrative action of the foreign tribunals (2). It addresses its decree to the person within its jurisdiction, forbidding his action (3).

Again, there are certain Courts in England which were not affected by the Judicature Act, 1873, and which therefore, continue to be ruled by the old principles and procedure. One instance of this is the Lord Mayor's Court in London ; and if from any circumstances it were inequitable that a person should take or continue proceedings therein, there seems no reason why he should not as formerly be restrained by a Court of equity (4). Other local Courts in England fall within the same principlle (5). The other Court mentioned above are the Liverpool Court of Passage (6), the Palatine Court (7) and tribunals constituted for a special purpose (8).

Injunctions to restrain proceedings in foreign Courts—In a fit case the High Court of England also exercises jurisdiction to restrain persons within its jurisdiction from prosecuting suits in foreign countries (9). "The jurisdiction is grounded, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstances of the party against whom the injunction is sought being within the power of the Court (10)." The exercise of such a jurisdiction, being a matter of discretion (11) it should be exercised with great caution and on sufficient evidence that the action abroad would prove vexatious and useless (12). Mere hardship or inconvenience would not justify the Court to exercise its jurisdiction (13). As the decree of the Court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the Courts of State or country (14). The fact of a

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Copper Mines v. *Rio Tinto Co*, (1912) 105 L. T. 852 ; *Heillmann* v. *Fakenstein*, 33 T. L. R. 383 ; *Cohen* v. *Rothfield*, (1919) 1 K. B. 414, 416=88 L. J. K. B. 470.

(1) *Re Herman Loog*, 36 Ch. D. 502 ; *Mc Henry* v. *Lewis*, 22 Ch. D. 397 ; *Carter* v. *Hugerford*, 59 S. J. 428.

(2) Smith's Principles of Equity p. 729 ; *British S. Africa Co.* v. *Companhia*, (1893) A. C. 602 ; Kerr on Injunction 596.

(3) *Portarlington* v. *Soulby*, 3 My & K. 106 ; *Hope* v. *Carnegie*, 1 Ch. 320 ; Smith's Principles of Equity p. 729 ; Kerr p. 590.

(4) *Mildred* v. *Neate*, 1 Dick. 279 ; *Collesworth* v. *Stephens*, 4 Ha. 185 ; Smith p. 29.

(5) Smith's Equity p. 729 citing *Hedley* v. *Bates*, 13 Ch. D. 498 ; *Stannard* v. *St Giles*, 20 Ch. D. 190.

(6) *The Teresa*, 71 L. T. 343.

(7) *Dyke* v. *Stephens*, 29 Sol. Jo 682 ; *Wood* v. *Connolly Brothers*, Ltd (1911) 1 Ch. 731 C. A.

(8) *Earl Beauchamp* v. *Darby*, W. N. (1866) 308.

(9) *Carron Iron* v. *Maclaren*, 5 H. L. C. 416, 436 ; *Mc Henry* v. *Lewis*, 22 Ch. D. 398 ; *Armstrong* v. *Armstrong*, (1892) p. 98 ; *Lett* v. *Lett*, 1 Ir. 618, 635 ; *Pena Copper* v. *Rio Tinto* 105 L. T. 852 ; *Hailman* v. *Falkenstein*, 33 T. L. R. 383 ; *Cohen* v. *Roth Field*, 88 L. J. K. B. 470.

(10) Halsbury Vol. 17 p. 264 ; *Lord Portartintion* v. *Soulby*, 3 M & K. 108 ; *Carron Iron Co*, v. *Maclaren*, 5 H. L. C. 416, 437 ; *Wood* v. *Connolly*, 80 L. J. Ch. 415.

(11) *Parnell* v. *Parnell*, (1858) 7 I. Ch. R. 322 ; Halsbury Vol. 17 p. 264.

(12) *Cohen* v. *Rothfield*, 88 L. J. K. B. 469.

(13) *Fletcher* v. *Rogers*, 27 W. R. (Eng.) 97.

(14) *Dehon* v. *Foster*, 4 Allen, 5

foreigner having property in England, enables a Court of Equity there, to make effectual an injunction issued to him. But in the case of a foreigner who seeks no assistance from the Courts of England, the issuing of such injunction ought clearly to be shown to be required as conducive to justice (1). Where there is a plain equity in favour of an injunction, and the representatives of the real and personal property, who seek it, are in England, the Court will grant it, and restrain proceedings in the Court of a foreign country, and in such a case the Court will decide, upon a consideration of all the circumstances, and require parties in England, to take or direct such steps in foreign Courts, as the ends of justice require ; but the particular provisions of the foreign law applicable to a transaction, proceedings as to which in a foreign Court are thus restrained, must not be disregarded (2). A Court of Equity in England will not interfere with the action of an American Court, to restrain the negotiation of bills of exchange, which have come into the possession of a party in England, by virtue of a commission issuing out of the American Court, for the purpose of taking evidence upon proceedings there upon the bills, upon an allegation that the bills came into the possession of the party bringing the action in America, and the party in England, an agent of the plaintiff, by a breach of duty. The exercise of such a jurisdiction would be interfering with the action of the American Court, and a violation of the principles of the administration of justice ; the complaint, if any, should be asserted in the American Court (3). A Court of equity in England will aid the proceedings in a foreign Court competent to decide the questions, by restraining an action at law here, to recover moneys which are part of the subject-matter in dispute, in the foreign Court, between the parties (4).

The jurisdiction of the High Courts in what was formerly possessed by the Supreme Court at Calcutta and continued to it by the Indian High Courts Act, 1861 (5) viz., over Bengal, Behar and Orissa, and, for the purpose of restraining suits, any Court outside such jurisdiction is to be considered foreign Court. The definition of "foreign Court" in s. 2, Civil Procedure Code, is for the purposes of that Code only, and *semble*, does not apply to extend the jurisdiction of the High Court for the purpose of restraining suits pending in Courts outside its jurisdiction under the charter. A Court can restrain a person from proceeding with a suit in a foreign Court, only when the person sought to be restrained is within its jurisdiction and not otherwise, so that, in the event of an injunction being granted against him and disobeyed by him, he would be subject to the process of that Court for contempt (6).

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(1) Joyce Doctrines p. 10 ; *Carron Iron Co.*, v. *Maclaren* 5 H. L. C. 416.

(2) *Carron Iron Co*, v. *Maclaren*, 5 H. L. C. 416.

(3) Joyce on Doctrines p. 11 citing *London and Mediterranean Bank Ltd*, v. *Strutton*, 18 W. R. 107=21 L. T. N. S. 415.

(4) *Transatlantic Co*, v. *Pictroni*, Joh. 604 ; Joyce on Doctrines p. 11.

(5) 24 & 26 Vict. C. 104.

(6) *Vulcan Iron Works* v. *Bishumbhar Pershad*, 13 C. W. N. 346=36 C. 233 ; See also *Jumna Das* v. *Har Charan*, 38 C. 405=16 C. W. N. 4 : The High Court has no jurisdiction to issue an

A A, a Mahomedan, died leaving estates situate partly within British India and partly within the ceded districts of the Feudatory State of Rampur, and leaving him surviving a widow, a daughter and her children. The daughter and her children alleging that A A was a Shia and that therefore the daughter excluded the residuary heirs from inheritance, institutes a suit against the latter in a British Indian Court (viz : the Court of the Subordinate Judge at Bareilly) where their claim was opposed by the residuaries, and finally obtained an *exparte* decree upholding their claim, the defendants having failed to obtain an adjournment which they said was necessary to enable them to call witnesses. This decree was affirmed by the High Court at Allahabad. Meanwhile the residuaries instituted against the daughter and her children a suit in a court of the Rampur State for possession of a moiety of the estate of A A situate in the ceded district of Rampur State, claiming as they had done in their defence in the other suit, that A A was a Sunni. The daughter and children therefore instituted another suit in the Court of the subordinate Judge at Bareilly praying for a declaration that the previous decree of that court was binding between the parties and operated as *res judicata* and that the defendants (the residuaries) be restrained by a perpetual injunction from continuing their suit in the Court of Rampur State. The Subordinate Judge as well as the High Court at Allahabad on appeal having held that they had no jurisdiction to grant the injunction and dismissed the suit, the Privy Council on appeal of the plaintiffs affirmed that desicion and dismissed their appeal (1).

A defendant in a pending suit in British India should not be restrained from commencing and prosecuting in a foreign court to enforce rights which he acquired within the jurisdiction of the foreign court against the plaintiffs under the law of that foreign country. In an application for an injunction to restrain the defendant in a pending suit from prosecuting an action in a foreign court about the same subject matter it is an essential condition that it should be applied for very promptly and that it should not be applied for after a considerable amount of time and trouble has been expended in the foreign suit (2). It is doutful whether a subordinate court in British India has power to restrain by injunction a party from prosecuting a suit in a foreign Court (though within the British Empire). The chartered High Courts have such power, not by reason of Order 39, rules, 1 and 2, C. P' code, but by reason of the equity jurisdiction they inherited from the old Supreme Court (3). Unless the plaintiff satisfies the court that no advantage can be gained by

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injunction against a person, who though possessed of property within its jurisdiction, does not reside within such jurisdiction, restraining him from proceeding with a suit instituted by him in a Court situate beyond the local limits of its jurisdiction.

(1) *Maqbul Fatima* v. *Amir Hasan*, 20 C. W. N. 1213=36 Ind. Cas. 710 (P. C.)

(2) *Ticumchand* v. *Santokechand* 24 C. W. N. 735 ; see also *Hyman* v. *Helm*, 24 Ch. D. 531 ; *Varda pulo* v. *Varda pulo*, 25 T. L. R. 518.

(3) *Periakaruppan* v. *Rama swani*, A. I. R. 1928 Mad. 491=27 L. W. 218.

the defendant by proceeding with the action in which he is a plaintiff in another part of the king's dominions, the court should not stop him from proceeding with the only proceedings which he as plaintiff can control (1).

Law in India prior to the passing of the specific Relief Act.— Before the establishment of those Presidency High Courts, there were three Supreme Courts in the three Presidency towns. The Supreme Courts by their charters were vested with five distinct jurisdictions, namely, Criminal, Civil, Equity, Ecclesiastical and Admiralty, and they were enjoined to accommodate their processes, rules and orders. to the religion and manners of the natives, so far as may consist with the due execution of the laws and the attainment of justice (2) So the old Supreme Courts which were Courts of Law as well as Courts of Equity used to grant legal reliefs as well as equitable remedies. But in the mofussil, Courts never exercised the exclusive jurisdiction of the Courts of Chancery in England. Now after the establishment of the Presidency High Courts of India which are Courts both of law and of equity, there is scarcely room for the jurisdiction, so often asserted in England and America of staying proceedings at law. "The chartered High Courts have power to restrain Courts (though within the British Empire) not by reason of the equity jurisdiction they inherited from the old Supreme Courts. *Rash Behory Dey* v. *Bhawani charan* (3) and *Mungle Chand* v. *Gopal ram* (4). Those decisions were followed in *Uderan Kesoji* v. *Hyderally* (5), though the remarks of *Woodroffe J*, in *Hukum Chand Boid* v. *Kamala Nand Singh* (6) about the inherent powers of a Court now governed by s. 151, Civil Procedure Code were also relied on. But it is noteworthy that *Woodroffe J*, himself in *Rash Behary Dey* v *Bhowani Charan* (3) does not rely on the inherent powers of a Court but only on the equity jurisdiction inherited from the Supreme Court" (7) "It is hardly necessary to observe that, in a country where law and equity are administered by the same Courts, the subject of staying legal proceedings is not to be dealt with at much length (8)".

In *Beer Chund* v. *Hogg* (9) injunction was granted by the High Court to restrain proceedings in the mofussil against the Court Receiver. In *W. Moran* v. *The River Steam Navigation Co.*, (10) the plaintiffs brought a suit for specific performance of an agreement in the original side of the High Court, which they alleged was entered into between them and the defendants, under which they were, on payment of a certain rent, entitled to the use and occupation of a certain mud dock for the repair of two of three vessels, and from

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(1) (Per Scrutton, L. J. in) *Cohen* v. *Rothfield*. (1919) 1 K. B. 413=88 L. J. K. B. 468 ; *Carron Iron Co* v. *Maclaren*, 5 H. L. C. 416 ; *Periakaruppan* v. *Rama swami*, supra.

(2) Clarke's Rules and Orders pp. IV to IX.

(3) 34 C. 97.

(4) 34 C. 101.

(5) 33 B 469=3 Ind. Cas. 390=10 Bom. L. R. 1141 ; but see *Jairam* v. *Zamenlal*, 27 B. 357.

(6) 24 C. W. N. 735=59 Ind. Cas. 218.

(7) *Peria Karuppa* v. *Ramaswami*, A. I. R. 1928 Mad. 491.

(8) Statement of Objects and Reasons to Specific Relief Bill para 25.

(9) Cor. 56.

(10) 14 B. L. R. 352.

which the defendants had threatened to eject them whilst they were making such repairs. The defendants being about to take proceedings in the Hoogly Court to recover possession of the dock, the plaintiffs applied for an *ad interim* injunction to restrain the defendants from taking such proceedings pending the decision of the High Court, and from taking any other steps to interfere with the plaintiff's possession of the dock until the repairs in course of being executed were completed. In granting temporary injunction *Markby J.* observed. "The question is, whether I ought to inhibit the proceedings in the Hoogly Court. Very little assistance appears to me capable of being derived on this part of the case from the English decisions, because the relations between the Court of Chancery and the Courts of Common Law in England are very different from those between this Court and the mofussil Courts. The Courts of Common Law in England are wholly independent of the Courts of Chancery. The Courts of Chancery have no control over the Courts of Common Law ; they have only control over the suitors before them, and the Courts of Chancery will therefore, of course, never interfere in any case where the Courts of Common Law can administer full justice. But they frequently do interfere, because there are many cases in which, in Courts of Common law, full justice cannot be done. But this Court and the Hoogly Court have substantially the some powers, so far as this case is concerned. For the purpose of this case, the law administered by the Hoogly Court and by this Court would be substantially the same, and I cannot say that, in the Hoogly Court, complete justice could not be done. So far that is against the injunction being granted. On the other hand, it cannot be denied that there are cases, especially where the parties are Europeans residing in Calcutta, which it is desirable should be tried in this Court, and not in the mofussil. At any rate this is clear that this Court having full jurisdiction in the matter ought not, if it can prevent it, to allow the same matter to be simultaneously litigated in this Court and in the mofussil between the same parties. That would be most undesirable, and if the two Courts come to different result, it would be most inconvenient. It really therefore comes to a question where this suit ought to be tried. Now, that is matter upon which this Court has a very wide discretion. Under the charter, this Court can remove any case from the mofussil if it thinks justice can be better administered by trying the case here.

"Now, as to whether it is desirable that this case should be tried here or in the mofussil, I think the suit having been filed first in this Court, and being a suit in which this Court can do full justice, this is the Court in which the suit ought to be tried, and I therefore think I ought to grant the injunction." On appeal this order was modified by *Macpherson C. J.* who also granting the *ad interim* injunction, observed "I have some doubts as to how far the Court ought to have absolutely restrained the defendants from bringing their suit in the Hoogly Court ; but none as to their being restrained from executing any decree until the plaintiff shall

have had a reasonable time within which to complete the repairs of the *Nepal* and remove her. Therefore I think the order should be modified so far as to allow the defendants to bring a suit for possession in the Hoogly Court, but they must still be restrained from executing before the 15th May any decree or order which they may obtain. *Mr. Woodroffe*, on behalf of the plaintiffs, offers to give the defendants an immediate decree for possession in the Hoogly Court upon a plaint being filed, the defendants being restrained by our order from executing such decree, and from ejecting the plaintiff's from or interfering with the plaintiff's possession of, the dock, or interfering with the plaintiff's ship, until the 15th May. Upon these terms the defendants may bring and proceed with such suit for possession in the Hoogly Court as they may be advised." But in that case the injunction was issued to restrain proceedings in a Court subordinate to the High Court (1).

In *Dhuronidhor Sen* v. *The Agra Bank*, (2) A, the proprietor of an indigo concern, which comprised a *patni taluq* after mortgaging the entire concern to B, allowed the *patni taluq* to be sold for arrears of rent under Reg. VIII of 1819; C, the darpatnidar of the *taluq* whose rights were thus extinguished then sued and obtained a decree for damage against A. After C had obtained this decree against A, A sold his equity of redemption in the entire mortgaged concern to B, and by this sale, all the *dena* and *pouna*, or liabilities and outstandings of the concern, were transferred from A to B. C then after notice to B, obtained an order, by which B was made the judgment debtor in place of A. B took no proceedings within one year to set aside this order; but, after the lapse of three years, upon C attempting to execute his decree, instituted the present suit to set aside the order, and for an injunction to restrain B from executing the decree against him. The Court in the first instance on the Letters Patent Appeal refused the injunction observing: "But for one Judge to issue an injunction against a decree holder to restrain him from executing the decree of another Judge exercising co-ordinate jurisdiction, upon the ground that the proceedings by which the decree was obtained were altogether illegal, is, as far as I am aware, a proceeding entirely without precedent, and one which it seems to me very dangerous to introduce. It has already been found difficult enough to bring litigation in this country to a termination, and if we were to grant this injunction, I am very much afraid that advantage would be taken of the precedent to prolong litigation very much further. The cases in which injunctions are granted by the Court of Chancery against proceedings in other Courts in England appear to me to rest upon a totally different principle. They proved upon the assumption that the rights of the parties cannot be fully enquired into except in the Court of Chancery itself. But it is significant that as soon as all the Courts of Westminster Hall came to be Courts of co-ordinate jurisdiction under the New Judicature Acts, these proceedings by way of

(1) *Dhuronidhor* v. *Agra Bank*, 4 C. 380, 397.

(2) 4 C. 380.

injunction were abolished. The Specific Relief Act is not applicable in this case, but it may be observed that under that Act no injunction to stay proceedings can be granted unless the Court in which the proceedings are to be stayed is subordinate to that in which the injunction is sought."

Against this judgment an application for a review was made and granted. In granting the injunction the Court observed (1). "The principle laid down in *Daniell's Chancery Practice*, 3rd Edition p. 1218 is this—it is a general rule illustrated by an abundance of cases that 'wherever a party by fraud, accident, mistake or otherwise' has obtained an advantage in proceedings in a Court of ordinary jurisdiction, which must make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong by 'restraining the party, whose conscience is thus bound, from using the advantage he has gained'. And in *Drewry on Injunctions* p. 96, where the same subject is discussed, it is said, 'upon this principle it seems immaterial where or what the Court is in which proceedings are sought to be restrained, provided the party sought to be restrained is amenable to the jurisdiction and is capable of being acted on by the process of contempt of Court ; and the extension of the jurisdiction of equity to stay proceedings in other Courts, besides Courts of common law and in foreign Courts as well as the Courts within the jurisdiction of the Court of Chancery becomes, when considered in reference to the principle stated, as rational and intelligible as it is firmly established in practice (2)."

The plaintiffs filed a suit in the High Court against the defendants, on the 25th March 1919 to recover a certain amount from the defendants...On the 13th March 1919 the defendants had filed a suit for the accounts against the plaintiffs and some other persons in the Court of the First Class Subordinate Judge at *Bijapur*. The defendants applied for a stay, of the proceedings in the High Court suit under s. 10 of the Civil Procedure Code. The plaintiffs also applied for an injunction restraining the defendants from proceeding with the suit in the *Bijapur* Court. The Court of first instance held that s. 10 of the Civil Procedure Code did not apply and issued an injunction restraining the defendants from proceeding within their suit in the *Bijapur* Court only against the plaintiffs. On appeal the defendants contended that the Court had no power to make such an order : *Held* confirming the order of the lower Court, that the Court had jurisdiction to order a party to the suit before it to refrain from prosecuting a suit in a mofussil Court (3).

Injunctions to stay proceedings under the present law—The provisions for the issue of perpetual injunction are laid down by the Specific Relief Act. It lays down the principles for its issue and specifies the cases in

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(1) *Dhuronidhor* v. *The Agra Bank*, 5 C. 86.

(2) This distinction made between injunction issued to Courts and to the parties, which according to Mr. Justice Woodroffe is difficult to understand (Injunction p. 159), it seems, has been adopted by *Lort Williams J* in *Milton & Co.* v. *Ojha Automobile*, 57 C. 1280.

(3) *Mulchand* v. *Gill & Co.* 21 Bom. L. R. 963=53 Ind. Cas. 518.

which it cannot be granted. Section 56, clauses (*a*), (*b*) and (*e*) specify the cases in which an injunction cannot be granted to stay proceedings. (1), Clause (*a*) lays down that an injunction cannot be granted to stay a judicial proceeding pending at the institution of the suit in which injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings. Clause (b) lays down that it cannot be granted to stay proceedings in a court not subordinate to that from which the injunction is sought. Clause (*e*) says that a grant of injunction to stay proceedings in any criminal matter cannot be made. These provisions no doubt owe their origin to the English decisions and the provisions of the Judicature Act of 1873. "Now the first question that strikes one with reference to these clauses" says a learned writer "is whether they do not merely prohibit the issue of an injunction to the Court in which the proceedings are held. Do they prohibit as well as the party concerned from being restrained in the institution or prosecution of such proceedings ? *The prima facie* impression derived from the language is that the clauses (*a*), (*b*) and (*e*) merely prohibit the issue of an injunction to the Courts but not to the parties concerned. But a little consideration of the history of the law of injunctions in England and the nature of the remedy of injunction will serve to show that that impression cannot be correct. It may no doubt be said that if these clauses were intended to prevent an injunction to the parties in judicial proceedings, nothing would have been easier than to say so. More especially as in cl. (*c*), the legislature advisedly refers to an injunction to restrain persons from applying to any legislative body. But this argument does not possess such weight as it is not usual to speak of the stay of proceeding of the legislature and what cl. (*c*) aims at is the prevention of the only form of injunction with reference to such proceedings, namely, an injunction to restrain the application of a party to the legislature for the enactment of special private laws which private individuals could promote. Unless therefore reference is made to the individual promoting the law the provision against an injunction restraining proceedings of the legislature would not refer to persons applying to the legislative body. Moreover, if from the nature of the remedy of injunction and the history of the law upon the subject there can be no doubt as to the meaning of the phrase 'staying a proceeding by injunction.' we are not obliged to adopt the *prima facie* meaning of the phrase " (2)

"Clause (*a*) (3) is apparently taken from section 21 (5) of the English Judicature Act of 1873, which was as follows : 'No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restricted by prohibition or injunction.' The object of the enactment appears to have been to do away with the use of injunction as a means of controlling proceedings in other Courts, and it has been adopted in Act I of

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(1) Madras Law Journal vol. V page 159; see also *Radha Madhab* v. *Rajendra*, 14 P L. T. 258=A. I. R. 1933 Pat. 250,

(2) Madras Law Journal vol. V pp. 159, 160.

(3) In the Report it is written clause (b).

1877 to prevent in the Court of this country the use of any such jurisdiction (1). In interpreting the above quoted words in s. 24, subsection (5) of the Judicature Act, 1873, *Jessel M. R.* said (2): "What does that mean? The Court never did by injunction restrain a proceeding. What it did was to restrain a party to a cause from going on. Therefore when the Act says no cause or proceeding shall be restrained by injunction, it means that no party shall be restrained from going on with his action. This is what the Act means, otherwise it would seem to imply that one branch of the High Court has power to restrain another branch."

But the above view was negatived in a recent Calcutta case (3) where the plaintiffs and defendants entered into an agency agreement for the sale of motor cars in Agra and elsewhere. By Cl. 18 thereof it was agreed that "any litigation arising out of this agreement shall be settled in the High Court of Judicature, Calcutta or in the Small Cause Court, Calcutta, and in no other Court whatsoever." Disputes having arisen the defendants brought a suit in Agra. Subsequently the plaintiffs brought a suit in Calcutta claiming *inter alia* an injunction to restrain the defendants from proceeding with the Agra suit. Then they applied to the Agra Court for a stay upon the contention that the Agra Court had no jurisdiction owing to the above clause. This application was refused, but a temporary stay was granted pending an application to the High Court at Calcutta. The plaintiff now asked for an order restraining the defendants from proceeding with the suit at Agra until the final determination of this suit.

They base their contention on the above clause, and in addition say that this suit is more comprehensive than the Agra suit, that the contract was made in respect of goods supplied from, and other incidents of the contract arose in, Calcutta; that from every point of view, it will be more convenient to litigate in Calcutta, and that the defendants commenced their suit in Agra with the sole object of harassing and delaying the plaintiffs. But the defendants' counsel has raised various points of law. He contends, in the first place, that the clause itself is *ultra vires* and illegal being in conflict with s. 28 of the Contract Act, secondly, he says that section 56(*b*) Specific Relief Act, prohibits an injunction to stay proceedings in a Court not subordinate to that from which the injunction is sought. *Lort Williams J* in delivering the judgment said: "In my opinion, this section 56 contemplates injunctions directed to the Court itself and does not prevent any Court from making an order in *personam*, forbidding an individual from prosecuting proceedings in another Court even if such person be outside the jurisdiction of the Court. *Cohen* v. *Rothfield* (4); *Sutton L. J.* at p. 413. Moreover, s. 56 refers only to

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(1) *Appa* v. *Raman*, 14 M. 425.
(2) *Artistic Colour Printing, In re*, 14 Ch. D. 502.
(3) *Milton & Co.* v. *Ojha Auto-mobile*, A. I. R. 1931 Cal. 279=57 Cal. 1280.
(4) (1919) 1 K. B. 410=88 L. J. K. B. 468.

perpetual injunction. Temporary injunctions are regulated by the Civil Procedure Code (Order 39); see section 53, Specific Relief Act and *Amir Duthin* v. *Administrator General of Bengal* (1). But the defendants' counsel next contends that the Court will not grant any injunction, whereas in the present case, the defendants are not within the jurisdiction, because any such order *in personam* could be enforced. The answer to that contention is that Order 39, rule 2 (*1*) provides that, in any suit for restraining the defendant from committing a breach of contract, a temporary injunction may be granted to restrain the defendant from committing the breach complained of, and under s. 136 (*1*) Civil Procedure Code, such order may be enforced outside the local limits of the jurisdiction of the Court to which the application is made. Even if such specific provision had not been made I am satisfied that the Court is not powerless in such circumstances, and can, if necessary, resort to its inherent jurisdiction for the remedy.

"It is contended for the defendants, however that the jurisdiction of this Court to restrain a person from proceeding in Courts outside its jurisdiction is governed by the same principles as those which governed Courts of equity in England, and that no injunction will be granted where such person is not within the limits of the jurisdiction of this Court, so that he would be subject to process for contempt; and reliance in support of this contention is placed upon the judgments in the well known case of the *Carron Iron Co* v. *Maclarren* (2) and the Indian cases *Vulcan Iron Work* v. *Bishumbhar Prosad* (3) and *Jumna Dass* .v *Harcharan* (4) in which *Fletcher J* and *Stephen J* respectively purported to follow that decision.

"In my opinion that case is not an authority for any such proposition. It decided that circumstances which would justify a restraint from proceeding in another court within the jurisdiction would warrant the imposition of a similar restraint with regard to proceedings in a foreign court, that such an order will not be made unless plain equity is in favour of it, and that it will be made only in such circumstances that it can be made effectual. The position of courts in India *inter se* is quite different from that of English courts as regards foreign courts: there is no analogy between them.

"The order of one Indian Court may be effective against a person within the jurisdiction of another court, when a similar order by an English court would be of no avail against a person within a foreign jurisdiction.

"I agree with the opinion expressed by *Sale J* in *Mungle Chand* v. *Gopal Ram* (5). The spirit of co-operation existing between the courts in India will often be sufficient alone to make such orders effectual, where otherwise they might not be, apart altogether from reciprocatory rules, such as those relating to the transfer of decrees for execution. I have little doubt that the learned

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(1) 23 C. 351.
(2) (1855) 5 H. L. 416=24 L. J. Ch. 620.
(3) 36 C. 233.
(4) 38 C. 405=11 Ind. Cas. 416.
(5) 34 C. 101.

judge at Agra will assist in making the order of this court effectual when it is brought to his notice.

"Even if this were not so I am satisfied that the order sought by the plaintiff can be made effective. "The circumstances of trade between Agra and the port of Calcutta, the necessity for obtaining from Calcutta the supplies necessary for their business, and the arrangements incidental thereto, will necessitate the presence of the defendants within the jurisdiction of this court, as heretofore, apart from the necessity of appearing to defend this suit, or of becoming liable to arrest, imprisonment and attachment, if and when the decree is transferred for execution.

"On the merits I have no doubt whatever that I ought to make this order : plain equity demands it. The defendants have instituted proceedings in the Agra Court, in defiance of the specific terms of their contract, apart from the other considerations, to which I have referred already. In such circumstances, the principles upon which the court ought to proceed are clearly stated in the case of *Cohen* v. *Rothfield* (1). I have no doubt, in the circumstances of this case, that the continuous prosecution of the *Agra* suit would be oppressive and vexatious, and that the defendants can gain no advantage therefrom, which is not equally open to them in this court. Finally, in my opinion, this court has an inherent right to protect suitors resorting to it, and to prevent interference with suits instituted in it : see the judgment of *Heaton J.* in *Mulchand Raichand* v. *Gill & Co.* (2). If the Agra suit is allowed to proceed, I have no doubt that the plaintiffs in this suit will be hampered, embarrassed and delayed. For these reasons an injunction will be granted *restraining the defendants* from prosecuting their suit No. 138 of 1929, in the sub-Judge's Court at Agra, until the final determination of this suit, with liberty to the defendants to apply in case this suit be not prosecuted by the plaintiffs with diligence and expedition."

But in a recent Madras case (3) a Division Bench consisting of *Beasley C. J.* and *Cornish J.* said : "It is sufficient to say with regard to jurisdiction that, whilst it is true that a court can issue an injunction against persons within its jurisdiction restraining them from doing acts outside the jurisdiction, it will not do so unless the remedy is likely to be an effective one."

The question of interpretation of clauses (a) and (b) of section 56 Specific Relief Act, was raised in a very recent case (4). After quoting the above two clauses the court observed : "It is contended that the two conditions must be satisfied before an injuction can be granted, viz., that (*i*) the proceeding sought to be restrained must be pending in a subordinate court, and (*ii*) the injunction must be necessary to prevent multiplicity of proceedings. In this case the suit and the proceeding sought to be stayed were pending in the court

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(1) (1919) 1 K. B. 410=88 L. J. K. B. 468.

(2) (1919) 44 Bom. 283=53 Ind. Cas. 518.

(3) *Venkata Chalam* v. *Rajagopal Naidu*, 55 M. 966=A. I. R. 1932 Mad. 705=63 M. L. J 568.

(4) *Radha Madhab* v. *Rajendra Prosad*, A. I. R. 1932 Pat. 250=14 P. L. T. 258.

of co-ordinate jurisdiction, and therefore clause (b) operates and the plaintiffs were not entitled to injunction.....As is pointed out in *Appu*. v. *Raman* (1) clause (b), s. 56, apparently is taken from s. 24(5) of the English Judicature Act, of 1873, which was as follows: 'No cause or proceeding at any time pending in the High Court of Justice or before the court of appeal shall be restrained by prohibition or injunction.' But the same section provided that: 'nothing in this Act contained shall disable either of the said courts from directing a stay of proceedings in any case or matter pending before it if it shall think fit.' As was pointed out by *Sir George Jessel M R*, in the case of *In re Artistic Colour Printing Co.* (2), the court never did by injunction restrain a proceeding: what it did was to restrain a party to a cause from going on. There fore when the Act says, 'no cause or proceeding shall be restrained by injunction,' it means that no party shall be restrained from going on with his action. As in the present case both the proceedings were pending in the same court clause (b) of s. 56 has no application. The court can always regulate its own proceedings. This was pointed out by *Mukherjii J* in *Ram Sadan* v. *Mathura Mohan* (3), where the learned Judge observed that the prohibition contained in clause (b) of section 56 operates only in respect of courts which are not subordinate (4) in the sense that they are co-ordinate or superior and not in respect of the court itself which must always be taken as competent to regulate its own proceedings. As regards clause (a) it is contended that there is no question here of multiplicity of proceedings. It it contended that what is meant by multiplicity of proceedings is as illustrated in the illustrations (p) and (q) of s 54 of the Specific Relief Act. In the present case there is no apprehension of a multiplicity of proceedings. Reliance is placed upon the observations of *Sir Lawrence Jenkins C. J.* in *Karnodhar Haldar* v. *Hari Prosad* (5). Where in considering the provisions of clause (e) of section 54 of the Act the learned Chief Justice observed: 'the clause has application to a well-known condition of affairs which is absolutely remote from that which we have to deal in this case. It is not as though the plaintiffs here would have to bring repeated suits to make repeated applications or to take repeated proceedings for the purpose of establishing or safe-guarding their rights, or of preventing the acquisition of rights by the defendant.' And it is argued that there is no apprehension of any such repeated proceedings or repeated applications so far as the present case is concerned. That was a case in which a suit had been instituted with a prayer to have it declared that the defendant had no title to the lands in suit and to establish that the plaintiffs were not bound by a decree in a title suit for perpetual injunction restraining the plaintiffs in the former suit from taking possession

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(1) 14 M. 425.

(2) 14 Ch. D. 502=49 L. J. Ch, 526.

(3) A. I. R. 1925 Cal. 233=81 Ind. Cas. 2.

(4) "The Specific Relief Act (Act I of 1877) is not applicable to this case, but it may be observed that under that Act no injunction to stay proceedings can be granted under the Court in which the proceedings are to be stayed is subordinate to that in which the injunction is sought."

(5) 37 C. 731=6 Ind. Cas 444.

of the lands in suit by executing the decree of the previous title suit. The second suit had been instituted before the plaintiffs in the previous suit had taken any steps to execute the decree, nor did it appear that he had even threatened to execute it. In the present case the decree of the Privy Council has already been executed and possession delivered to plaintiffs, and the defendant has already filed an application under Order 21, rule 100 of the Code of Civil Procedure. Under the circumstances I am of opinion that the contention based on clauses (a) and (b) is not sound and cannot be given effect to."

Section 56 of the Specific Relief Act (1 of 1877) applies to perpetual injunctions, temporary injunctions being left by section 53 to be regulated by the Code of Civil Procedure, and section 56 was not intended to affect injunctions applied for under section 492 (1) of the Civil Procedure Code (2). In a proceeding for execution of a decree pending before the District Judge, certain moveable properties having been ordered to be sold, an application was made by a third party that property No. 1. on the sale list should be sold after the other properties on the list. The application was rejected, and the appellant brought a suit in the Court of the Subordinate Judge for a declaration that the property was not liable to be sold, and he also applied for an injunction to stay the sale of the property, which was granted by the Subordinate Judge. The District Judge, in accordance with that injunction, postponed the sale of property No 1, and caused two other properties on the list to be sold. Objection was made under section 311 of the Civil Procedure Code that the District Judge had acted with material irregularity in postponing the sale, in as much as the injunction was not binding upon him, being one not granted by a superior Court, and the subordinate Judge having no power to grant it under section 56 of the Specific Relief Act. On appeal, it was held that the temporary injunction granted by the Subordinate Judge was not *ultra vires* and that the District Judge was bound to postpone the sale as he did, and he did not act irregularly in doing so (3). In delivering the judgment in the above case the Court observed: "Though it may be anomalous and inconvenient if a Court of inferior or co-ordinate jurisdiction were to order a stay of proceedings in another Court on the ground of error or illegality in its proceedings, there can be no anomaly or inconvenience, where (as in the case before us) the higher Court can under the law deal with a matter only in a summary way, and its summary order is made subject to the result of a regular suit which may lie in a Court of an inferior grade,

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(1) This reference is to Act XIV of 1882, see now Order 39 rule 1 of Act V of 1908.

(2) *Amirdulin* v. *A. G.*, 23 C. 251; *Bahuria* v. *Radha*, A. W. N. 1884, 352, but see *Malik Ghora* v. *Ahmad Khan*, 17 P. L. R. 1900=57 P. R. 1899: "The same principles which govern the granting of perpetual injunction are applicable to the case of temporary injunction. According to section 56 (b) the Chief Court has no power to restrain partition proceedings in a Revenue Court which is in no way subordinate to the Chief Court." *Khusha* v. *Dit Mal*, 133 P. L. R. 1903.

(3) *Amir Dulin* v. *A. G.* 23 C. 35; see also *Ram Sadan* v. *Mathura*, 81 Ind. Cas. 2.

and in the course of which such inferior Court may be asked to grant a temporary injunction restraining the defendant from carrying on the proceedings in the superior Court."

In a Bombay case (1), the plaintiffs instituted a suit in the original side of the High Court to recover damages for breach of contract, and sought to obtain an interlocutory injunction restraining the defendant from proceeding with a suit filed by the defendant against the plaintiffs in the Small Cause Court in respect of the same contract until the hearing of the High Court suit. The Court refused the prayer holding that an application to restrain a suit in the Small Cause Court does not come within the provisions of sections 492 and 493 of the Civil Procedure Code (2). But in a similar case the Calcutta High Court dissenting from the Bombay case granted the injunction (3). In that case *Woodroffe J.* in delivering his judgment said : "It is contended however by Mr. Das (who appears for the defendant), on the authority of the decision in *Jairamdas Ganeshdas* v. *Zamanlal Kissorilal* (4), that I have no jurisdiction to make the order sought. The grounds of decision in that case were that an application of the present character can only be granted by the final decree under the Specific Relief Act and not upon an interlocutory application, in that such an application is not expressly mentioned in sections 492 and 493 of the Civil Procedure Code (2). The question however does not appear to have been considered in this case, as to whether apart from the terms of the Civil Procedure Code the High Court might issue an injunction under the general equity jurisdiction inherited by it from the Supreme Court. The Civil Procedure Code does not, as I have already held in *Hukum Chand Boid* v. *Kamalanand Singh* (5), affect pre-existing powers of the Court, unless it takes them away. In my opinion, this Court had and has, independently of the Civil Precedure Code, power to make the order sought, and that power is not affected by the fact that sections 492 and 493 of the Civil Procedure Code (2) do not mention the particular injunction, which is the subject of this application....It has been the practice of this Court to grant injunctions of the chacracter sought ; for instance a similar injunction was granted in the case of *Mungle Chand* v. *Gopal Ram* (6) decided on the 6th August 1906 by *Sale J*, in which case, I am informed, my learned brother issued an injunction upon the defendant in the suit in this Court, restraining him from proceeding with a suit in Bareilly. In the case of *Hart* v. *Grosser* (7) an objection was taken on behalf of the defendant that on the authority of the Bombay decision cited, this Court had no jurisdiction to grant an injunction. It was held however that this Court had jurisdiction to restrain the defendant in the High Court suit from proceeding with the suit in the Small Cause Court."

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(1) *Jairamdas* v. *Zamontal*, 27 B. 357.
(2) Now see Order 39. rules 1 and 2.
(3) *Rash Behary De* v. *Bhawani Charan Basu*. 34 C, 97.
(4) I. L. R. 27 B. 357.
(5) I. L. R. 33 C. 927.
(6) I. L. R. 34 C. 101.
(7) 9 C. W. N. 748.

This decision was followed in a later Bombay case (1). So it is now well established that the three Presidency High Courts, over and above the powers which they enjoy under the Civil Procedure Code, possess an equitable jurisdiction derived from the old supreme Court to issue an injunction in appropriate cases (2).

But the jurisdiction of the High Court to restrain proceedings in Courts outside its jurisdiction is governed by the same principles as those that govern courts of Equity in England, namely, that the party, whom it is sought to restrain must be within the limits of the jurisdiction of the High Court so that in the event of an injunction being granted against him and being disobeyed, he would be subject to process for contempt (3). The High Court has the power under Order 9, rule 2, C. P. Code, to interfere and restrain a party from proceeding with a suit pending in another court which involve the commission of a breach of contract by one party to the detriment of the other (4). But in *Tulsi Ram* v. *Ratan Chand* (5), the issue of a temporary injunction staying further proceedings in another court in the exercise of equitable jurisdiction was refused as the petitioner could easily raise his plea of want of jurisdiction in the other court.

Injunctions against pending proceedings.—So far as perpetual injunctions are concerned they are regulated by the Specific Relief Act and under section 56 of the Act an injunction cannot be issued to stay proceedings in a court not subordinate to that from which the injunction is issued (6) Such injunction can be issued only when such restraint is necessary to prevent a multiplicaty of proceedings (7). "Clause (b) of section 56 of the Specific. Relief Act is apparently taken from section 24 (5) of the English Judicature Act of 1873 which was as follows :—'No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction." The object of the enactment appears to have been to do away with the use of injunctions as a means for controlling proceedings in other courts, and it has been adopted in Act 1 of 1877 to prevent in the court of this country the use of any such jurisdiction (8). But although pending proceedings cannot be restrained, in England after the passing of the Judicature Act, 1873, a person may be restrained from instituting proceedings (9). In a suit for a mere declaration, it is not proper to

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(1) *Uderam Kesuji* v. *Hyderally*. 33 B. 469 ; see also *Punchanon Singh* v. *Kanaklota*, 3 C. L. J. 29.

(2) *Govinda Rajalu* v. *Imperial Bank*, A. I. R. 1932 Mad. 180=136 Ind. Cas. 346 ; see also *Nandalal* v. *Kalipoda*, 54 C. L. J. 317=36 C. W. N. 291 ; *Periakaruppan* v. *Ramaswami*, A. I. R. 1928 Mad. 491=109 Ind Cas. 281 ; *Singaravelu* v. *Bala Subramania* (obiter) ; A. I. R. 1926. Mad. 1126=97 Ind. Cas. 938.

(3) *Vulcan Iron Works* v. *Bishembhur*, 36 C. 233 ; *Carron Iron* v. *Maclaren* 5 H. L. C. 416.

(4) *Singaravelu* v. *Balasubramania*. A. I. R. 1926 Mad. 1126=97 Ind. Cas. 938.

(5) A. I. R. 1933 Lah. 592.

(6) *Ramsadan* v. *Mathura* 81 Ind. Cas. 2=1925 Cal. 233 ; Specific Relief Act s. 56 (b).

(7) Specific Relief Act s. 56 (a).

(8) *Appu* v. *Raman*, 14 M. 425.

(9) Per *Jessel M. R.* in *Besant* v. *Wood*, 12 Ch. D. 605 at p. 630 ; see also

grant an injunction staying proceedings in another suit pending in another court (1).

Multiplicity of Judicial proceedings.—To prevent a multiplicity of suits was a favourite ground for granting injunctive relief in courts of equity. The object to be attained by a resort to a court of equity in such cases was to obtain a final determination of the particular right in controversy, as between all the parties concerned, by a single issue, instead of leaving the right open to litigation by separate suits brought by each of the parties in interest. It began probably, in the bill of peace, a remedy rendered necessary by the common law rule, that a judgment in an action of ejectment did not conclude the plaintiff from bringing successive suits upon the same cause of action. In order to prevent this vexatious repetition of suits, the defendant, after a judgment at law in his favour, could by a bill of peace, enjoin the plaintiff from bringing further suits. The principle of the bill of peace was extended to cases where a great number of parties had a common cause of action against the same party, growing out of the same enquiry, and depending on the same questions of law and fact. And it was declared that commonly Chancery would assume jurisdiction in the first instance to prevent a multiplicity of suits where a party prosecuted and defended a right against a great number of persons or where a great number of persons prosecuted or defended a right against a single individual (2). Multiplicity, as employed in the statement that equity will interpose to prevent a multiplicity of suits, does not mean a multiplicity merely, and an injunction will not be granted on that ground where the object is to obtain a consolidation of actions or to save the expense of separate actions (3).

The Specific Relief Act, by clause (*a*) of section 56, lays down that an injunction cannot be granted to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of suits (4). In *Ramchand Dutt* v. *Watson* (5), *Wilson J.* sai . : "Particularly, since the passing of the Specific Relief Act, an injunction may properly be granted, if on a consideration of the facts of the case, the Court thinks that the remedy is necessary in order to prevent repitition of injury and

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Hart v. *Hart*, 18 Ch. D. 670, 680 ; *Circle Restuarant* v. *Lavery*, 18 Ch. D. 555 ; *A Company, In re*, (1894) 2 Ch. 349 ; *Maidstone Palace of Varieties, In re*, (1909) 2 Ch. 286.

(1) *Samandar* v. *Fazal*, 78 Ind. Cas. 802

(2) H. C. Joyce on Injunction § 518.

(3) *Murphy* v. *City of Wilmington* 66 Houst (Del), 108, 22 Am. St. Rep. 345, where the Court said : "Equity will interpose in a proper case to prevent a multiplicity of suits, excessive litigation or circuity of action. A Court of equity, on a bill being filed for a discovery, will sometimes proceed to take jurisdiction of all the matters in controversy between the parties, instead of sending them to a Court of law and thus avoid circuity of action, And so, to prevent a multiplicity of suits, as of one against many or of many against one, in relation to the same cause of action, the aid of equity may be invoked. But multiplicity does not mean multitude, and equity will not interfere where the object is to obtain a consolidation of actions, or to save the expense of separate actions."

(4) *Venkatesa* v. *Rama Sami*, 18 M. 338, 341 ; see also *Moran* v. *River Steam Navigation*, 14 B. L. R. 359.

(5) 15 C. 214.

multiplicity of suits. This is a case in which there has been a continued wrong and a wrong which the defendants have attempted to justify. A continuance of that wrong and a multiplicity of suits seem to us not only highly probable, but almost certain, if we were simply to set aside the injunction." One of the objects of the Legislature in passing such a provision was to guard as far as possible against multiplicity of suits (1).

Stay of proceedings in subordinate Courts.—The jurisdiction of Court to stay proceedings on the ground that they are an abuse of the process of the Court, will be exercised with great caution (2). Under section 56 (*b*) an injunction cannot be granted by a Court to stay proceedings in a Court not subordinate to the Court granting the injunction. But when no proceedings are pending an injunction can be granted (3). In *Ram Sadhan Biswas* v. *Mathura Mohan Hazara*, (4), *Mr. Justice Mukherji* said: "It is well settled that temporary injunctions are governed not by the Specific Relief Act, but by the provisions of the Civil Procedure Code, Order XXXIX, r. 1 and a temporary injunction may be granted by a subordinate Court against a party even in respect of proceedings in a Superior Court (5). So far as perpetual injunctions are concerned they are regulated by the Act and an injunction cannot be issued by a Court not subordinate to that from which the injunction is issued. In *Venkatega Tawker* v. *Rama Swami Chettiar* (6).and *Ramayyar* v. *Ramayyar* (7) it has been held that a Court cannot by reason of clause (*b*) of section 56 of the Act grant an injunction in respect of proceedings before itself. I am not aware of any case in which this view has been either accepted or dissented from. The objection, however, is one of a highly technical character and has very little of sense in it, and puts an obstacle in some measure at least of a description which was probably never meant by the Legislature. The sources of this relief, the Courts of Chancery in England, made abundant use of injunctions as a means of controlling proceedings in other Courts which were in theory perfectly independant of them. This they did not by any order addressed to such Courts, nor by the assumption of any power to control them, but through the fundamental principle of their own jurisdiction of acting *in personam* and so compelling parties to suits before them to regulate their proceedings in other Courts in accordance with what the Courts of Chancery conceived to be the dictates of equity and good conscience in the particular case. It is difficult to conceive on what principle a Court can be said to be not empowered to do in respect of proceedings before itself what it thinks proper in respect of proceedings before another Court subordinate to it. I beg, therefore, to respectfully dissent

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(1) *Kirpa Dayal* v. *Rani Kishori*, 10 A. 80=A. W. N. 1888,7

(2) Kerr on Injunction p. 594 citing *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 150; *Norton* v. *Norton*, (1908) 1 Ch. 479; *Shakeleton* v. *Swift* (1913) 2 K. B. 312=82 L. J. K. B. 613; *Evans* v. *Barday's Bank*, (1924) W. N. 97.

(3) *Karnadhor* v. *Hari Prosad*, 6 M. L. T. 247=3 Ind. Cas. 338. *Ramsudan* v. *Mathura*, A. I. R. 1925 Cal. 233.

(4) *Kansho* v. *Sharaf*, 73 Ind. Cas. 909.

(5) 81 Ind. Cas. 2=1925 Cal. 233.

(6) 18 M. 338.

(7) 21 M. 356.

from the view taken by the Madras High Court, in support of which I have not been able to discover any authority so far as any other High Court is concerned. So far as this Court is concerned I think I am not wrong in treating this question *res integra*. My view is that the prohibition operates only in respect of Courts which are not subordinate in the sense that they are not co-ordinate or superior and not in respect of the Court itself which must always be taken as competent to regulate its own proceedings."

A Revenue Court not being a Court subordinate to a High Court, the latter has no power to grant an injunction restraining a partition proceeding in the Revenue Court (1). But in a case in which an appeal from a decision of the Revenue Court lies to the Civil Court the former Court is subordinate to the latter Court within the meaning of s. 56 (*b*) of the Specific Relief Act (2).

The District Court in execution of a decree fixed a date for the sale of certain properties. Before that date the claimant instituted a suit in Sub-Court and obtained an injunction restraining the decree-holder from selling the property. The District Court refused to stay the sale whereupon the sale was held and the purchase money paid into Court. On an application to set aside the sale, *held* by the High Court that though the District Court was not personally bound by the order of injunction, yet it should in the exercise of its inherent power have directed stay of sale having regard to the fact that the decree holder was restrained by injunction from executing the decree. In the result the sale was set aside and the money deposited in Court was refunded to the purchaser (3). Were a person obtains a decree for restoration of possession of land under section 9 of the Specific Relief Act the person against whom it is passed and who is in possession of the land, can institute a suit to establish his title to the land and obtain an injunction to restrain the decree-holder from dispossessing him by enforcing his decree, notwithstanding the provisions of section 56, clause (b) of the same Act (4).

Injunction against proceedings not pending.—The object of the English Judicature Act of 1873, appears to have been to do away with the use of injunctions as a means for controlli :g proceedings in other Courts, and it has been adopted in clause (b) of section 56 of Act I of 1877 to prevent in this country the use of any such jurisdiction. But this clause is no bar where the effect of the injunction granted by the Lower Court is to prevent the appellants from applying to the Court to execute his decree. This clause is not applicable where no application for execution has yet been made, and so long as the injunction is in force cannot be made, no proceeding of a Court being restrained by the injunction (5). The English Act only applies where a 'proceeding is pending', accordingly there is jurisdiction to restrain by

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(1) *Matloob Hasan* v. *Kalawat*, 132 Ind. Cas. 42=1930 A. L. J. 1469=A. I. R. 1931 All. 57 ; *Mahadie* v. *Bahu Rani*, 6 O. L. J. 55=50 Ind. Cas. 180.

(2) *Mahadei* v. *Bahu Rani*, 6 O. L. J. 55=50 Ind. Cas. 180.

(3) *Maharaj Bahadur Singh* v. *A. H. Forbes*, 3 Pat. L. T. 645=(1922) Pat. 225

(4) *Mari Dodda lainna* v. *Santya*, 24 Bom. L. R. 768=68 Ind. Cas. 490.

(5) *Appu* v. *Roman*, 14 M. 425 ; see also *Kunhamed* v. *Kutti*, 14 M. 167.

injunction the institution of proceedings in the High Court (1). There is nothing in the section to prevent the Court from restraining the commencement of proceedings (2). A married woman can contract to leave apart from her husband, and the husband is entitled to come to the Court to enforce specific performance of such a contract. A husband is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenant on his part. In such a case injunction was granted to restrain the wife from suing for restitution of conjugal rights (3).

Injunctions restraining execution of a decree.—Section 56 of the Specific Relief Act, which occurs in the chapter relating to perpetual injunctions, has no application to temporary injunctions which are by the express words of section 53 left to be regulated by the Code of Civil Procedure (4). A court can issue a temporary injunction staying proceedings in a Court not subordinate to it (5). The Code of Civil Procedure is not exhaustive and the courts have an inherent jurisdiction to act *ex debito justitiae* in order to do that real and substantial justice for the administration of which they exist (6). So even in a case where it is not covered by the provisions of order XXXIX, a court can grant a temporary injunction for the ends of justice. A obtained a decree against B and others (*Hindus*) on a title of purchase from them, for possession of an undivided moiety of a dwelling house, to the remaining moiety of which C (*a Hindu*) alleged he was jointly entitled, and that he and his family were in possession. On A's proceeding to obtain execution of his decree, C brought a suit, alleging that A had obtained no title under his purchase, and praying for a partition of the property. On application for an *interim* injunction to restrain A form executing his decree pending the partition suit, the Court granted the application (7). In a suit brought in a subordinate court by the junior members of a *Malabar tarwad* against their *Karnavan* and others, the plaintiffs prayed for a declaration of the *uraima* right of their *tarwad* in a certain *devasom* and for an injunction to restrain the defendants, other than the members of the plaintiff's *tarwad*, from executing a decree of a District court, passed on appeal from a Munsiff's Court, whereby certain lands of the *devason* were decreed to be surrendered to them in the character of *uralers* ; it appeared (a) that plaintiff's *karnavan* was a party to the suit

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(1) Kerr the Injunction p. 593 citing *Besant* v. *Wood*, 12 Ch. D. 630 ; *Hart* v. *Hart*, 18 Ch. D. 680 ; *Maidstone Palace of Varieties In re*, (1909) 2 Ch. 283, 286=78 L. J. Ch. 739.

(2) *Maidstone Palace of Varieties, In re*, 78 L. J. Ch. 739.

(3) *Besant* v. *Wood*, 48 L. J. Ch. 497 = 12 Ch. D. 605.

(4) *Kanshi Ram* v. *Sharfdin*, 73 Ind. Cas. 909=1923 Lah. 144 ; *Amir Dulhin* v. *A.G.* 23 C. 351.

(5) *Ibid.*

(6) *Kanshi Ram* v. *Sharfdin*, 73 Ind. Cas. 909=1923 Lah 144 ; *Monohar Lal* v. *Jai Narain*, 50 Ind. Cas. 403=2 L L. J. 283.

(7) *Anath Nath* v. *Machintosh*, 6 B. L. R. 571.

in which the above mentioned decree was passed, (b) that the plaintiff's *tarward* was otherwise entitled to the *uramia* right by adverse possession, if not immemorial title : *Held* that the injunc tion sought was not precluded by Specific Relief Act, S. 56 (b) (1). A temporary injunction can be granted restraining the defendants from executing any decree they might obtain in a suit (2). Where the ground of action really is that the defendant by fraud has obtained an advantage in proceedings in a court having jurisdiction which must necessarily make that court an instrument of injustice, the remedy would appear to be by way of injunction to restrain the party from executing the decree (3).

Sons in a joint Hindu family sued their father and his creditors for declaration that certain debts were not binding upon their share in the family property, and applied for temporary injunction to restrain execution of certain decree against their father. *Held* that the sons had no right to claim injunction unless they made out a fairly strong *prima facie* case (4). Where the suit of a person for declaration of title to property attached in execution of a decree between third parties is dismissed and he prefers an appeal, he cannot ask for a stay of sale under Order XLI, r. 6 of the Civil Procedure Code as that provision is applicable only where the appeal is pending against the decree which is to be executed. Such a person can however, take action under Order XXXIX of the Code and pray for a temporary injunction (5). A brought a suit and obtained a decree against B on a mortgage bond in the Court of a Subordinate Judge, which decree was confirmed by the High Court on appeal. A then applied for execution. In the execution proceedings the sons of B intervened claiming a portion of the properties attached ; this claim was dismissed, and the sons of B brought a regular suit before the same Subordinate Judge to have their rights to the property declared, and obtained an *interim* injunction restraining A from executing his decree pending the decision of their suit. This suit was dismissed and the sons of B appealed to the High Court. A again applied for execution of his mortgage decree, whereupon the sons of B applied for a further injunction restraining A from executing his decree pending their appeal to the High Court ; this application was granted. *Held*, that the subordinate Judge had no right to restrain the decree-holder from executing his decree, merely on the possibility of the Appellate Court reversing the decision (6). But in such a case the Appellate Court may issue a temporary injunction restraining the decree-holder from proceeding with the execution of his decree during the pendency of the appeal (7). In *Onkar Singh* v.

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(1) *Appu* v. *Ram*, 14 M. 425

(2) *Maran* v. *The River Steam Navigation Co.* 14 B. L. R. 251.

(3) *Kunhamad* v. *Kutti*, 14 M. 167.

(4) *Vithal* v. *Dawoo*, A. I. R. 1931 Nag 106.

(5) *Mohar* v. *Kanahaya Lal*, 77 Ind. Cas. 116=4 L. L. J. 188=1922 A. I. R. (Lah) 58.

(6) *Gossain Money Puree* v. *Guru Pershad*, 11 C. 146 ; see also *Yamin-ud-dowlah* v. *Amed Ali*, 21 C. 561.

(7) *Kripa Dayal* v. *Rani Kishori*, 10A. 80.

Bhup Sing (1) it was held that the term "decree" as used in the Civil Procedure Code does not include the decree of a Court of Revenue, hence an application under section 492 of the Code of Civil Procedure (2) for stay of sale in execution of a decree of a Court of Revenue in a suit under s. 93 of Act XII of 1881, cannot be entertained by a Civil Court. But in a later Calcutta case (3), *Mr. Justice Mookerjee* said: 'In support of this view, the District Judge has referred to the case of *Onkar Singh* v. *Bhup Singh* (1). It does not appear, however, to have been brought to his notice that this decision of the Allahabad High Court has been accepted as well-founded by this Court in the case of *Ram Lochan Singh* v. *Beni Prosad Kurmi* (4). The latter decision is an authority for the proposition that although a decree may have been passed by a Revenue Court, when it is under execution in a Civil Court, proceedings may be stayed by the Civil Court, if a suit has been brought for a declaration that the decree was obtained by fraud or was made without jurisdiction and for perpetual injunction to restrain the decree-holder from executing the decree (5)".

By a *sanad* duly executed on the 20th August, 1850, the plaintiff's father, *Yashvant Rao*, who was a *vatandar deshmukh*, appointed the defendants and their heirs hereditary *vatani gumastas*, and granted, by way of remuneration for their services, Rs. 201, and a quantity of grain out of the annual *vatan* income in perpetuity. In consideration of certain sums obtained from the defendants, *Yashvant Rao* mortgaged the *vatan* property to the defendants, who subsequently sued *Yashvant Rao* upon the mortgage. A decree upon award was obtained by the defendants against *Yashvant Rao*. Subsequently *Yashvant raw* died. The defendants sought to execute the decree against the plaintiff's eldest brother, who filed objections, but his objections were overruled, and execution was ordered. The plaintiffs brought this suit for a declaration that the defendants were no longer entitled to the allowance under the *Sanad*, and for an injunction restraining the defendants from execution of the decree against the *vatan*. *Held* confirming the decree of lower Courts, that the plaintiffs were entitled to the declaratory decree and to the injunction prayed for (6),

But a Judge cannot be too careful as to the mode in which he permits the machinery of the court to be used for the purpose of enabling the plaintiff in one suit to delay the decree holder in another from obtaining the fruits of his judgment by executing his decree in the ordinary course against the property of the judgment-debtor (7). A suit for a declaration that a decree obtained by the defendant against the plaintiffs in a certain original suit has been satisfied and for an injunction restraining the defendant

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(1) 16 A. 496.

(2) See now Order XXXIX, rule 1 of C. P. Code of 1908.

(3) *Jit Lal* v. *Kamaleswari*, 16 C. L. J. 555.

(4) 36 C. 252.

(5) See also *Manraj Kuari* v. *Radha Prosad*, A. W. N. 1884. 352.

(6) *Krisnaji* v. *Vithalrao*, 12 B. 80.

(7) *Bhabhikan* v. *Chakradhar*. 9 Ind. Cas. 227.

from executing that decree is not maintainable as the question involved in that suit would come under clause (1) of s. 47 of the Code of Civil Procedure (1).

In an application for a stay of execution, the Court has to be satisfied that the appellant is likely to sustain substantial injury by execution being allowed to take place before the disposal of the appeal. In an application for a temporary injunction, the Court will have to be satisfied that the applicant has *prima facie* case, and further, that the protection of his interests requires that an injunction should issue temporarily. It is not usual for the Court to grant stay of execution if the appeal itself does not raise fairly arguable questions. Where no pecuniary or tangible loss is shown it would not be right to grant stay of execution, merely on the ground of annoyance to the feelings of the appellants (2). In a case in which the the defendants have submitted to the jurisdiction of a Court by entering appearance, the court has jurisdiction to grant an injunction restraining the defendants from executing in another court a decree which they have obtained against the plaintiff (3).

Plaintiffs were owners of a bunglow which had been let to defendant on lease, which plaintiff alleged expired on 30. 6. 1920. Meanwhile defendant had sublet the premises or part of them, and as he could not get possession from his sub-tenants a suit had to be filed in which there was a decree in defendant's favour. The plaintiffs as owners of the property sued defendant claiming that they were entitled to possession and that the decree which the defendant had obtained against his sub-tenants was not binding upon them, and for an injunction against defendant, not to take possession. An application was made by plaintiffs for a temporary injunction restraining defendant from executing his decree against the sub-tenants. *Held* that the court had no jurisdiction to restrain the defendant from seeking to get the benefit of his decree which had nothing whatever to do with the plaintiff's claim (4). But a judgment debtor can sue for an injunction restraining the execution of a decree which he alleges to be fraudulent, even before steps are taken in execution (5). The High Court granted an injunction to stay execution proceedings on giving security (6). Where there was no prayer in the plaint in the title suit to the effect that the court should declare that the prior rent decree was bad or that if the property was sold in virtue of it, it would be wrongfully sold. *Held* in revision, that under those circumstances the court would not order a temporary injunction restraining the execution of the rent decree (7).

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(1) *Manjunatha* v. *Appaya*, 31 M. L. J. 429=36 Ind. Cas. 988.

(2) *Vathiar Ramanuja* v. *P. R. Ariyanachariar*, 23 M. L. J. 316.

(3) *Kumar Ganga* v. *Pirthi Chand*, 1 Pat 356=(1922) p. 34.

(4) *Nasarvanji* v. *Shahajadi Begam*, 24 Bom. L. R. 378=66 Ind. Cas. 768.

(5) *Sultan Ali* v. *Balaji*, 1924 Nag. 413.

(6) *Jagey Ram* v. *Richh Pal*, 26 P. L. R. 753.

(7) *Ahibhusan Dutta* v. *Bibhuti Bhusan Dutt*, I. L. T. 40 Cal. 151.

A court cannot grant a general injunction restraining a party from realising rents in execution of any decrees that he might obtain (1). The High Court is not bound by the provisions of the Code in issuing injunction in appropriate cases. Thus pending an appeal against an order refusing to set aside *ex parte* decree, the Court can restrain the decree-holder from executing the decree (2).

Injunction restraining sale in execution of a decree.—Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wrongfully sold in execution of a decree, the court may by order grant a temporary injunction to restrain such act (3). There was some conflict of opinion in the Allahabad High Court as regards the meaning of the words "wrongfully sold in execution of a decree." In *the Matter of the petition of Chando Bibi* (4). *Knox and Aikman J J.* dissenting from the decision of *Kirpa Doyal* v. *Rani Kishori* (5) and following an unreported case *Musamat Haidari* v. *Musamat Hayat Begum* (F A. No. 1 of 1901) of the same High Court, held that such an injunction could not under the circumstances (6) be granted, in as much as it was impossible to say that the attached property was in danger of being

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(1) *Profulla Chandra Basu* v. *Kshetra Lal Singh Roy*, 49 C. L. J. 281 = A. I. R. 1929 Cal. 417.

(2) *Govinda Rajulu* v. *Imperial Bank*, 136 Ind. Cas. 346 = 35 L. W. 168 = A. I. R. 1932 Mad. 180.

(3) Vide Order XXXIX, rule, of Act V. of 1908 ; *Brojendra* v. *Rup Lal*, 12 C. 515, 517 : "It is contended by the learned Advocate General on the authority of two cases *Luchmiput Sing* v. *The Secretary of state*, 20 W. R. 11 = 11 B. L. R. Ap. 27 ; and *Durga Charan Chatterjee* v. *Ashutosh Dutt*, 24 W. R. 70, that the First Subordinate Judge had jurisdiction, and that the order staying the execution sale was properly made. It appears to us that the Legislature has deliberately altered the law as laid down in the two cases just referred to under s. 92 of the old Code, Act VIII of 1859. The words were "that any property which is in dispute in the suit is in danger of being wasted, damaged, or alienated, by any party to the suit ; "and in the case of *Roy Lachmiput Singh* v. The *Secretary of the state, Supra*, it was held that property, which was about to be sold in execution, could not be said to be in danger of being wasted, damaged, or alienated within the purview of these words. In the present Code in s. 492, other words have been introduced, namely, 'or wrongfully sold in execution of a decree,' and these words must be read with the previous part of the section, that is, 'that any property in dispute in a suit is in danger of being wrongfully sold in execution of a decree.' The law does not say that a property is or is about to be wrongfully sold, but that it is in danger of being wrongfully sold. We think that these words are wide enough to include a case, such as that which is now before us, and that in a case of this kind there is sufficient remedy provided under the present Code by an application to the Court in which the title to the property is being litigated. for an *ad interim* injunction to restrain the defendant in that suit from proceeding to a sale of the property until the title has been definitely determined." See *Gossain Money Puree* v. *Guru Pershad* 11C. 148.

(4) 26 A. 311.

(5) 10 A. 80.

(6) In exeeution of a simple money decree against one Mohon Lal, the decree holder, Rai Krishen Chand, attached certain property as belonging to his judgment-debtor. To this attachment one Mussammut Chando Bibi objected, and her objection was sustained. The decree holder thereupon brought a suit as provided by section 238 of the Code of Civil Procedure of 1882 against the judgment debtor and Mussammut Chando Bibi, and in this suit obtained a decree from the Court of first instance. Mussammut Chando Bibi appealed to the High Court, and, pending the appeal,

'wrongfully' sold in execution of a decree within the meaning of section 492. But this decision (1) was overruled by subsequent Full Bench case of the same High Court (2). In the Full Bench case *Mr. Justice Banerjee* in delivering his judgment said: "The words 'wrongfully sold in execution of a decree'. were added in the Code of Civil Procedure of 1877 (Act X of 1877). This did not exist in section 92 of Act VIII of ,1859, and it is manifest that when the words 'wrongfully sold in execution of a decree' was added by the legislature, it was clearly intended that an injunction might be granted when property, which the claimant claimed to be his, was in danger of being sold in execution of a decree against another person or even against himself. In certain circumstances it might be in danger of being wrongfully sold in execution of a decree against the plaintiff himself. For instance, if the plaintiff has instituted a suit for a declaration that the decree obtained against him was obtained by fraud the property would be in danger of being wrongfully sold in execution of such a decree. Other instances are given in *Dr. Satish Chandra Banerjee's* elaborate work on Specific Relief at p. 741. The view I have expressed above is supported by the ruling of the Calcutta High Court in *Brojendra Kumar Rai Choudhuri* v. *Ruplal Das* (3), and also by the decision of *Oldfield J* in *Ganga Nand* v, *Balgobind Das* (4) which was followed in *Kirpa Dayal* v. *Rani Kishori* (5). As regards the merits of the case, I am of opinion that the case is one in which a temporary injunction ought to be granted." In the same case *Stanley C. J.* said: "I concur in the judgment which has been pronounced by my brother *Banerji*. In an earlier case I was a member of a Bench which expressed approval of the decision *In the matter of the petition of Chando Bibi*, namely, in the ase of *Megraj Singh* v. *Lala Mal* (6) At that time I was not aware of the amendment of the law by Act X of 1877. As has been pointed out, under section 92 of Act VIII of 1859, the words 'or wrongfully sold in execution of a decree,' did not exist in the earlier statute. These words it appears to me, were obviously added to meet a case such as the present, and in view of this it appears to me that the words 'in danger of being wrongfully sold' we are not correctly interpreted in the case of *Chando Bibi*. After reconsideration of the matter I am of opinion that in the judgment which has just been pronounced, the section has been rightly interpreted" (7).

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applied for an injunction agaiast Rai Krishen Chand under section 492 of the Code.

(1) In the matter of the petition of Chando Bibi, 26 A. 311.

(2) *Abdullah Khan* v. *Banke Lall*, 33 A. 79.

(3) 12 C. 515.

(4) A. W. N. 1884, 349.

(5) 10 A 80.

(6) 4 A. L. J. 342 (Reporters' Diary)

(7) Even before such amendments such execution sales were restrained by *in terim* injunction. *Ruplal* v. *Mahima* 5 B. L. R. 254: *Sreenarain* v. *A. B. Miller*, 5 B. L. R. 254 notes. But in certain cases the court found it very difficult to interpret the word wrongful. In *Kripa Dayal* v. *Rani Kishori*, 10 A 80, *Straight J* said: 'It is not without some hesitation that I have come to the conclusion to grant it, my chief difficulty being caused by the word wrongfully in s. 492 of the code under which it is presented. It seems to me that we cannot be too careful as to the mode in which we permit the

So it is clear that a sale in execution of a decree of court may be enjoined if wrongful, and the very language of the code shows that the legislature distinctly contemplates and recognises that even a sale, ordered by a court of a competent jurisdiction may under certain circumstances be "wrongful." It is easy to conceive that a stranger to a decree may have rights in the property, which the decree purports to affect superior to and paramount over any that the decree holder may claim (1). Certain properties were ordered to be sold by an order absolute passed in a mortgage suit. The plaintiff brought the present suit for a declaration that the properties really belonged to him and not to the judgment debtors and prayed for a temporary injunction restraining the defendant decree holder from proceeding to sell the same. It was held that the court had jurisdiction to grant temporary injunction prayed for under Order 39, tule 1 of the Civil Procedure Code (2). So where there is a *bona fide* contention to be determined between the parties and balance of convenience is that the execution sale should be stayed, a temporary injunction to prevent the sale should be passed (3). The court has to consider at this stage whether there is a *bona fide* contention between the parties or whether there is a fair and substantial question to be decided as to what the rights of the parties are (4).

Where an objector's declaratory suit under Order 21, r. 63, has been dismissed and the house property sold in execution of the decree since the sale cannot be held as complete until possession has been delivered, on appeal by objector against the dismissal, an injunction can be issued under

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machinery of the court to be used for the purpose of enabling a plaintiff in one suit to delay a decree holder in another from obtaining the fruits of his judgment by executing his decree in ordinary course against the property of his judgment debtor. At the same time it is of course most desirable to guard as far as possible against a multiplication of suits, and I presume that this was one of the objects the Legislature had in view in passing s. 492 in the present shape. I cannot but feel that if *Mussamut Rani Kishori* is allowed to proceed with the sale of the rights and interests of her judgment debtors under the mortgage of the 20th June, 1876, many complications are likely to arise which would probably result in further litigation in some shape or another, whereas if she is restrained from doing so until after the appeal in this court has been disposed of, no practical injury that I can see will result to any one." Where ancestral property was attached in execution of a decree, and a son of the judgment debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit, held, that, inasmuch as what was advertised to be sold was the right and interests of the plaintiff's father in the property, and it could not be said that the property was being "wrongfully sold in execution of a decree" and the application on the face of it disclosed no sufficient ground to warrant an order under s. 492 of the Civil Procedure Code being made as prayed, the temporary injunction ought not to have been granted. *Amolak* v. *Sahib*, 7A. 550.

(1) Banerjee's T. L. L. for 1906 p. 594; *Ramsundar* v. *Ram Dheyan*, 46 Ind. Cas. 224=3 Pat. L. J. 456.

(2) *Haji Fate Mahammad* v. *Ebrahim Biswas*, 35 C. W. N. 910; see also *Gossain* v. *Gour Parshad*, 11 C. 149.

(3) *Nawal Kishore* v. *Santosh Singh* A. I. R. 1930 Lah. 108=31 P. L. R. 587=123 Ind. Cas. 527; see also *Lee Lake* v. *Lim Tie*, 2 L. B R. 89.

(4) *Israil* v. *Samser Rahaman*, 41 C. 436=18 C W. N. 176=19 C. L. J. 47; *Moran* v. *R. S. N. Co.*, 14 B. L. R. 352; *Walker* v. *Jones*, L. R. 1 P. C. 50; "The real point is, not how these questions ought to be decided at the hearing of the cause, but whether the nature and diffi-

Order 39, rule 1, preventing the delivery of possession (1). But in a Nagpur case (2) it has been held that a prohibitory order by way of injnnction can be issued so long as the property in dispute is in danger of being wrongfully sold in execution of a decree, but once it is sold no such order can be passed. There the question was whether the sale was *ultra vires* in view of the fact that an order under Order XXXIX of the Civil Procedure Code, although passed on the previous day on which the sale took place but was neither served on the decree holder, nor reached the executing court before the sale took place. In delivering the judgment the Court observed : "It is contended, on the authoriry of *Huknm Chand Boid* v. *Kamalanand Singh* (3) and *Ramanathan Chetty* v. *Arunachalam Chetty* (4) that the sale was *ultra vires*, even though the injunction was not served on the decree holder nor the order communicated to the executing court before the sale. In the two cases cited it was held that a stay order issued by the Appellate Court suspends the power and jurisdiction of the executing court to conduct further proceedings from the moment the order of the superior court is passed. This view, which has not been accepted by a later Full Bench of the Madras High Court (5) cannot, in our opinion, be extended to the case of an injunction passed under Order XXXIX, rule 1. It is difficult to see how the jurisdiction of a superior court can be taken away by an order of an inferior Court where, as in this instance, an appeal lay from that order to the court which was requested to stay the sale. As was pointed out by *Woodroffe J.* in *Hukum Chand Boid* v. *Kamalanand Singh* (6), a prohibitory order by way of injunction is directed to a party and not to a court. If the execution court has notice of the injunction, it would no doubt compel the decree-holder to do what he is ordered to do by a court of competent jurisdiction. In other words, it would stay the sale : but after the sale it is no longer in the power of the decree holder to stay it, and the court cannot compel him to do what he is legally incompetent to do. If the decree-holder happened to be himself the auction purchaser with notice of the injunction, he may be treated as a trustee subject to the ultimate order of the court issuing the injunction. This is not the case here. It has been held that an alienation made in contravention of an injunction is not void, such as would be the case when it is made after the attachment has been effected. Such an alienation subjects a party to the penalty prescribed by order XXXIX, rule 2 (7). Assuming that a prohibitory

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culty of the question is such that it was proper that the injunction should be granted until the time for deciding them should arrive." See also *Jones* v. *Pacaya*, (1911) 1 K. B. 455.

(1) *Inayat Ulla* v. *Gurdit Singh*, A. I. R. 1930 Lah. 850=31 P. L. R. 972=127 Ind. Cas. 360 ; *Radha Ballav* v. *Sheo Ram* 15 Ind. Cas. 876.

(2) *Dharamchand* v. *Mitsui Bussan Kaisha*, 54 Ind. Cas. 928.

(3) 33 C. 927 at p. 944.

(4) 22 Ind. Cas. 99=38 M. 766=26 M. L. J. 275.

(5) *Kasoribada* v. *Maddipattla*, 43 Ind. Cas. 214=41 M. 151=33 M. L. J. 515 (F.B.)

(6) 33 C. 927.

(7) *Delhi and London Bank* v. *Ramnarain*, 9 A 497 ; *Manohar Das* v. *Ram Autar Panday*, 25 A. 431.

order by way of injunction for certain purposes operates from the date when the order is made, it appears to be the opinion of the learned Judges of the Calcutta High Court, that a sale made in ignorance of the order would utmost be only an irregularity. Under rule 90 of Order XXI the sale cannot be set aside unless the judgment debtor has sustained substantial injury by reason of such irregularity."

In order to justify an order under this rule, it must be shown that the property in dispute is being wrongfully sold in execution of a decree. Even in such a case a court has no jurisdiction to issue an injunction upon a person who is not a party before it (1). In the execution of a decree ordering the sale of immoveable property it is not competent for the court to refuse to sell it, because a stranger to the suit in which such decree was obtained, who is in possession of such property, impeaches the decree as having been obtained by fraud ; the course open to him, if he wishes stay of execution, being to file a suit and obtain an injunction for that purpose (2). A temporary injunction staying a sale in execution of a decree on the ground that the decree was obtained by fraud cannot be granted unless there is a reasonable prospect of the allegation being proved. A court has jurisdiction to issue an injunction upon a person residing outside the territorial limits when he has property within its jurisdiction which can be proceeded against in the event of any contempt of the court's authority (3). Where a court made an order granting a temporary injunction under s. 492 of the Civil Procedure Code, without directing notice of the application for injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed *ex-parte* without the other side being given an opportunity to show cause, the order was irregular (4).

A suit was brought by a Muhammadan woman against her husband for a declaration that she was entitled to the possession of certan specified villages for her own debt. The defendant applied to the Court under s. 492, Civil Procedure Code, stating that several decrees had been passed against him in favour of certain persons named, that these latter in execution of their decrees had brought those villages to sale, that the sale was then pending, that the result of the action brought by his wife would be to depreciate the selling value of the property and prayed for a temporary injunction to restrain the sale of the properties in execution of the decrees till the disposal of the suit brought by wife. *Held* that there would be no waste or damage of the property within the meaning of s 492 of Criminal Procedure Code, that the property was not being wrongfully sold in execution of a decree, and that the application should not be allowed, as it would have the result of unnecessarily delaying the decree-holder's money (5).

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(1) *Ram Sundar* v. *Ram Dheyan*, 46 Ind. Cas. 224 = 3 Pat. L. J. 456.

(2) *Purshottam Vithal* v. *Purshottam Iswar*, 8 B. 532.

(3) *Rameshar Singh* v. *Ganga Nand Singh*, 75 Ind. Cas. 381 = 1 Pat. L. R. 462 = 5 Pat. L. T. 121.

(4) *Amolak Ram* v. *Sahib Singh*, 7 A, 550.

(5) *Muhammad Ismail* v. *Kishan Sahai*, A. W. N. 1887, 42

The sons of a judgment debtor filed a suit for declaration that the property notified for sale was their joint family property and applied for a temporary injunction to stay the sale. The decree holders resisted the application and filed an affidavit to the effect that the property was "talukdari property" belonging absolutely to the judgment debtor. *Held* that under the above circumstances an injunction might properly be granted (1). Where the property of a debtor was attached in execution of a decree and he applied for declaration of insolvency and pending application for stay of sale on the ground that the other creditors will be prejudiced. *Held* that the Court could not stay the sale in as much as there was neither an order adjudicating the debtor insolvent nor a receiver was appointed. (2).

Where a mortgagee or attaching creditor proceeds to sell the right, title and interest of his debtor, the balance of convenience is in favour of the creditor and no injunction should issue restraining him from effecting such sale during the pendency of a suit to which he is a party and wherein his claim is being impugned. All that the Court might do *ex majore cautela* is to require the creditor to give an undertaking that at the time of the sale, whether it be through the Court or otherwise, the intending purchaser should be informed of the pendency of the suit (3),

Injunction against criminal proceedings—An injunction cannot be granted to stay proceedings in a Criminal Court (4). In the *Commissioners for the Port of Calcutta* v. *Suraj Mall Jalan* (5) the Court observed : "Now under section 56, sub-section (*e*) of the Specific Relief Act, a Civil Court has no jurisdiction to stay by means of a permanent injunction proceedings in any criminal matter and it is settled law that where the legislature has indicated a mode of procedure before a Magistrate, a Civil Court will not interfere unless in very special circumstances by way of injunction on declaration of right (6). If these be the principles relating to the issue of permanent injunctions, it follows as a necessary corollary that there is no warrant for the issue of a temporary injunction....."The law on the subject was fully discussed by *Mookerjee* and *Rankin JJ*, in *Corporation of Calcutta* v. *Bijoy Kumar Addy* (7). In delivering the judgment their Lordships observed : "There has been much discussion at the Bar as to whether a Court of Equity has jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by a Statute for breach of its enactments. An authority for an affirmative answer has been traced to the decision of *Lord Hardwicke* in *Mayor* of *York* v. *Pilkington* (8), though a contrary view had been indicated by *Holt C. J.* in *Holderstaffe* v.

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(1) *Narindra Bahadur* v. *Haji Abdul*, 25 Ind. Cas. 9.

(2) *Anuradh Kumar* v. *Kesho Das*, 15 A. L. J. 473=39A. 547=39 Ind. Cas. 783 ; see also *Ramsunder* v. *Ram Dheyun Ram*, 3 Pat. L. J. 456=46 Ind. Cas. 224.

(3) *Jaikishindas* v. *Naraindas*, A. I. R. 1933 Sind. 118 ; *Ismail Ghulam Hussain* v. *Tyeballi Eassaji*, A. I. R. 1929 Sind. 182=119 Ind. Cas. 223=24 S. L. R. 81.

(4) Specific Relief Act s. 56 (*e*).

(5) 32 C. W. N. 576=55 C. 978.

(6) *Corporation of Calcutta* v. *Bijoy Kumar Addy*, 50 C. 813=27 C. W. N. 787.

(7) 50 C. 813=27 C. W. N. 787.

(8) (1742) 2 Atk. 302

Saunders (1), see also the decision of *Lord Hardwicke* in *Montague* v. *Dudman*(2). But the tendency of the modern decision is that even if the Court has such jurisdiction, it will not interfere as a general rule [*Saull* v. *Browne* (3), *Kerr* v. *Preston Corporation* (4), *Hedley* v. *Bates* (5), *Stannard* v *Vestry of Saint Giles* (6), *In re Briton Medical etc., Association* (7), *Grand Injunction Water-works Co.*, v. *Hampton Urban Council* (8), *Devon Port Corporation* v. *Tozer* (9), and *Merrick* v. *Liverpool Corporation* (10)]. The principle deducible from the decisions is that though the extreme position cannot be maintained that there is absolutely jurisdiction in the Court to restrain proceedings before a Magistrate, the Court will not interfere unless in very special circumstances by way of injunction or declaration of right where the legislature has pointed out a mode of procedure before a Magistrate ; see also *Emperor of Austria* v. *Day* (11). A similar view had been adopted in the Courts of the United States and relief has been frequently denied on the ground that the proceedings were for the enforcement of a criminal or *quasi* criminal nature and that equity declines to interfere with the administration of the criminal laws. It has been maintained, however, that a Court of Equity may in a proper case interfere by injunction to restrain an act or proceeding, criminal or *quasi* criminal in form, which tends to the impairment of property rights, and proceedings for the enforcement of Municipal Ordinances, such as the one before us, have been treated as *quasi* criminal (12). We need not pursue this point further, but it should not be overlooked that the judicial decisions on the subject in other jurisdictions were largely rendered necessary by the system of classification of Courts prevalent there. Apart from this we have the settled rule that it is not the practice of the Court to interfere with corporate bodies, unless they are manifestly abusing the powers. *Duke of Bedford* v. *Dawson* (13) and *Ahmedabad Municipality* v. *Manilal Udenath* (14). It is consequently unnecessary to consider the terms of section 56 (*e*) of the Specific Relief Act, which provides that an injunction cannot be granted to stay proceedings in any criminal matter, and, which it has been suggested, should be construed to imply that there is no bar to enjoining contemplated prosecutions where proceedings are only threatened and are not yet pending. Nor need we adopt the extreme view that an injunction should not be granted to prevent the institution of criminal proceedings for non-compliance with requisitions of Municipal authorities, merely because the person concerned, when prosecuted for an alleged default, may be acquitted on proof that the action of the Corporation was *ultra vires*."

In a recent Madras Case (15), *Mackay J.* observed : "I am not prepared to

(1) 6 Mod. 12
(2) (1751) 2 Ves. Sen. 396
(3) L. R. 10 Ch. 64
(4) 6 Ch. D. 463
(5) 13 Ch. D. 498
(6) 20 Ch. D. 190
(7) 32 Ch. D. 503
(8) (1898) 2 Ch. 341
(9) (1902) 2 Ch. 195
(10) (1910) 2 Ch. 449.
(11) 3 De G F & J. 217.
(12) Pomeroy on Equity Jurisprudence § 1777.
(13) L. R. 20 Eq 353
(14) 19 B. 212 S. C. 20 B. 146.
(15) *Rama Ayyar* v. *Municipal Council, Madura*, A. I. R. 1929 Mad. 345.

disagree from the Appellate Court when it holds that a Civil Court has no power to restrain a person or corporate body from contemplated prosecution where proceedings are threatened but are not yet pending although in terms s. 56 (*e*) may not appear to apply. It seems to me a much more serious thing to restrain a person from seeking redress in a Criminal Court than to restrain him from applying to a legislative body, which is forbidden by clause (*e*). However that may be, I am clearly of opinion that this is not a case in which the Municipal Council should be restrained from launching a prosecution against the petitioners .....It is unnecessary to decide whether s. 56 (*e*) is a bar to enjoying contemplated prosecutions, because it is clear on the authorities, that even if a Court has such jurisdiction it will only interfere in very special circumstances and I am of opinion that no special circumstances exist in this case" (1). In England "the Court will not interfere by injunction in matters merely criminal or immoral, which do not affect any right to property. But if an act which is criminal touches also the enjoyment of property, the Court has jurisdiction, but its interference is founded solely on the ground of injury to property (2)" A Civil Court has no jurisdiction to restrain a party by an injunction from pursuing her remedy under s. 4`8 Cr. P. Code in a criminal Court (3).

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(1) In *Raj Kumari Debi* v. *Bama Sundari Debi*, 23 C. 610, *Rampani J.* held that the High Court has no power to direct that criminal proceedings in the Court of a Magistrate should be stayed, until the disposal of a civil suit, in which the question, at issue in the criminal proceedings shall have been decided. [*In the mother of Ram Prosad Hazara*, B. L. R. (F. B.) 426 Followed]. But in the same case *per Ghosh J*— A proceeding in a criminal Court should not as a general rule, be stayed pending the decision of a civil suit in regard to the same subject matter ; but ordinarily it is not desirable, if the parties to the two proceedings are substantially the same and the prosecution is a private prosecution, and the issues in the two Courts are substantially identical, that both the cases should go on at one and the same time. It is open to Magistrate, having regard to the facts of the case before him, to consider whether it is not desirable that the proceedings in his court should be stayed, till the decision of the civil suit, or for a limited period of time ; and it is also open to him to put the defendant on terms as to appearance or otherwise, if he does stay proceedings. The High Court has the power to order a Magistrate to stay proceedings in his Court if a sufficient cause in that behalf is made out. But in as much as the legislature has given him the power to regulate the proceedings in his own be left to him either to stay proceedings or not, as he is in the circumstances of each case may think right and proper. *Sri Nama Maharaj*, (16B 729) *per Jardine J.* Criminal proceedings arising out of a civil litigation should not as a rule, go on during the pendency of the litigation. See also *Ashrabuddin* v. *Kali Dayal* 19 C. W. N. 125 ; *Gobordhone Paramanik* v. *Iswar Chandra*, 5 C. W. N. 44 ; *Dwarka Nath* v. *Emperor*, 31 C. 858 ; *Rex* v. *Ashburn* and *Rex* v. *Simons*, 8 C. & P. 50 ; *In re Devji Valad Bhavani*, 18 B. 581 ; *Jogia* v. *Emperor*, 31 M. 510 ; *Anna Ayyar* v. *Emperor*, 30 M. 226. Proceedings under s. 145 Cr. Pro. Code, can not be said to be criminal proceedings within the meaning of that principle, and a Civil Court's action cannot possibly be fettered by an action, which one of the parties to the suit may choose to take before the Magistrate under the provisions of that section. *Nawab* v. *Seth*, 2 Ind. Cas. 266.

(2) Kerr on Injunction p 8 ; The *Emperor of Austria* v. *Day* & *Korsuth* : "The jurisdiction of a Court of equity rests upon injury to property, actual and prospective, and the Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property."

(3) *Krishna Gobind* v. *Keshori Bala*, 129 Ind. Cas. 103=32 Cr. L. J. 232=A. I. R. 1930 Cal. 663.

Injunction against donee registering deed—A gift of immoveable property under section 123 of the Transfer of Property Act can only be effected by a registered instrument. Therefore a donor can, if he is so minded, revoke the gift before registration, and obtain an injunction from the Court restraining the donee from getting the gift deed registered (1).

Injunction against arbitration proceedings.—Where a contract is impeached on equitable grounds the Court may restrain arbitration proceedings commenced under it by issuing injunction (2); but no such injunction should be granted where the contract is merely denied. The Court would not grant an interlocutory injunction restraining proceedings which are null and futile, although the same may be vexatious (3) A temporary injunction should not be granted unless the applicant satisfies the Court that its interference is necessary to protect him from irreparable or at least serious injury before the legal right can be established at the trial. If there is any remedy open to the applicant by which he can protect himself from the consequences of the injury apprehended a temporary injunction will not be granted. Where one party to a contract alleges a breach and refers the matter to arbitration and the other party brings a suit for a declaration that he is not liable upon the contract, then if the existence of the contract itself is denied, no temporary injunction should be granted restraining the arbitration proceedings but if the contract is impeached on grounds of equity such as fraud and misrepresentation, a temporary injunction should ordinarily be granted (4).

Though the obtaining of an entirely wrong award from an arbitrator does not inflict a legal wrong upon the person against whom the award is made and would not entitle such person to recover damages and though the general principle is clear that a plaintiff is entitled to ask for an injunction only against a legal wrong, yet where in an action the validity or existence of the contract is challenged on any ground, the court has jurisdiction to restrain arbitration proceedings under the agreement until the question has been determined (5).

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(1) *Subba Rama* v. *Venkata Subba*, 20 L. W. 14=80 Ind. Cas. 82=1924 Mad. 722.

(2) *Kitts* v. *Moore*, L. R. (1895) 1 Ch. 253; *Mansell* v. *Midland Ry.* 32 L. J. Ch. 513; *Mylne* v. *Dickinson*, Copper 195.

(3) *Sardarmull* v. *Agar Chand*, 23 C. W. N. 811; *North London Ry* v. *Great Northern Ry*, 11 Q. B. D. 30; *Wood* v. *Lillies*, 61 L. J. Ch. 158; *Baijnath* v. *Mansukrai*, 23 C. W. N. 258; *M'Harg* v. *Universal Stock Exchange*, 11 T. L. R. 409; *Kuverji* v. *David*. 101 Ind. Cas 162=A. I. R. 1927 Sind. 182,

(4) *Firm of Sohanlal* v. *Jai Narain* 42 A. 98=58 Ind. Cas. 600; see also *Firm of Kripaldas* v. *Firm of Gojanmal* 15 S. L. R. 5=70 Ind. Cas. 864.

(5) *Ramdas Khatun* v. *The Atlas Mills Co.*, 55 B. 659=130 Ind. Cas. 583=33 Bom. L. R. 19=A. I. R. 1931 Bom. 151.

CHAPTER VII.

Injunctions against waste, damage and alienation, etc, pending a suit.

Injunctions against waste, damage etc, pending a suit—It has already been stated that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual (1). Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of suit, and are regulated by the Code of Civil Procedure (2). A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit ; the defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an act, which would be contrary to the right,of the plaintiffs(3) In the original Court of Chancery the domain for the issue of such injunc-. tions were very wide. By the text writers they were divided into two classes, namely (*i*) injunctions to stay proceedings in Courts of Law and (*ii*) injunctions to stay wrongful acts of special nature. So long as the Courts of Chancery had exclusive jurisdiction to grant equitable relief and to recognise equitable right, the first class of injunctions had a very great importance. Now the second class of injunctions exercises a most prominent part. It comprises cases in which Equity interferes to restrain the commission of wrongful acts of a special nature, or acts inconsistent with the probable rights of the complainant, and the due preservation of the property affected by the act sought to be restrained (4) Such injunctions are granted for restraining breach of contract, or other injury of any kind, under section 54 of the Specifiic Relief Act. Rule 2 of order XXXIX makes provision for the issue of temporary injunction where a suit is brought to enjoin perpetually the breach of a contract or other wrong independent of contract *i.e.* a tort. But the ultimate object of a suit may be the determination of some right to property or otherwise. In such cases, where the defendant has committed or is threatening what the plaintiff alleges to be a breach of obligation, or more briefly, a wrong, the plaintiff may ask the Court to direct the subject matter of the dispute to be maintained in *status quo*, till the issue between the parties has been determined. If specially, the plaintiff's suit is to recover property *in specie*, the defendant ought not to be allowed to decide the suit in his own favour by making away with the property in question (5). Rule 1 of Order XXXIX says : "Where in any suit it is proved by affidavit or otherwise—(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in

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(1) Specific Relief Act s. 52.
(2) Specific Relief Act s. 53 ; *Ram* v. *Mathura*, 81 Ind. Cas. 2.
(3) Specific Relief Act s. 53.
(4) Drewry on Injunction p. ix Intro.
(5) Banerjee's T. L. L. for 1906 p. 590 citing *Robinson* v. *Pickering*, 16 Ch. D. 636.

execution of a decree, or (*b*) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders."

A Court having jurisdiction to make orders under this rule has no right to make such orders without some evidence that the property in dispute in the suit is in danger of being wasted, damaged, or alienated by any party to the suit (1). Under this rule an injunction cannot be issued to a Court but only to a party, and an injunction to a party contemplates that some property, the subject matter of the suit, is in danger of being wasted (2). The Civil Procedure Code is not exhaustive. Therefore a Court of Equity has power, in a case of specific performance, to interfere by an injunction, in order to maintain matters in their present state even if the case does not fall strictly within the purview of this rule. There is no reason why, because the plaintiff might possibly be protected in one way, namely by the doctrine of *lis pendens*, he should not also be protected in another way namely, by an injunction (3). But where there is no allegation that the property which is the subject of the suit is likely to be wasted or removed by the defendants, the Court has no jurisdiction to issue an injunction under this rule (4). The power given to the Civil Court by this rule of issuing injunctions *pendente lite* should be exercised only in cases where the property which it is essential to be kept in its existing condition, is in danger of being destroyed, damaged, or put beyond the power of the Court (5). The admission of an intention to take certain money for investment in trade shows that the money will run the risk of an alienation within the meaning of section 92, Act VIII of 1859 (6).

The Court in granting an *ad interim* injunction, will first see that there is a *bona fide* contention between the parties, and then on which side, in the event of obtaining a successful result to the suit, will be balance of inconvenience if the injunction do not issue, bearing in mind the principle of retaining immoveable property in the *status quo* (7).

Where there is no apprehension of waste, and when the plaintiff really seeks to obtain control over the expenditure of the income of the disputed property by the defendant in possession, the appropriate remedy is by way of appointment of a receiver rather than the grant of injunction (8). As a general rule, when the plaintiff is out of possession and claims possession, the Court

(1) *Dhundiram* v. *Chandanbai*, 2 B. H. C. 98; see also *Rustam Ali* v. *Muhtaq Hussain*, 14 A. L. J. 554=35 Ind. Cas. 718.

(2) *Rajah ram* v. *Dharam Das*, 2 A. L. J. 601.

(3) *Nawab Sultantara* v. *Seth Dooli Chand*, 2 Ind. Cas. 266.

(4) S. *Subramania* v. *S. Vengu Iyer*, 4 M. L. T. 91=18 M. L. J. 302.

(5) *Munmohinee* v. *Ichamoyee*, 13 W. R. 60.

(6) *Goluck Chunder* v. *Mohim Chunder*, 13 W. R. 95.

(7) *Gomes* v. *Carter*, 1 Ind. Jur. N. S. 411.

(8) *Kesho Prasad* v. *Srinivasa*, 13 C. L. J. 394.

will refuse to interfere by grant of injunction against the defendant in possession under a claim of right ; but where the threatened injury would be irreperable, an injunction will lie at the instance of a complainant out of possession. The remedy by injunction is afforded more liberally to a complainant in possession to protect that possession than to one out of possession to protect the property until possession can be recovered by law. When a plaintiff has sued an ejectment and obtained a decree for possession and mesne profits, he should not ordinarily be granted an injunction to restrain the defendant in the ordinary natural use of the disputed property and the enjoyment of all benefits which flow from possession, as the plaintiff has adequate remedy by way of execution of his decree (1).

But where it appears from affidavits and other documents which were placed before the Court that some portion of the valuable jewellery and gold mohurs were removed from the defendant's house and found buried in an out house, and that some of the gold ornaments were taken away by the defendant placed in the custody of a banker, at a different place, these circumstances being suspicious and lending support to the allegation of the plaintiffs that there is danger of the movable properties being wasted or alienated, the Court ought to make an order under this rule for the purpose of preserving the moveable properties from being wasted and alienated (2).

In regard to negotiable securities, if transferred to a *bona fide* holder without notice, the latter would be entitled to recover upon them, notwithstanding any fraud in their original concoction or the loss of them by the real owner, it is therefore often indispensable to the security of the party, against whose rights they may be thus made available, to obtain an injunction prohibiting any such transfer (3). The same principle is applied to restrain the transfer of stocks. Thus for instance, where there is a controversy respecting the title to stock under different wills, an injunction will be granted to restrain any transfer *pendente lite* (4). So an injunction will be granted where the title to the stock is controverted between principal and an agent (5) ; or where trustee or agent attempts to transfer it for his own benefit, and to the injury of the party beneficially entitled to it (6). So also, to restrain the payment of money, where it is injurious to the party to whom it belongs ; or where it is the violation of the trust to which it should be devoted (7). So too, to restrain the transfer of diamond or other valuables, where the rightful owner may be in danger of losing them (8). In like manner an injunction will be

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(1) Ibid.

(2) *Chandidat* v. *Padmanand*, 22 C. 459, 466, 467. See also *Guru Sami* v. *China Thumbiyar*, 10 L. W. 551 = 53 Ind. Cas. 760 ; 29 M. L. J. 209.

(3) *Hood* v. *Ashton*, 1 Russ. 412 cited in Story's Equity 3rd English Ed. § 906.

(4) *King* v. *King*, 6 Ves 172,

(5) *Chedworth* v. *Edwards*, 8 Ves. 46.

(6) *Stead* v. *Clay*, 1 Sim. 294 ; *Rogers* v. *Rogers*. 1 Aust. 174.

(7) *Reeve* v. *Parkins*, 2 Jac &. Walk. 390 ; *Green* v. *Lowis*, 3 Bro. C. C. 217 ; *Pearce* v. *Piper*, 17 Ves 1.

(8) *Ximenes* v. *Franco*, 1 Dick. 149; *Tonnis* v. *Prout*, 1 Dick. 387.

granted to restrain a party from making vexatious alienations of real property, *pendente lite* (1).

A person who brings a suit under Order XXI, r. 103 of the Civil Procedure Code, after being defeated under r 99 of the same Order, cannot obtain a temporary injunction, under Order XXXIX, rules, 1 and 2 to restrain the defendant from taking possession of the property (2). An application for a temporary injunction by the defendants that the plaintiffs should, pending the disposal of the suit, be restrained by injunction from interfering with the defendant's right to worship in and to have free access to, the temple does not fall either within cl. (*a*) or cl. (*b*) of Order XXXIX, r. 1 of the Civil Procedure Code (3).

Plaintiff sued for specific performance of a contract for sale of a certain property and prayed for temporary injunction restraining defendants from selling his right in the same property to a third person *pendente lite*. Some of the owners of the property were minors and permission to sell their interest at a certain price was obtained by their guardian from the District Judge. It appeared, however, that if certain facts had been brought to the notice of the District Judge, he would not been granted permission to sell at that price which was inadequate. *Held* that on these facts the plaintiff was entitled to the temporary injunction prayed for in the suit (4) The expression "property in dispute in suit" means the subject matter of the suit. A temporary injunction should not be refused on the sole ground that the relief prayed for in the suit may be continually refused. Where a Hindu widow in possession of a valuable estate is recklessly making alienations there is *prima facie* case for protecting the estate by an injunction restraining her from alienating (5). In a case of waste. although an injunction cannot be stated to be as of right, yet the Court will always exercise its discretion in favour of an applicant for an injunction to restrain such waste (6).

Effect of temporary Injunction—The effect of a temporary injunction is not to make subsequent alienation of the property in respect of which the injunction was issued illegal and void (7). From Order XXXIX, rule 2, which provides a penalty for a breach of an injunction under rule 1, it is clear that it cannot be taken to be the legal effect of a temporary injunction, that any dealing with the property, which is the subject of such injunction, contrary to its terms, is illegal and void. There being no provision of law, by which a mortgage of property made by a party subsequent to a temporary injunction against him would be void or illegal, s. 23 of the Contract Act

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(1) *Daly* v. *Kelly*, 4 Dow. 440 ; Story Eq. Jur. 3rd Ed. §§ 907, 908.

(2) *Chhotalal* v. *Jithalal*, 16 Bom. L. R. 676.

(3) *Karari Chand* v. *Maharaj Bahadur*, 1 Pat. L. J. 560.

(4) *Manaranjan Sadhu Khan* v. *Birendra nath Dutt*, 57 Ind. Cas. 847.

(5) *Tija Singh* v. *Rani Harnam Kuer*, 89 Ind. Cas. 678=A. I. R. 1925 Lah. 628.

(6) *Maharup Kuer* v. *Mahabir Singh*, 105 Ind. Cas. 131.

(7) *Kala Khan* v. *Kirpal Singh*, 144 P. R. 1889.

can have no application so as to render the contract or mortgage void (1). Though an order under this rule does not by itself operate to make a subsequent alienation void, yet a sale by debtor, who has received notice of the order, to one of his creditors, who has had knowledge of the issue of the order and prejudicial to other creditors is void (2). In a suit brought by *Maung Myaing* against one *Ma Bu* Si, at the plaintiff's instance, the court issued an injunction to *Ma Bu Si* under this rule, restraining her from disposing of 800 baskets of paddy. After being served with injunction, *Ma Bu Si* allowed a creditor *Chellappa Chetty* to take 250 of the said baskets of paddy in part satisfaction of a debt. *Maung Myaing* now sues *Chellappa Chetty* for the value of the 250 baskets of paddy taken by him. *Held* that *Chellappa Chetty* was not liable to compensate *Maung Myaing* even if he had notice of the injunction (3).

Where a temporary injunction was passed restraining the parties from alienating a party till the disposal of the suit, a mortgage after decree does not contravene injunction order (4). An alienation effected in violation of a prohibitory order is not void though the person who alienates it may be liable for action in contempt of court or damages (5),

Disposal of property for defrauding the creditors :—When in any suit it is proved by affidavit or otherwise that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the Court may grant a temporary injunction to restrain such removal or disposition (6). Under this clause the property to be restrained by injunction is not the property in dispute and as such is not subject matter of the suit. Where it is proved that the intention of the debtor is to defeat the creditor by the sale of his own property an injunction is granted under his rule. There is no dispute as regards the title to the property to be restrained ; it admittedly belongs to the defendant. This rule is analogous to rule 5 of Order 38 of the Civil Procedure Code, where attachment before judgment is granted. A Court of equity may grant an injunction restraining a debtor from alienating his property where it appears that he intends or is about to transfer it with intent to defraud his creditors and in many States in the United States of America such relief is especially provided for by Statute in such cases (7). But there even where there is an adequate remedy by attachment an injunction is not granted (8). The Court of Chancery in

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(1) *The Delhi London Bank* v. *Ram Narain*, 9A. 497=A. W. N. 1887, 107 ; *Bhagwan Das* v. *Lala Kanshi*, 253 P. L. R. 1914=145 P. W. R. 1914 ; *Puznakkal Edom* v. *Mahadeva Pattar*, 35 M. L. J. 96=47 Ind. Cas. 778 ; *Monohor Das* v. *Ram Autar Pande*, 25 A. 431 ; *Beli Ram* v. *Ram Lal*, 6 Lah. 380= 90 Ind. Cas. 937 ; *Balabhaddar* v. *Balla*, 127 Ind. Cas. 577=A.I . R. 1930 All. 387 ; *Darbari* v. *Ghulam*, 128 Ind. Cas. 304= =A. I. R. 1930 Lah. 858.

(2) *Agar Chand* v. *Chajjoo Lal*, 12 C P. L. R. 109.

(3) *A. S. S. Chellappa Chetty* v. *Maung Myaing*, L. B. R. (1893-1900), 414.

(4) *Paras Ram* v. *Firm of Hargolal*, 79 Ind. Cas. 444.

(5) *Hakim Singh* v. *Wasan Singh*. 108 Ind. Cas. 395=A. I. R. 1928 Lah. 639.

(6) Order XXXIX rule, 1 (b).

(7) H. C. Joyce on Injunction § 974.

(8) *Winans* v. *Beidler*, 6 Okla 603, 52 Pac. 405.

England will not grant an injunction to restrain a man who is alleged to be a debtor from parting with (1) or dealing with (2) his property as he pleases. Where no order has been made by the Court for the payment of money, the court has no power to make an order to restrain a man from removing his property out of the jurisdiction or otherwise dealing with it (3). But it seems that the powers conferred on courts by Order XXXIX rule 1 (b) is wider than those conferred on American and English courts. It can not only exercise jurisdictions in granting injunction after decree for payment of money has been obtained by the creditor (4) but may by order grant a temporary injunction to restrain such removal or disposition of the property as it thinks fit, until the disposal of the suit or until further orders (5). "Order 38, rule 5 is applicable only to cases where it is probable that the defendant is about to make away with his property so as to make it impossible for the plaintiff to execute any possible decree against him, and empowers the court in such a case to make an order calling upon the defendant for security, and in default thereof, to attach the property" (6). Where the relief sought in equity is to set aside a fraudulent transfer of goods and chattels, made to hinder and defraud creditors, an injunction is often useful as ancillary to that relief. In such cases, the difficulty of tracing out and identifying the goods, and the multiplicity of suits necessary to get possession of them, makes it a case for a court of equity to interfere by injunction (7).

An application praying for a temporary injunction restraining a person from withdrawing certain amount standing at his credit, and the order of Court issued thereon are, inspite of their wording, really for attachment before judgment (8). A sale under a deed of trust, if made to defraud creditors may be enjoined and set aside, and a judgment creditor may be permitted to redeem the land from the lien (9). In a suit by creditors of an insolvent to enjoin sales under fraudulent attachments, the insolvent debtor is a necessary party, and the court may, in its discretion, refuse to dissolve the injunction on the filing of answers fully denying the allegation of the bill, if it appears that greater injury may be caused to complainant by its dissolution than to defendant by its continuance till final hearing (10).

American Law :—" The most important and the usual reason" says Mr. Spelling "for interfering by injunction to prevent transfer of property, whether upon application of creditors or of others, is the preservation of a lien

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(1) *Robinson* v. *Pickering*, 16 Ch. D. pp. 661, 663 ; Kerr on Injunction p. 614.

(2) *Robinson* v. *Pickering*, *supra* ; *Mills* v. *Northern Railway*, 5 Ch. 621.

(3) *Newton*, v. *Newton*, 11 P. D. 11 ; *Burmester* v. *Burmester*, (1913) P. 76 ; *Jagger* v. *Jagger* (1926) P. at p. 96, 101 ; Kerr p. 614.

(4) The English Courts of Chancery exercise jurisdiction only in such cases, vide *Sidney* v. *Sidney*, 17 L. T. N. S. 9 ; *Gillet* v. *Gillet*, 14 P. D. 158 ; *Waterhouse* v. *Waterhouse*, (1893) P 284 ; *Newton* v. *Newton*, (1896) P. 36 ; Kerr on Injunction p. 614.

(5) Order XXXIX rule 1 (b).

(6) Woodroffe on Injunction p. 182.

(7) *Hyde* v. *Ellery*, 18 Mad. 496.

(8) *Maung Ba* v. *Ma Pwa*, A. I. R. 1929 Rag. 94=116 Ind. Cas. 473.

(9) *Findley* v. *Findley*, 93 Mo. 493.

(10) *Planters' Bank* v. *Lucheimer*, 107 Ala. 454.

which would otherwise be defeated and lost, to the irreparable injury of the lien. Mere general or contract creditors have no such interest in or claim upon the property of their debtors as will warrant an injunction in their behalf to restrain a transfer and disposal by such debtors of their property ; and in the absence of statutory provisions of the subject, or facts giving jurisdiction on the other and independent grounds, equity will not, at a suit of a creditor who has not reduced his claim to judgment, interfere to restrain a debtor from making any disposition of his property which he sees proper to make. But after a creditor has instituted and prosecuted an action on his claim to judgment equity will enjoin on his behalf the debtor defendant from making any disposition of his property with intent to defeat or delay the collection of the judgment-debt or to give preference to a portion of his creditors over the others.....The rule stated above with reference to creditors before judgment does not apply where special circumstances exist under which to deny relief could operate to deprive a party of a right or preference secured by superior diligence, as where he is entitled to a lien which would otherwise be defeated or where the relation he holds is in some respects that of a *cestui que trust*, and that of the defendant, a trustee. It cannot therefore be stated as an unqualified rule that equity will not enjoin a transfer of personal property.

"The only grounds on which injunctions are granted against third persons in possession of personal property and ostensibly its rightful owers, upon an *ex parte*, application, is for the protection of the fund or property when shown to be in danger without this interposition. And in the absence of qualifying and exceptive circumstances or unless it becomes proper in order to prevent a breach of trust, a creditor has no such certain claim upon the property of his debtor as to entitle him to an injunction to restrain the latter from disposing of it until a judgment has been obtained against him. Any other rule would lead to an unnecessary, and perhaps a fruitless and oppressive interruption of the exercise by the debtor of his rights.

"In several states the rule governing courts of equity on this subject has been materially altered by statutory provisions, under which any creditor of an insolvent debtor may file a bill setting up facts showing his insolvency or failing circumstances, and obtain the appointment of a receiver and an injunction restraining the debtor from further proceeding or interfering with the disposition of his effects. New York was the first state to enact such a law, but many states have followed its example, specially since the repeal of the National Bankrupt Act. Such Statutes usually provide that an injunction may be issued and a receiver appointed, before judgment, at the instance of any creditor, and against any debtor, to prevent a fradulent disposition of the property, and 'as a security for the satisfaction of such judgment as the plaintiff may recover." (1).

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(1) Spelling on Injunction and other Extraordinary Remedies § § 516-520.

CHAPTER VIII.

Injunctions, relating to Executors and Administrators.

Executors, definition of—"Executor" means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided (1). An executor is a latin word and means a prosecutor. An executor is a personal representative appointed by testament to administer the estate of the testator in accordance with the lawful directions contained in the testament (2). An executor is defined by *Wentworth* as one to whom the execution and performance of another man's will after his death is commended or committed. Where there is no will there can be no executor ; a will it has been quaintly said, is the only bed where an executor can be begotten or conceived (3). "To appoint an executor" says *Swinburne*, "is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against testator's debtors, and who may dispose of the same goods and chattels, towards the payment of the testator's debts, and performance of his will." (4) The bare nomination of an executor, without giving him legacy, or appointing anything to be done by him, is sufficient to make it a will, and as a will it is to be proved (5).

An executor derives title from the will, and he need not in general prove the will to clothe himself with that character (6). But it is clear that the executor must either prove the will or intermeddle before he is entitled to be considered as an executor (7). In *Wankford* v. *Wankford* (8), *Lord Holt* observed : "By administering, the executor has accepted and taken upon him the whole administration, and is a complete executor. He is before probate entitled to receive all debts due to the testator, and all payments made to him are good, and shall not be defeated, though he dies and never proves the will." In order to constitute one an executor according to the tenor of a will, it must appear on a reasonable construction thereof, that the testator intended that such a person should collect his assests, pay his debts and funeral expenses, and discharge the legacies contained in the will (9); in other words, that the testator intended to cast upon him the duties of an executor. (10).

Administrator, Definition of—"Administrator" means a person appointed by competent authority to administer the estate of a deceased person when

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(1) Vide s. 2 (*c*) of the Indian Succession Act XXXIX of 1925.

(2) *Farrington* v. *Knightly*, (1719) 1 P. Wms. at p. 548-49 ; *Brownrigg* v. *Pike*, (1882) 7 P. D. 64.

(3) Walker's Executor p 1.

(4) Williams on Executor, 11th Ed. p. 151.

(5) Williams on Executors p. 151.

(6) *Fenton* v. *Clegg* (Ex. 1854) 23 L. J. Ex 197-198.

(7) *Rawlison* v. *Shaw*, 3 T. R. 557 ; *Bruzier* v. *Hudson*, 8 Sim. 67 ; *Mahomed* v. *Pitchey*, (1895) A. C. 437=63 L. J. P. C. 90.

(8) (1699) 1 Salk. 299, 306.

(9) *Adamson*, (1875) 3 P & D. 253.

(10) *Earl of Levin and Melville*, (1889) 15 P. D. 23.

there is no executor. Administrator is a latin word. Originally the administrators were officers of the ordinary appointed by him in pursuance of the statute, and their title and authority were derived exclusively from the Ecclesiastical Judge, by grants which are usually denominated letters of administration" (1). In *Shepherd's Touchstone* an administrator is defined 'to be one that hath the goods and chattels of a man dying intestate, (or some of them) committed to his charge by the ordinary for want of an executor, or on account of his absence, or his renunciation, or *pendent lite* respecting the right to probate." (2) "After the administration is granted, the interest of the administrator in the property of the deceased is equal to and with the interest of the executor (3). Executors and Administrators differ in little else than in manner of their constitution" (4)

Former jurisdiction narrowed by Statute.—In England and in America, much of the former jurisdiction, in equity to control by injunction and other equitable remedies, specially that founded upon the absence of a remedy at law has been taken away by statute and vested in the Courts of probate jurisdiction. These statutes generally make elaborate provisions for correcting errors in the course of administering estates, and for calling administrators and executors to account with respect to the funds entrusted to them. Effective powers are also vested in these Courts for enforcing equality and impartiality among creditors, heirs and distributees (5).

The jurisdiction still remaining in Courts of equity is referable to the trust relation which, notwithstanding the increase of legislation on the subject, executors and administrators, does not oust courts of equity of their original jurisdiction pertaining thereto. Such courts still exercise control over matters affecting the administration of estates unless such jurisdiction has been expressly withdrawn (6).

In British India the jurisdiction of courts owes its origin to statute. The equitable jurisdiction of the original-side of the three Presidency High Courts, which have inherited the jurisdiction of the old supreme court is somewhat more extended in matters of granting injunctions against executors and administrators as in all other matters. But other Civil courts, whether exercising civil or testamentary and intestate jurisdiction, owe their origin to the different statutes and can exercise jurisdictions vested by them. Elaborate provisions are now made by the Indian Succession Act (7) for the protection of the property of the deceased and the Probate Court can compel an executor or an administrator to exhibit an inventory and an account. The exhibition of an intentionally false inventory or account is also punishable under the Penal Code (8).

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(1) Williams on Executors 11th Ed. p. 314.
(2) Mozumdar's Hindu Wills Act 2nd Ed. p. 34.
(3) Tuchs. 474; *Black borough* v. *Davis* 1 P. Wms. 43 by *Holt* C. J.
(4) Williams on Executors, 11th Ed. p. 494.
(5) Spelling on Injunction and other Extra ordinary Remedies § 571.
(6) Spelling on Injunctions and other Extra ordinary Relief § 572.
(7) Act XXXIX of 1925.
(8) Vide s. 317 of Act XXIX of 1925.

But in a fit case the Civil Courts by virtue of section 54 of the Specific Relief Act and Order XXXIX of the Civil Procedure can grant relief by issue of injunction for or against executors and administrators.. In *Nirod Barini Debi* v. *Chamat Karini Debi* (1) the question raised was whether the Probate Court is competent to grant temporary injunction pending the administration proceeding, restraining the other party from alienating the properties of which she was in possession. In refusing the injunction the Court observed : "The decision of the question raised must depend upon the terms of Order 39, rule 1, of the Code of Civil Procedure, assuming that the povisions of that rule are applicable to proceedings under the Probate and Administration Act by virtue of section 55 thereof. It is essential for the application of r. 1, Order 39, that the property in dispute in the suit is in danger of being wasted, damaged or alienated by a party or wrongfully sold in execution of a decree. Consequently the applicant for an injunction must satisfy the Court that the proceeding is a suit (2) in which there is property in dispute (3). In our opinion, the answer must be in the negative. It has been repeatedly held, as appears from the cases of *Arunmoyi Dasi* v. *Mohendra Nath Wardar* (4) *Jagannath* v. *Ranjit Singh* (5) *Birj Nath* v. *Chander Mohan* (6) and *Ochavaram Nana bhai* v. *Dolatram* (7) that the only question in controversy in a proceeding in the Probate Court is that of representation of the estate of the deceased, and no question of title thereto, that is, the title of the deceased or of the conflicting titles alleged by the parties to the probate proceeding can be investigated by the Court. Consequently it would be, in our opinion, an undue straining of the language to hold that a probate proceeding is a suit in which there is property in dispute. The circumstance that in England an injunction has been granted in a probate proceeding is of no assistance to the Appellant, because the terms of section 25, sub-section 8, of the Judicature Act of 1873 are wider than the language used by the legislature in this country in r. 1 of Order 39.....But we do not lay down the proposition that the Court is not competent, because it is a Court of Probate, to grant an injunction in any circumstances. In England, injunctions have been granted in cases of this description under r. 3 of Order 50, of the Rules of the Supreme Court. There is a corresponding provision in the Code of Civil Procedure embodied in r. 7 of Order 39. The proper procedure to follow in cases of this description is for the aggrieved party to apply to the Court for the appointment of an administrator *pendente lite*, under s. 34 of the Probate and Administration Act."

Jurisdiction to grant injunction based on just relation—Much of the former jurisdiction in equity to control by injunction and other equitable

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(1) 19 C. W. N. 205=27 Ind. Cas. 617.
(2) Vide *Tija Singh* v. *Harnam Singh*, 1 Lah. Cas. 241 ; *Joynarain* v. *Shibpershad*, 6 W. R. Mis 1 ; but see *Hunmohinee* v. *Ichamoyee*, 13 W. R. 60 ; *Paresh* v. *Omrita* 17 C. 614.
(3) Vide *Sant Das* v. *Ishar Das*, 51 Ind. Cas. 168=46 P. L. R. 1919 ; *Joynarain* v. *Shibpershad*, 6 W. R. Mis 1.
(4) 20 C. 888.
(5) 25 C. 354.
(6) 19 A. 458.
(7) 28 B. 644.

remedies, especially that founded upon the absence of a remedy at law, has been taken away by statute and vested in the Courts of probate jurisdiction (1) These statutes generally make elaborate provisions for correcting errors in the course of administering estate, and for calling administrators and executors to account with respect to the funds entrusted to them. The jurisdiction still remaining in Courts of equity is referable to the trust relation which, notwithstanding the increase of legislature on the subject, executors and administrators still hold to all parties interested in the estate entrusted to them. The vesting of other tribunals with jurisdiction over matters affecting executors and administrators does not oust courts of equity of their original jurisdiction pertaining thereto. Such courts still exercise control over matters affecting the administration of estate unless such jurisdiction has been expressly withdrawn (2).

Protection extended to both parties—Jurisdiction is not confined to those entitled to the beneficial interest in the trust fund in the charge of executors and administrators, but will in proper cases be administered in their favour. Relief is as freely granted in favour of as against administrators and executors where necessary for their protection in administering the estate. Thus an administrator with the will annexed may enjoin the levying upon and sale of legacies in his hands pending the settlement of the estate of the deceased (3). Injunction is sometimes necessary to protect the lawful possession of executors and administrators (4). An administrator is entitled to an injunction to restrain the encroachment of a judgment against him where, subsequent to the rendering of the judgment, he has discovered set-offs and credits to which his intestate was entitled, of which the administrator, without fault or negligence on his part, was ignorant prior to the judgment being obtained (5). So where an executor, through misconduct or insolvency, is bringing the property of the deceased into danger, the Court may grant an injunction to restrain him from getting in the assets (6).

Injunctions against executors—An executor who has accepted office, is a trustee for the due administration of the assets in behalf of all interested under the will (7); and if he fails in his duty or through his misconduct (8) or insolvency (9), endangers the testator's property, he may be restrained and inhibited from getting in the assets (10). In an old English case (11) where after

(1) In British India, vide the Indian Succession Act, (XXXIX of 1925).

(2) Spelling on Injunctions and other Extraordinary Remedies §§ 571, 572.

(3) *Stout* v. *La Fallet*, 64 Ind. 365.

(4) Spelling on Injunctions and other Extraordinary Remedies § 573.

(5) *Terril's Admers* v. *Southall's Exrs.* 3 Bubb. 458.

(6) Section 54 of Specific Relief Act, *illustration* (*e*).

(7) Williams on Executors 11th Ed. 1590; Banerjee's T. L. L. for 1906, 630; *Re Marsden*, 26 Ch. D. 783, 789; *Re Lacy* (1899) 2 Ch. 149.

(8) Anon, 12 Ves. 5; *Harrison* v. *Cockerell* 3 Mer. 1; *Colebourne* v. *Colebourne*, 1 Ch. D. 690; Kerr on Injunc. 503.

(9) *Ulterson* v. *Mair*, 2 Ves. 95, 98; *Scott* v. *Becher*, 4 Price, 346; *Mansfield* v. *Shaw*, 3 Madd. 100; *Gladden* v. *Stoneman*, 1 Madd. 142 (n); *Bowen* v. *Phillips*, (1897) 1 Ch. 173; *Johnson In re*, 1 Ch. 325.

(10) Specific Relief Act s. 54 ill. (e); Banerjee's T. L. L. 1906. p. 630.

(11) *Hills* v. *Mills*, 1 Shaw. 293.

probate of the will, the executor became bankrupt, and a suit was commenced in the Ecclesiastical Court to revoke the probate, and grant of administration to another; the Court of Queen's Bench granted a prohibition (1). To avoid the consequence of decisions like this, the Court of Chancery was forced to assume a new jurisdiction (2). Where there is only one executor appointed by the Will and he becomes insolvent or misconducts, a receiver is now appointed (3). But where there is another executor willing to act, the Court only restrains the disqualified executor, and does not appoint any receiver (4). The same rule is applicable when the sole executor is about to leave the country (5).

The court can not refuse to grant the probate of a will to a person appointed executor, on account of his poverty or insolvency (6). So if a person known by the testator to be a bankrupt or insolvent, be appointed an executor by him, such person cannot on the ground of insolvency alone be controlled by the appointment of a receiver (7). It is not however to be inferred from the circumstance of the will having been made sometime before the commission, and not altered afterwards, that the testator had a deliberate intention to entrust the management of his estate to an insolvent executor (8). The Court will not interfere by appointing a receiver upon the single ground that the executor is in mean circumstances (9).

Great poverty, bad character and drunken habits of executors will justify a court to restrain him by injunction (10). Injunction will also be granted where there is evidence that he is not in a situation to be trusted with the management of the deceased's estate (11) Where shortly after the death of a tenant intestate, the landlord wrongfully entered and seized the goods of the deceased, the court, on the *exparte* application of the sole next-of-kin before administration, granted an injunction restraining the landlord from interfering with the assets, the plaintiff giving an undertaking as to damages (12).

In a case where an executor had before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, the court gave leave to the co-executor to issue a writ against him,

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(1) Williams on Executors p. 156.

(2) *Per Lord Mansfield* in *Rex* v. *Simpson*, 1 W. Black. 458.

(3) Williams on Executors p. 157.

(4) *Bowen* v. *Philips*, (1897) 1 Ch. 174.

(5) Halsbury vol. 17 p. 252, citing *Coleborne* v. *Coleborne*, 1 Ch. D. 690 ; *Scott* v. *Becher*, 4 Price 346.

(6) Williams on Executors 11th Ed p. 156 ; Kerr on Injunction p. 503 ; *Stainton* v. *Carron Co*, 18 Beav. 161 ; *Old field* v. *Cobbet*, 4 L. J. N. S. ch. 271.

(7) Williams on Executors 11th Ed. p. 157 citing *Gladdon* v. *Stoneman*, 21st March, 1808, *Coram Lord Eldon* C. reported in a note to 1 Madd. 143 ; *Longley* v. *Hawke*, 5 Madd. 46 ; *Stainton* v. *Carron Co*, 18 Beav. 146, 161.

(8) Williams on Executors, 11th Ed. p. 157 citing *Longley* v. *Hawke*, 5 Madd. 46.

(9) Williams on Executors p. 157 ; *Hathornthwaite* v. *Kessell*, 2 Atk. 126 ; *Anon*, 12 Ves. 4 ; *Howard* v. *Papera*, 1 Madd. 142.

(10) Halsbury vol. 17 p. 252 ; *Everett* v. *Prythergch* 12 Sim. 363. 365, 367 ; Kerr on Injunction p. 503.

(11) Kerr on Injunction p 503 ; *Old field* v. *Cobbet*, 4 L. J. N. S. Ch. 271.

(12) *Cursidy* v. *Foley*, (1904) 2 Ir. R. 427. per *Andrews J.*

claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver (1). The court will restrain a defendant who is alleged to have improperly obtained probate and to be insolvent, from receiving the testator's assets and form prosecuting actions at law for that purpose (2). So a court of equity will restrain an executor, who is residing out of the jurisdiction and is insolvent, from prosecuting proceedings at law to obtain fund belonging to the estate, which it is feared may be wasted, until he submits himself to the jurisdiction of the court (3). An executor claiming under a will and also by gift from a testatrix in her life time, will, upon evidence of undue influence, be restrained from converting furniture and other specific property into money (4).

If an annuity is secured by a covenant and warrant of attorney by the testator and the arrears have been paid, a court of Equity will not restrain the executors of the grantor from paying his simple contract debts, until they set apart a fund to answer the future payments, unless a case of past or probable misapplication is made out (5). In this case it was contended on behalf of the annuitant that the relief asked was frequently granted in the case of legatees (6). But *Sir L. Shadwell V. C.* refused the motion for an injunction, and said, that, "if there was anything like misapplication of assets in this case, that would be a reason for the Court interfering. The executors may, by law, the day before an instalment of the annuity becomes due, apply the whole of the assets to pay the simple contract debts. The case of a bond creditor is different ; for when the condition of a bond is broken, the whole penalty is due. Here no case has been made out of probable misapplication of assets ; and certainly none has been mãde out of the past misapplication (7)". Where however the liability in future is certain, the case is different and the assests may not be parted with (8). An administrator or executor may prefer one creditor to another, and there is no equity which entitles the court to

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(1) Williams on Executors 11th Ed. p. 1666 citing *In the goods of Moore*, 13 P. D. 36. In England such applications are generally made in the Chancery Division. *Green* v. *Knight*, (1895) W. N. 69 ; *Salter* v. *Salter*, (1896) P. 291 C. A ; *Moxley, In the goods of*, (1916) 2 Ir. 145. "It is, however, the duty of all executors to watch over, and, if necessary, to correct the conduct of each other, and an executor who stands by and sees a breach of trust committed by his co-executor, becomes responsible for that breach of trust. "Per *Mookerjee J* in *Satya Kumar* v. *Satya Kripal*, 10 C. L. J. 503 at 515 see also *Mahomed* v. *Pedro*, 7 Bom. L. R. 601.

(2) Joyce Doctrines p. 285 citing *Mansfield* v. *Shaw*, 3 Madd. 100.

(3) *Ibid* citing *Dougherty* v. *Walker*, 15 Geo. 442 (Am.)

(4) Joyce Doctrines p. 285 ; *Edmunds* v. *Bird*, 1 Ves & P. 542.

(5) *Read* v. *Blunt*, 5 Sim. 567 ; Joyce Doctrines p. 132 ; Joyce Injunction p. 182

(6) *Slanning* v. *Style* 3 P. *Wms.* 336. The question whether an annuitant under a will, has a right to have an adequate portion of the assets set aside for the satisfaction of his legacy, turns on an entirely different principle, connected with the appropriation of legacies payable in *futuro*. Williams on Executors 11th Ed. p. 786.

(7) See also *Norman* v. *Johnson*, 29 Beav. 77 ; *Burrel* v. *Delevante*, 30 Beav. 550 ; *King* v. *Malcott*, 9 Hare 692 ; *Mellor* v. *South Australian Land Mortgage* (1907) 1 Ch. 73 cited in Halsbury vol. 17 page 253.

(8) Kerr on Injunction 304 ; Halsburry vol. 17 p. 253 ; *King* v. *Malcott*, 9 Hare, 692 ; *Atkinson* v. *Gray* 1 Sim. & G. 577 ; *Re Hall*, (1903) 2 Ch. 226 ; *Re King*, (1907) 1 Ch. 75.

interfere except after judgment for administration. Therefore the plaintiff in a creditor's action for administration is not entitled to *interim* relief against the executor or administrator unless a case is shown of the assets being wasted (1).

Mere creditor of an estate will not be entitled to an injunction against an executor, except in the case of waste or mismanagement by him, whereby payment of the indebtedness to him is imperilled (2). By a separation order the husband was ordered to make certain weekly payment to the wife for her support, but he left the country and evaded his obligation under the order. The husband became entitled to a legacy under the will of a deceased relation, and he gave a power of attorney to a solicitor to receive it for him. The wife having petitioned for a divorce and incurred a bill of costs which had been taxed against the husband, but had not been paid by him, applied for an injunction to restrain the trustees of the will under which the legacy was bequeathed to the husband from paying, and the husband from receiving, the legacy. *Held* that an injunction should be granted (3). An injunction may be had to restrain an executor *de son tort* from parting with assets (4). According to the law obtained in the United States where an executor, having power of sale of the testator's real estate to pay debts, is taking steps to execute the power for the purpose of paying debts which are time barred, those who have succeeded to the testator's title may maintain an action to restrain such sale, as it would place a cloud on their title (5). But in England the law is otherwise. There an executor may pay a debt proved to be justly due by his testator, although

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(1) *Wells, In re, Moloney* v. *Brooke* 59 L J. Ch. 810=45 Ch. D. 569 ; *Harris, In re, Harris* v. *Harris*, 59 L. J. Ch. 754 ; *Stevens, In re*, (1898) 1 Ch. 173.

(2) *Elam* v. *Elam*, 72 Ga 162 cited in Lewis on Injunction and other Extraordinary Remedies § 581. But an injunction is properly granted against executors who refuse to distribute the estate rateably among the creditors, and in accordance with the terms of the devise, and are threatening to secure the certain favoured creditors not entitled to a preference either at law or in equity. *Depan* v. *Moses*, 3 Johns. Ch. 349.

(3) *Bullus* v. *Bulls* 102 L. T. 399=26 T. L. R. 330.

(4) Kerr on Injunction p. 504 citing *Lovett, Inre*, 3 Ch. D. 198, 206 ; *Brand* v. *Mitson*, 45 L. J. P. 41.

(5) H. C. Joyce on Injunction § 942 citing *Buller* v. *Johnson*, 111 N. Y. 204 per *Peckham J* : 'An executor or administrator is bound to set up the bar of the statute and he would not be allowed in his accounting any sum paid upon a debt which, at the time of its payment by him was barred by such statute. *Bloodgood* v. *Bruen*, 8 N. Y. 362 ; *Bucklin* v. *Chapin*, Kans. 443, 448 ; *Burnett* v. *Noble*, 5 Redf. N. Y. 69 As against an estate, therefore, a debt barred by the statute must be regarded as not debt. There is not only no moral obligation to pay it but on the contrary there is duty to set up the bar of the Statute.....Assuming that the claims are outlawed and that the executrix, if sued by the creditors of the estate or by the legatee, could successfully interpose the bar of the statute to the maintenance, of such suit or of any proceeding against her, can these plaintiffs properly enjoin the defendant from taking steps to voluntarily pay debts which are thus outlawed ? We think they can, as it is the duty of the executrix to set up the bar of the statute.....We think that the plaintiffs have a right to ask the court to prevent this substantial trustee from violating her duty and from placing this cloud upon their title, even though in so doing the plaintiffs necessarily use the statute of limitations as the foundation of their claim ; under such circumstances the bar of the statute is simply a defence to the affirmation and improper proceedings of the defendant, and is not an attack upon any right of third parties."

barred by the statute of limitations (1). The reason for this is that the statute of limitations does not make the contract void, but bars the remedy (2). Again it has been held that he is not bound to plead the statute of limitation to an action commenced against him by a creditor of the testator (3). Then if the surplus of the personal estate, after payment of debts and legacies, be bequeathed to a residuary legatee, and several creditors, although barred by the Statute of Limitations, commence action against the executor, equity will not, on his refusal to plead the statute, compel him to plead it in favour of the residuary legatee (4).

In cases of administration injunction is usually, and it has been said only, resorted to in order to protect legal rights of parties interested in the estate where there is likely to be a misapplication, or *devastavit*, by an insolvent administrator or executor (5). So it has been decided that while the appointment of a receiver and order of injunction may be resorted to by a judgment creditor of an insolvent husband, who survives his wife and who is attempting to dispose of the interest he may have in her estate, yet these proceedings are not applicable to her administrator where there is no *devastavit* committed or threatened (6). An injunction going to the whole power of the executor who is charged with abusing his trust will not ordinarily be granted in the first instance, for that would leave the estate without representative. In such cases the appointment of a receiver is sometimes sufficient (7). Where the administrator of an estate and others conspire to bring proceedings in a probate Court to procure the sale of estate property upon fraudulent claims allowed by the administrator, such proceedings may be restrained by injunction; but if the proceedings are regular on their face, the probate order will not be set aside, but the relief will be confined to preventing the sale (8).

An injunction against the sale of land for assets may also be granted on the motion of heirs, where the land is advertised under a power contained

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(1) *Norton* v. *Frecker*, 1 Atk. 526, by *Lord Hardwike*; *Stanlschmidt* v. *Lett*, 1 Sim. & G. 415. It *seems* that the law is the same in British India Vide Section 368 of the Indian Succession Act (Act XXXIX of 1925) which is based on English Law. Under the law prior to the passing of the Probate and Administration Act, an executor was competent to renew a barred debt of the deceased testator and the Act has not superseded the previous law. *Alumuri* v. *Venkata*, 42 M L. J. 559=67 Ind. Cas. 104.

(2) Williams on Executors 11th Ed. page 1421. Whereas an executor or administrator would commit a *devastavit* if he paid a debt to a creditor who is prevented from enforcing it by the Statute of Frauds, or if he retains such a debt due to himself. *Re Rownson*, 29 Ch. D. 358. An executor may not however, pay a debt which has been judicially declared to be barred by the Statute of Limitations. *Midgley* v. *Midgley* (1893) 3 Ch. 282. It seems doubtful whether an executor may pay a statute-barred debt against the declared wish of his co-executors. *Ibid.* An acknowledgment of a debt by one of several executors, as executor, binds the estate even after his death. *Re Macdonald*, (1897) 2 Ch. 181.

(3) Williams on Executors 11th Ed. p. 1421 citing *Castleton* v. *Franshaw*, Prec. Ch. 180; but see *Re Wenham* (1892) 3 Ch. 59.

(4) H.C. Joyce on Injunction § 930 (*a*); *Mahoney* v. *Stewart*, 123 N. C. 106.

(5) *Ibid.*

(6) H. C. Joyce on Injunction § 936 citing *Boyd* v. *Murray*, 3 Johns. Ch. (N. Y.) 48.

(7) H. C. Joyce on Injunction § 936 citing *Larn* v. *Friedman*, 49 Cal. 278; Spelling on Injunctions and other Extraordinary Relief § 576.

in an instrument purporting to be a will, which was admitted to probate without notice to the heirs, and the validity of which is in controversy (1). But equity will not interfere to prevent a threatened sale of lands of the intestate where full relief against such sale may be had upon application to the probate Court where the proceedings are had (2).

Injunctions pendente lite—The matters upon which an injunction *pendente lite* will issue in cases affecting administrators and executors must, as in other cases, be immediately connected with the litigation, and an injunction will not be granted to an executor seeking to enjoin in the same suit the enforcement of a judgment against himself, upon the ground of an agreement by the judgment creditors to look to the testator's estate, and not to the executor personally. The executor must institute a new suit for the purpose (3) while equity will freely interfere to prevent breaches of trust by administrators where necessary for the protection of assets in their hands, pending an action to test their right to administer, yet when they have been regularly appointed by the proper Court, equity will not interfere, upon the application of those claiming a superior right to administer, seeking to enjoin the administrator so appointed from proceeding with the administration of the estate (4). Since Courts of Equity have undoubted power to prevent their decree from being interfered with, a decree requiring an administrator to render an account will be protected by injunction, and since the decree is for the benefit of all creditors, and in the nature of an interlocutory judgment in which they all have an interest, the preventive relief will be allowed on the application of either party, in restraint of legal proceedings by any of the creditors against the administrator which may be instituted pending a decree (5).

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(1) *Galbreath* v. *Everett*, 84 N. C. 546; H. C. Joyce on Injunction § 939.

(2) *Johnson* v. *Jones*, 75 N. C. 206; Spelling on Injunctions and other Extra-ordinary Remedies § 585.

(3) *Lucas* v. *Williams*, 4 De G F & J. 436.

(4) *Maher* v. *Gorman*, 6 Ir. Eq. 304; see also *Watkines* v. *Brent*, 7 Sim. 512; *Connor* v. *Connor*, 15 Sim. 598; Spelling on Injunctions and other Extra-ordinary Remedies § 583.

(5) *Brooks* v. *Dent*, 4 Md. Ch. 473; see also *Thompson* v. *Brown*, 4 Johns. Ch. 619.

CHAPTER IX

Injunction pertaining to trustees and confidences.

Trustees, who are—"Trustees" include every person holding expressly or by implication or constructively, a fiduciary character (1); and a "trust" includes every species of express, implied or constructive fiduciary ownership (2). A trust is a confidence; not necessarily a confidence expressly reposed by one party in another, for it may be raised by implication of law; and the trustee of an estate need not be actually capable of confidence, for the capacity itself may by supplied by legal fiction, as where the administration of the trust is committed to a body corporate. It is a confidence reposed in other; not in the some other than the author of the trust, for a person may convert himself into a trustee, but in some other than the *cestui que trust*; for as a man cannot sue a *subpoena* against himself he can not be said to hold trust for himself (3). Z bequeathes land to A; not doubting that he will pay thereout an annuity of Rs. 100 to B for his life. A accepts the bequest. A is a trustee, within the meaning of this Act, for B, to the extent of the annuity (4). A is the legal, medical or spiritual adviser of B. By availing himself of his situation as such adviser A gains some pecuniary advantage which might otherwise have accrued to B. A is a trustee, for B within the meaning of this Act, of such advantage (5). A being B's banker discloses for his own purpose the state of B's account. A is a trustee, within the meaning of this Act, for B of the benefit gained by him by means of such disclosure (6). A mortgagee of certain leaseholds, renews the lease in his own name. A is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease (7) A, one of several partners, is employed to purchase goods for the firm. A unknown to his co-partners, supplies them, at the market price, with goods previously brought by himself when the price was lower, and thus makes a considerable profit. A is a trustee for his co-partners within the meaning of this Act, of the profits so made (8). A, a manager of B's indigo-factory, becomes agent for C, a vendor of indigo seed, and receives, without B's assent, commission on the seed purchased from C for the factory. A is a trustee, within the meaning of this Act for B., of the commission so received (9). A buys certain land with notice that B has already contracted to buy it. A is a trustee within the meaning of this Act for B of the land so bought (10). A buys land from B, having notice that C is in

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(1) Specific Relief Act s. 3.
(2) *Ibid.*
(3) *Good right* v. *Wells.* Dougl. 747 per *Lord Mansfield*; *Conolly* v. *Conolly*, 1 Ir. Ref. Eq. 383 per *Christian L. J.*; *Re Selons* (1901) 1 Ch. 921; Lewin on Trust p. 12.
(4) Specific Relief Act s. 3 ills. (a)
(5) *Ibid*, illustration (b)
(6) Specific Relief Act s. 3 ill. (c)
(7) *Ibid* ill. (d)
(8) *Ibid* ill. (e)
(9) *Ibid* ill. (f)
(10) *Ibid* ill. (g)

occupation of the land. A omits to make any inquiry as to the nature of C's interest therein. A is a trustee, within the meaning of this Act, for C, to the extent of the interest (1)

In this connection it should be borne in mind that there are two kinds of trusts, namely express trust and implied trust ; the latter comprehending all those trusts which are called constructive or resulting trusts. Express trusts are those which are created by direct and positive acts of parties by some writing, or deed or will (2). Not that in those cases the language of the instrument need point out the very nature, character and limitations of the trust in direct terms, *ipsissimis verbis* ; for it is sufficient that the intention to create it can be fairly collected upon the face of the instrument from the terms used, and the trust can be drawn, as it were, *ex visceribus Verborum*. Implied trusts are those which are deducible from the nature of the transaction as matter of clear intention, although not found in the words of the parties ; or which are superinduced upon the transaction by operation of law as matter of equity, independent of the particular intention of the parties (3). An express trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust (b) the purpose of the trust, (c) the beneficiary, and (d) the trust property and (unless the trust is declared by will, or the author of the trust is himself to be the trustee) transfers the trust property to the trustee (4)

Trusts are no more strange to the Hindu than to the English system of law. But, while the substantive Hindu law insists as strongly as any on the suppression of fraud and the fulfilment of promises, it fails to furnish detailed rules by which effect is to be given to its principles in cases of trust. It contemplates no such power and flexibility in the legal machinery as are an integral element of the English equity system. If, therefore, the court is called on to give effect to a trust in any given case, it looks, indeed to the Hindu law of property to determine the estate of the trustee ; but in many of the duties it annexes to that estate, the right it recognizes as arising from the position of beneficiaries, and the means by which their rights are made effectual, it is governed by the rules of English equity. There are no others that it can apply. It has to take care, in applying them, not to violate "laws, manners, customs and usages" of the native community as these may subsist. It must not allow it affect a course of a devolution opposed to the Hindu law of property and succession (5).

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(1) *Ibid* ill. (h)

(2) See as to what constitutes an express trust. *Banner* v. *Berridge*, 18 Ch. D. 254 ; *Burdick* v. *Garrick*, L. R. 5 Ch. 233, 239 ; *Foley* v. *Hill*, 2. H. L. Cas. 28, 35 ; *Paul* v. *Paul*, 19 Ch. D. 47.

(3) Story's Equity Jurisprudence § 1322.

(4) The Indian Trusts Act, (II of 1882) s. 6. The Indian Trusts Act, in the first instance, extends to the territories respectively administered by the Governor of Madras in Council, the Lieutenant Governors of the North Western Provinces and the Punjab, the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam ; and the Local Government may from time to time, by notification in the official gazette, extend it to any other part of British India.

(5) *In re Khandas Narandas*, 5 B. 154.

Technical language is not necessary to create a trust. Words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons, in whose favour such expressions are used provided the testator has pointed out, with sufficient clearness and certainty, both the subject matter and the object or objects of the intended trust (1). A trust may be created by a written instrument or by oral declaration (2).

Injunction to protect equitable estates or interests—The jurisdiction to grant injunctions restraining acts in violation of trusts and fiduciary obligations, or in violation of any other purely equitable estates, interests, or claims in and to specific property is really commensurate with the equitable remedies given to enforce trusts and fiduciary duties, or to enforce any other equitable estates, interests, or claims with respect to specific things, whether lands, chattels, securities, or funds or money, or to relieve against mistake, or fraud done or contemplated with respect to such things. In all such cases the question whether the remedy at law was adequate could not arise ; much less could it be the criterion by which to determine whether an injunction could be granted ; for there was no remedy at law. Since the estate, interest, or claim of the complainant was purely equitable, it was exclusively cognizable by equity ; and if its existence was shown, a Court of equity not only had the jurisdiction, but was bound to grant every kind of remedy necessary to its complete establishment, protection, and enforcement according to its essential nature. Many breaches of trust are of such a nature that, if accomplished, they would completely defeat the right of the beneficiary to the specific trust property. The equitable relief against mistake or fraud with respect to specific equitable property, and the equitable remedies of all kinds to enforce trusts, express or by operation of law, and fiduciary duties concerning specific property, and to enforce any other equitable estate, interest, lien or right in or over specific property, would be of comparatively little practical value, unless the Court could by injunction restrain the alienation, transfer, or encumbrance of such property, and all other modes of dealing with it which would prejudice the rights of the complainant, and prevent him from acquiring the title, or from enforcing his claim, or from receiving the full benefits of his final relief. It may therefore be stated as a general proposition, that whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing any other equitable estates, interests or claims in or to specific property, requires the aid of an injunction, a Court of equity has jurisdiction, and will exercise that jurisdiction, to grant an injunction, either pending the suit or as a part of the final decree, to restrain a breach of trust or of fiduciary duty, or to restrain an alienation, transfer, assignment, encumbrance, or other

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(1) *Raynor* v. *The Mussorie Bank*, 2 A. 55.

(2) *Suddasook* v. *Ram Chunder* 17 C. 620.

kind of dealing with the property, which would be in violation of the trust or fiduciary duty, or in fraud of the complainant's rights, and which would therefore interfere with and prejudice the ultimate remedies to which he may be entitled with respect to such property (1).

Injunction against trustee—Principles underlying—When the defendant, who is trustee of the property for the plaintiff, invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant perpetual injunction (2). In the exercise of its powers to enforce the proper performance of their duties, the Court may enjoin trustees from proceeding in disregard of the conditions necessary to the proper exercise of their authority, or from an improper use of such authority (3). On this ground the rights of the *cestui que trust* will be protected by restraining the trustee from doing any act inimical to his duty as such (4). A Court of equity will always entertain jurisdiction wherever there is a trust, and will enjoin a breach of trust, whether grave or light, without enquiring if the same may be adequately and effectively compensated for by award of damages in money (5). The reason of this is that trusts were within the exclusive jurisdiction of the old Courts of Chancery in England, and no question of an alternative remedy in damages available in the ordinary Courts could arise in respect of suits relating to trusts (6). "It has become the invariable practice" says Mr. Joyce "when any act involving breach of trust is intended to be done, though not in its consequences irremediable, as for instance, where trustees contract to sell without proper care, or in a way which the parties interested consider inconsistent with the trust, to apply to a Court of equity to prevent the trustees from selling (7). It is a principle of a Court of equity that a trustee shall not be permitted to use the powers which the trust may confer upon him at law, except for the legitimate purposes of his trust; and the Court will restrain him from doing so, and that although the plaintiff may have a remedy at law (8)."

The particular instances to which this doctrine is applied are almost numberless, and extend through the entire range of equitable remedies against mistake, fraud, or to enforce trusts and fiduciary duties, or to establish and enforce other equitable estates, interests, liens, and primary

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(1) Pomeroy's Equity Jurisprudence § 1339.

(2) Specific Relief Act s. 54 (*a*)

(3) Spelling on Injunctions and other Extra ordinary Remedies § 557.

(4) *Ibid*: *Balls* v. *Strutt*, 1 Hare 146.

(5) Banerjee's T. L. L. for 1906 p. 629; Specific Relief Act s. 54 ill. (*f*); *Anon* (1821) 6 Madd. 10; *Att. Gen* v. *Liverpool*, (1835) 1 My & Cr. 171, 210.

(6) Banerjee's T L. L. for 1906 p. 629.

(7) *Att. Gen.* v. *Mayor of Liverpool*, 1 My & Cr. 171, 210.

(8) Joyce Doctrines p. 45. "Another important branch of equity jurisdiction in the exercise of which the granting of an injunction is frequently necessary, is in matters of trust. In the exercise of its powers to enforce the proper performance of their duties, the Court may enjoin trustees from proceeding in disregard of the conditions necessary to the proper exercise of their authority, or from an improper use of such authority there being no adequate remedy at law. On this ground the rights of the *cestui que trust* will be protected by restraining the trustee from doing any act inimical to his duty as such." Spelling on Injunctions and other Extraordinary Remedies § 557.

rights in and to specific property, of any kind or form. (1). So in suits by a beneficiary againt his trustee, an injunction, if needed will be granted as a matter of course (2). Under section 56 (1) of the Specific Relief Act no injunction should be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust (3). The jurisdiction of the Court in this respect is founded, not upon the irremediable consequences which would result from the act complained of, but upon the breach of the trust itself (4).

Caution in exercising the jurisdiction—In cases where threatened violation of trust if committed would be irremediable, it is proper to grant a preliminary injunction without notice to the defendant (5). But though the protection and proper administration of trusts is an important branch of equity jurisdiction, great care should be exercised in granting injunctions against trustees, lest by tying their hands, the trust estate may be left without any representative. A court of equity should not divest the trustee of his trust until he had an opportunity of answering,, except in a case of pressing necessity and imminent probability of great danger and detriment from delay (6). And when an injunction is sought against an executor or trustee, the charges should be specific ; the writ will not be awarded in the first instance upon mere general charges in the bill that he has abused and violated his trust (7). And it is held that to warrant a court of equity in granting an injunction and receiver in a suit for maladministration of trust funds, there must be proof that the funds have been invested in some tangible property, on which complainant can equitably claim a lien. If moneys have been so expended that they cannot be traced or identified, there is no opportunity for these remedies to attach (8). The abuse of trust which will warrant an injunction must relate to the management of pecuniary affairs or property interest. Thus it was held that the fraudulent abuse of their trusts by the directors furnished no sufficient ground for interference by a court of equity (9). And in such cases there must be alleged and shown probable danger of waste or loss, to justify relief by injunction and displacement of the legal right of the trustee (10). Nor will courts interfere by interlocutory injunction to restrain the transfer of an alleged trust fund when the defendant denies

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(1) Pomeroy's Equity Jurisprudence § 1339.

(2) Pomeroy's Equity Jurisprudence § 1687 ; see also *A. G.* v. *Liverpool Corporation*, 1 My & Cr. 171, 210 ; *A. G.* v. *Aspinall*, 2 My & Cr. 613 ; *A. G.* v. *De Winton*, (1906) 2 Ch. 106, 116.

(3) *Holland and Bombay Trading Co.* v. *Essardas Dharamchand*, 17 S. L. R. 320=84 Ind. Cas. 282=A. I. R. 1925 Sind. 175.

(4) Halsbury Vol. 17 page 259 citing *A. G.* v. *Liverpool Corporation*, 1 My & Cr. 171 210 ; *A. G.* v. *Aspinall*, 2 My & Cr. 613 ; *A. G.* v. *De Winton*, (1906) 2 Ch. 107, 116.

(5) *Davis* v. *Browne*, 2 De Ch. 188 ; *Fernie* v. *Maguire*, 6 Ir. Eq. 137.

(6) *Boyd* v *Murray*, 3 Johns. Ch. 48 ; *Odgen* v. *Kip*, 6 Johns. Ch. 160.

(7) *Boyd* v. *Murray*, 3 Johns. Ch. 48.

(8) *Allen* v *Freedman's Savings & Trust Co*, 14 Fla 418.

(9) *Odgen* v. *Kip*, 6 Johns. Ch. 160.

(10) *Satterfield* v. *John*, 53 Ala. 127.

that it is a trust fund, and when the right to deal with it is the question to be determined upon the final hearing (1).

Improper sale etc, of property by trustee—An injunction will be granted where necessary to prevent the trustee from encumbering the trust property by mortgage, conveyance, or contract, or in any other manner which would constitute a breach of trust (2). A trustee shall not be permitted to use his powers by a Court of Equity, except for the legitimate purpose of his trust (3). Although in *Pechal* v. *Fowler* (4) it was held that on a trust to sell an estate a suggestion in the bill, by the owner of the estate, of improper conduct of the trustees in not giving sufficient notice of the sale, there being no case made of irreparable injury, was not a ground for an injunction to stop the intended sale ; for if trustees sold in such a manner as to commit a breach of trust, they would be liable. But in *Attorney General* v. *Mayor of Liverpool* (5) the Master of the Rolls said that it had become the invariable practice, when an act involving breach of trust was intended to be done, though not in its consequences irremediable—where for instance, trustees contracted to sell without proper care, or in a way which the parties interested considered inconsistent with the trust, to apply to the Court to prevent them ; that the case cited [i.e. *Pechel* v. *Fowler* (4), which he said he believed had been overruled as often as it had been considered], would go to this extent, that the court ought never to interfere—parties might deal with the property just as they pleased, and while the suit was pending no new right could be aquired ; that, without adverting to more recent authorities, or to modern practice, the case of *Curtis* v. *Marquis of Buckingham* (6) and another in *Vessy* (7), proved that such was not the practice, at least of this Court, whatever might have been the rule in the Court of Exchequer (8). It is the law consistently with authority and principle, that, however large may be the power of trustees under their trust deed to introduce conditions limiting the title, and other special conditions which have or are calculated to have, a depreciatory effect on the sale, they are bound to exercise them in a reasonable and proper manner, that they must not rashly and improvidently introduce a depreciatory condition, for which there is no necessity or justification, and the Court will, at the suit of a *cestue que trust* restrain the trustees and a purchaser from completing a sale made under such conditions (8). A, a trustee for B is about to make an imprudent sale of a small part of the trust property. B may sue for an injunction to restrain the sale, even though compensation in money would have

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(1) *Bank of Turkey* v. *Ottoman Co*, L. R. 2 Eq. 366.

(2) *Great W. R. Co* v. *Birmingham Co* 2 Ph. 597 ; *Curtis* v. *Buckingham*. 3 V. & B. 168 ; *Spiller* v. *Spiller*, 3 *Swanst*. 556 ; *Rigall* v. *Foster*, 18 Jur 39.

(3) *Balls* v. *Strutt*, 1 Hare, 146, *Att. Gen* v. *Welsh*, 4 Ha. 572 ; *M'Fadden* v. *Jenkins*, 1 Ph. 153 ; *Marshall* v. *Sladden*, 7 Hare, 428.

(4) 2 Anster. 549.

(5) 1 My & Cr. 171, 210.

(6) 3 V & B. 168.

(7) *Ecliff* v. *Baldwin*, 16 Ves. 267 ; see Joyce on Injunction pp. 548, 549.

(8) *Dance* v. *Goldingham*, L. R. 8 Ch. 902, 909.

afforded him adequate relief (1). Though in default of payment, a deed of trust authorises a sale by trustee, yet where he attempts to sell property which is subjet to conflicting liens, and it is doubtful whether a part of it is covered by the deed, a court of equity has jurisdiction to restrain the sale, determine the parties' rights and administer the fund (2).

Where the trustee is empowered to sell any trust property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs (3). The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any condition of sale or contract for sale, as he thinks fit (4). Where a trustee is directed to sell trust property or to invest trust-money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase (5).

The jurisdiction is beneficially exercised in cases of trust of real property, though equity will not interfere to prevent the execution of a general power to sell lands for the benefit of others, where it does not appear that the power is being inequitably or unjustly exercised (6). Yet it is a proper and favourite use of the writ of injunction to prevent the power being abused (7). Thus where land has been conveyed to a Corporation in trust to be used for the purpose of a public street, the owner of the property on such street, being regarded as a *cestui que trust* with reference to such land, may enforce the execution of the trust by restraining its violation (8). So a temporary injunction will be granted to a remainder man to prevent a sale of the trust estate under a judgment against the trustees or tenant for life in whom the title is vested (9). Time affords no sanction to establish breaches of trust, and a Court of Equity will restrain the commission of acts in violation of a trust (10). The Court will restrain trustees having no power to sell, from doing so, with the consent of the adult beneficiaries, until it has been ascertained when it would be for the benefit of the persons interested, not *sui juris*, that the sale should take place (11). A Court of Equity will set aside an appointment of trustees which has been obtained from the donees of the power by parties with the intention of committing a fraud upon

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(1) Specific Relief Act s. 54 illus. (f); see also *Dance* v. *Goldingham*, L. R. 8. Ch. 902. The fact that plaintiff's interest is small and that he is an infant, is not sufficient reason for not granting injunction.

(2) *Draper* v. *Davis*, 104 U. S. 347, per *Bradley J*: "It cannot be doubted that the Court had full power to take the trustee under its control and to direct him to dispose of the trust fund embraced in the deed executed to him, including the personal property in dispute." H. C. Joyce on Injunction § 909.

(3) The Indian Trusts Act (II of 1882) s. 37.

(4) The Indian Trusts Act (II of 1882) s. 38.

(5) *Ibid.*

(6) *Selden* v. *Vermilyea*, 1 Barb. 58.

(7) Spelling on Injunctions etc. § 559.

(8) *Lawrence* v. *Mayor*, 2 Barb. 577.

(9) *Keaton* v. *Baggs*, 53 Ga. 236.

(10) *Drummond* v. *Att. Gen.* 2 H. L. C. 837; *Att. Gen.* v. *Drummond*, 1 *D* & Wr. 353; Joyce Doctrines p. 45; see also *Naran Das* v. *Naran Das*, 31 B. 418.

(11) *Wiles* v. *Gresham*, 17 Jur. 779; Joyce Doctrines p. 46.

the trust, and will restrain the new trustees from proceeding in ejectment to recover the trust premises (1).

Danger to trust fund.—Peril to trust fund alone will justify a Court of equity to interfere by injunction with a trustee in the exercise of his power over the fund, but unless such danger is shown by specific allegations and clear proof, the injunction will not be granted (2). A trustee may bring suit to prevent a co-trustee from committing breach of trust and generally it is his duty to do so (3). Equity will interfere by injunction in many cases where a party is bound by a trust actual or implied ; or where one person stands in such a relation to another as to be invested with something of a fiduciary or confidential character ;and where without either being bound by trust properly so called, or filling a character itself implying confidence, a person has *de facto* a confidence reposed in him (4). Thus where a church was vested in trustees to be used as a place of religious worship for Christians of the Scotch Presbyterian Church, and the office of minister being vacant, a portion of the trustees employed as a temporary measure lay persons and other persons not only duly qualified, to preach ; and had so conducted themselves, and continued so to conduct themselves as to evince an intention to elect a person to be minister, not regularly a licentiate or ordained minister of the Church of Scotland ; an injunction was granted, on the ground of contravention of the trust, to restrain the election of a person to be a minister of the Church, who should not be regularly licensed, as a preacher of the Church of Scotland ; while it was refused as to restraining the temporary employment of persons not so licensed, to preach (5).

Implied trust and trust by operation of law and injunction—The terms "Implied Trusts" "Trusts by Operation of law", and "constructive Trusts", appear from the books to be almost synonymous expressions ; but according to *Mr. Lewin* an "implied trust" is one declared by a party not directly, but by implication ; as where a testator devises an estate to A and his heirs, not doubting that he will thereout pay an annuity of £20 per annum to B for his life, in which case A is a trustee for B to the extent of the annuity. Thus such a case of "implied trust" arises when a testator employed words precatory, or recommendatory or expressing a belief (6) Trusts by operation

(1) *Newsome* v. *Flowers*, 30 Beav. 461 ; Joyce Doctrines p. 46.

(2) *Satterfield* v. *John*, 53 Ala. 127.

(3) *Re Chertsey Market*, 6 Price, 261, 279 ; *Scott* v. *Becher*, 4 Price, 346 ; section 54 of the Specific Relief Act ill. (*b*). "The law requires from trustees an active and vigilant prudence, and a trustee is called upon, even if a breach of trust is threatened, to prevent it by obtaining an injunction. Hence, where a trustee stands by four years while the trust funds are retained by his co-trustees and though he has abundant reasons to put him upon inquiry, makes nothing that can be called an inquiry but passively acquiesces in the disappearance of the funds, he is liable to the beneficiary for the default of his co-trustees." *Mahmood* v. *Radrigues*, 7 Bom. L. R. 691 ; see also *Lakhmi Chand* v. *Jaikam bai*, 29 B. 170.

(4) Drewry on Injunctions p. 266.

(5) Drewry on Injunctions p. 266 citing *Milligan* v. *Mitchell*, 1 My & K. 446 ; see also *Att. Gen* v. *Earl of Powis*, Kay. 186.

(6) *Cary* v. *Cary*, 2 Sch. & Lef 189, per *Lord Redesdale* ; *Raynor* v. *The Mussorie Bank*, 2 A. 55 ; *Sudda sook* v. *Ram Chander*, 17 C. 620.

of law are such as are not declared by a party at all, either directly or indirectly, but result from the rule of equity, and are either—(*a*) resulting trusts, as where an estate is devised to A and his heirs, upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir ; or (*b*) constructive trusts, which the court elicits by a construction put upon certain act of parties, as when a tenant for life of leasehold renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease (1)

In cases of apprehending breach of trust, injunction is granted both against trustees by implication of law or trustees of implied trust. In a case where the steward of a noble man received large sums from the rents of his master's estate, of which he rendered no account for a great many years, but purchased stock in his own name to a very large amount, and it appeared that some of the stock was purchased with his own money ; *Lord Eldon* granted an *ex parte* injunction to restrain the steward from transfering any part of the stock until answer, saying, "that as the mischief to the defendant in granting the injunction as to the whole, arose from his wrongful act in mixing it, he should do less mischief by fixing the injunction on the whole till the defendant informed the court what was his master's than by not fixing the injunction on any part, giving the defendant the opportunity of doing the enormous injustice, of which, by the affidavits, he appeared capable (2)" But where the deed declaring the trust of a dissenting chapel was silent as to the mode of electing the minister, and as to the operation of his office, and a minister was elected according to the custom of the particular sect ; the court held, that if a subsequent meeting regularly held by the members of the church pursuant to their customs, the minister first elected was deposed and another elected in his place, it had no jurisdiction to restrain the second from officiating or the members of the congregation from impeding the first in officiating (3).

Where M the manager of E's business, was allowed by him to send out bills to the customers in his (M's) own name alone, and M afterwards locked E out of the business premises, and E several times had to break the lock to get in, and M had made an assignment of the premises and stock in trade to P ; and P advertised them for sale, and E filed a bill against M and P to restrain the exclusion and the sale. In this case the Vice-Chancellor *Sir W. P. Wood* said that M has acquired the outward insignia of ownership by virtue of trust and so he restrained him from taking advantage of that circumstances and from excluding E the owner from entering on the property and from selling the same (4). In *Yovatt* v. *Winyard* (5) *Lord Chancellor Eldon*

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(1) Lewin on Trust 12 Ed. p. 124.

(2) *Lord Chedworth* v. *Edwards*, 8 Ves. 46.

(3) *Porter* v. *Clark*, 2 Sim. 520 ; Drewry on Injunction p. 267.

(4) *Eachus* v. *Moss*, 14 W. R. (Eng) 324 ; Joyce on Doctrines p. 46 ; Joyce on Injunction p. 598.

(5) 1 Jac & W. 394.

granted an injunction to restrain a defendant, who had, as alleged, as assistant, surreptitiously copied from a book the recipes of the plaintiff, from making use of, or communicating certain recipes for veterinary medicines, and from printing and publishing directions for administering them, on the ground that there had been a breach of trust and confidence (1)

A parol contract by which the purchaser of land agrees to buy and hold it for the joint benefit of himself and another, the latter paying no part of the purchase money, but the purchaser advancing half of it for himself, and half of it as a loan to the other party, creates a resulting trust in favour of the latter, which entitles him to an accounting and partition and to an injunction to restrain the other from prosecuting actions of ejectment and forcible detainer brought to deprive the *cestui que trust* of possession (2). As a resulting trust in lands is valid against all subsequent purchasers and incumbrancers with actual or constructive notice of the trust, and possession of land is constructive notice that it is under a claim of title, legal or equitable, the enforcement of a writ of possession against a person in whose favour there is a resulting trust in the land described in the writ, and who is in possession of the land, will be restrained by injunction (3). Where the owner of land conveys it without consideration, under an agreement by the grantee to sell it and to reconvey on demand any portion of it not sold, and the grantee refuses to reconvey or to account for the part sold, there is a constructive trust and the owner may maintain an action to quit his title and to restrain the grantee from setting up any title under his deed (4). Where the owner of property transfers it to another under an agreement to pay the former an annual income during his life and the apparent intention of the parties is that the one to whom it is transferred is to hold it as agent and trustee of the owner, if the transferee, upon the death of such owner, refuses to surrender up and transfer such property to the executors or administrators of the deceased, such refusal is an unlawful action on his part which operates in law to make his holding and transfers by which he took title, fraudulent and void as against the real owners and entitles the executors or administrators to an injunction restraining him from disposing of the property (5). So also where complainant had entered into an agreement with the defendant whereby defendant had agreed to devise to complainant certain premises, upon the consideration that complainant would be allowed to live with and would be cared for by defendant, during the remainder of complainant's life, complainant having complied with the contract, was allowed an injunction to restrain defendant from conveying the premises to a third party (6).

Equity will, where there is a duty incumbent upon one occupying an ordinary relation, as that of agent, to deliver a thing in specie, attach a trust to the

(1) Joyce on Injunction p. 569.
(2) *Towle* v. *Wadsworth*, 147 Ill. 80 (Am).
(3) *Ferrin* v. *Errol*, 59 N. H. 234; H. C. Joyce on Injunction § 911.
(4) *Giffen* v. *Taylor*, 139 Ind.: 573; H. C. Joyce on Injunction § 912.
(5) *Ingersoll* v. *Weld*, 103 App. Div. (N.Y) 154.
(6) *Aflugar* v. *Pultz*, 43 N. J. Eq. 440 cited in Spelling on Injunctions and other Extra-ordinary Remedies § 562.

article to compel such delivery, and enjoin its transfer to another person than its owner (1). In *Arundell* v. *Phillips* (2), the *Vice Chancellor* said: "I have not the slightest doubt that the plaintiff is entitled to the protection of the Court against the wrongful act which is threatened by his agent. I have known many bills to have been filed by the Court of Exchequer, formerly on behalf of the owners of cargoes, to prevent improper dealings with the goods by the agent or persons in the situation of agents."

Trustees in whom an estate is vested ought not to cut down ornamental trees alleged to be prejudicial, without first applying to the parties beneficially interested for their assent, or to the Court for its authority, the onus of showing that the trees are prejudicial resting on the trustees; and a perpetual injunction was granted against trustees who had cut down three ornamental trees, and failed in proving to the satisfaction of the Court that they were prejudicial (3). A devisee for fee being also a trustee as to remainder in fee, was restrained from cutting timber (4).

Injunctions against bankrupt or insolvent trustee—An injunction against the disposition of the fund may be obtained against an insolvent trustee (5) and *a fortiori* against one who is actually bankrupt (6).

Parties—A person who has a common interest with others in the trust fund or trust estate, can obtain an injunction for the protection of the property (7). Not only will the *cestui que trust* be entitled to an injunction against derelictions by the trustee, but he may enjoin third parties who are interfering with his possession and proper enjoyment of the trust fund (8). Where the sureties of the fund of a trustee for the benefit of creditors filed a bill in equity to enjoin the enforcement against them of a judgment allowing alleged fraudulent claims which had been obtained by a pretended fraudulent conspiracy between the trustee and the debtor and his wife, the injunction was denied on the ground that the bill did not show that the sureties were in danger of being injured, as they were responsible only for the amount received by the trustee; and as the allowance of fraudulent claims diminished that amount, it could not increase but rather lessen the sureties' liability (9). But a surety on an administrator's bond has such an interest in setting a judgment against the administrator aside that he may file a bill to enjoin its enforcement against the estate and for the purpose of having it declared void as against himself (10).

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(1) *Somerset* v. *Corkson*, 3 P. Wms. 389; *Arundal* v. *Phillips*, 10 Ves. 139; *Natbrown* v. *Thornton*, 10 Ves. 163; *Fills* v. *Read*, 3 Ves. 163; *Lamphiere* v. *Lange*, L. R. 12 Ch. D. 675.

(2) 10 Ves 139.

(3) *Campbell* v. *Allgood*, 17 Beav. 623.

(4) *Wright* v. *Atkyns*, 1 V & B. 313.

(5) *Mansfield* v. *Shaw*, 3 Mad. 100; *Scott* v. *Becher*, 4 Price, 346; *Taylor* v. *Allen*, 2 Atk. 213.

(6) *Gladdon* v. *Stoneman*, 1 Mad. 143, note.

(7) Kerr on Injunction p. 508 citing *Scott* v. *Becher*, 4 Price 346; *Dance* v. *Goldingham*, 8 Ch. 902; *Vaman* v. *Municipality of Sholapur*, 22 B. 652.

(8) Spelling on Injunctions and other Extra ordinary Remedies § 564.

(9) *Taylor* v. *Mallory*, 76 Mad. 1.

(10) *Washington* v. *Barnes*, 41 Ga. 307; H. C. Joyce on Injunction § 658.

A trustee can bring a suit against a co-trustee (1). A trespasser entering into a temple may be excluded from the temple as a trespasser by the person in possession, viz., the trustees of the temple. But a beneficiary or two or three or more of them cannot sue such a person as a trespasser or claim an injunction to restrain the entry by such a person into the temple on the mere ground that such entry wounds their religious feelings and desecrates the temple (2).

Voluntary Settlement—A Court of equity will direct trustees of funds in settlement to deal with them according to the trusts of the settlement, notwithstanding a notice not to do so, unless proceedings are taken upon the notice (3). Where a voluntary settlement is binding on the settler, he can be restrained from doing anything by which the settlement can be defeated (4). Though an agreement for a composition generally is not binding on the creditors, unless absolutely and strictly fulfilled, yet a bond creditor having concurred in a general resolution for a composition to be secured by notes, was, under the circumstances, with reference to the interest of the other creditors, restrained from taking action upon the bond for non-payment of the notes, beyond the term of composition (5). A Court of equity will not enforce the trusts of a voluntary deed made by a debtor in favour of creditors. The trusts being voluntary, the debtor may vary them as he pleases, and the court will not restrain the execution of the trusts of subsequent deeds until those of the first deed have been satisfied (6). The principle

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(1) *Ganga pai* v. *Baha*, 20 M. 403: "As we have already said it is not in every case of breach of trust that one trustee is enabled to sue another (see *Bahin* v. *Hughes*, L. R. 31 Ch. D. 390 and section 27 of the Indian Trusts Act). When the breach of trust is equally imputable to two trustees, obviously no such suit can lie. And where there are three trustees, and the management of the business has been left exclusively to one of them, it is clear that as between the other two, who are equally responsible to the *cestui que trust*, there can be no suit instituted. In both of these cases the parties are *pari delicto*. In the present case it is part of the defendant's case and it is otherwise clear from the evidence, that Subbaraya Pai was until his death in exclusive management of the affairs. Against him or his representatives it may be that a suit could have been successfully brought by the other trustees. Both the defendants have not been shown to be any more responsible for his acts than the plaintiffs themselves. Both plaintiffs and defendants have apparently neglected their duty. For these reasons we think the plaintiffs must fail so far as they seek to make the defendants resposible for breaches of trust which occured in the life-time of Subbaraya." "As a matter of fact an injunction may be granted on the application of a director restraining the plaintiff's co-directors from wrongfully excluding him from acting as a director." *Sarat Chandra Chuckerbutty* v. *Tarak Chandra Bhattacherjee*, 28 C. W. N. 803. In *Vaman* v. *Municipality of Sholapur*, 22 B. 646 at p. 652, *Parsons J.* said: "In the case of individuals and companies, co-trustees or beneficial owners or individual share-holders would be entitled to sue for an injunction to prevent such a breach of trust; see section 54 of the Specific Relief Act, 1877, illustrations (*b*), (*c*), (*d*)."

(2) *Saklat* v. *Bella*, 30 C. W. N. 289 P. C.=23 A. L. J. 1016 P. C=A. I. R. 1925 P. C. 298; see also *Anandrao* v. *Shankar Daji*, 7 B. 328.

(3) *Lonergan* v. *Strohton*, 9 Jur. (N. S.) 1067.

(4) Kerr on Injunction p. 508 citing *Mackenzie* v. *Mackenzie*, 16 Ves. 372; Vide s. 54 Specific Relief Act illus (g).

(5) *Mackenzie* v. *Mackenzie*, 16 Ves. 372 cited in Joyce on Injunction p. 1148.

(6) Joyce Doctrines p. 46; *Wallroyn* v. *Coutts*, 3 Mer. 707; *Gerrdard* v. *Lauderdale* (*Lord*) 3 Sim. 1; *Bill* v. *Cureton*, 2 M. & K. 511.

is this, that where a person does, without privity of any one, without receiving consideration, and without notice to any creditor, himself make a disposition as between himself and trustees, for the payment of his debt, he is merely directing the mode in which his own property shall be applied for his own benefit, and the general creditors, and the creditors, named in the schedule, are merely persons named there for the purpose of shewing how the trust property under the voluntary deed shall be applied for the benefit of the volunteers (1). But on the other hand that it is the established law of a Court of Equity, that where there is an actual settlement made for vesting an estate in trustees, and for vesting stock in trustees for volunteers, there, the legal character being complete, the persons who have the legal character are trustees for the volunteers, who may claim as *cestuis que trust* against the trustees under the deed (2). But a deed containing a trust in favour of creditors and an ultimate trust for the wife and children of the settlor was held to be irrevocable (3).

Religious Trusts—The Indian Trust Act (4) deals with the law relating to private trusts and trustees. It extends, in the first instance, to the territories respectively administered by the Governor of Madras in Council, the Lieutenant Governors of the North Western Provinces and the Punjab, the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam. But nothing therein contained affects the rules of Mahomedan law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts, to distribute prizes taken in war among the captors (5). The law relating to religious trusts is dealt with by Religious Endowments Act (6) and the Religious Societies Act (7). Section 14 of Religious Endowments Act lays down that any person or persons interested in any mosque, temple, or religious establishment, or in the performance of the worship or of the service thereof, or the trust relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue, before the Civil Court the trustee, manager or superintendent of such mosque, temple or religious establishment, or the member of any committee appointed under this Act, for any misfeasance, breach of trust, or neglect of duty, committed by such trustee, manager, superintendent, or member of such committee, in respect of the trust vested in, or confided to them respectively; and the Civil Court may direct the specific performance of any act by such trustee, manager superintendent, or member of a committee, and may decree damages and costs against such trustee, manager, superintendent, or member of a committee, and may also direct the removal of such trustee, manager,

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(1) *Gerrard* v. *Lauderdale*, 3 Sim 1. 497.
(2) *Ibid*; cited in Joyce on Doctrines p. 266.
(3) Lewin on Trust 12th Ed. p. 609 citing *Godfrey* v. *Poole*, 13 App. Cas.
(4) Act II of 1882.
(5) Vide s. 1 of the Indian Trust Act.
(6) XX of 1863.
(7) 1 of 1880.

superintendent, or member of a committee. Act XX of 1863, as appears from the preamble of the Act and ss. 1 to 12 applies only to endowments to which Reg. XIX of 1810 was applicable; and that Regulation, as appears from s. 16, had application only to endowments for public purposes. So s. 18, Act XX of 1863 is inapplicable to institutions not dedicated to the public (1). Misfeasance in s. 14 of Act XX of 1863 was simply used with reference to wilful acts of breach of trust, acts of a criminal nature; the provision applies to personal misconduct amounting to a breach of trust or neglect of duty by any member of the Committee in respect of the property and endowments vested in the Committee by s. 12 and of which they are by s. 13 required to keep regular accounts (2). A trustee of a religious endowment, constituted under Act XX of 1863, can sue his co-trustee for a breach of trust, without getting sanction under s. 18 of the Act. Such right of suit is given by the general law, and is independent of the provisions of Act XX of 1863 (3).

The plaintiffs and defendants together with one Subbaraya Pai who died in 1884, were trustees of a temple, having been appointed by the Committee under Act XX of 1863. For some years before his death Subbaraya Pai was let in exclusive management. Subsequently the defendants were in sole management of the temple until 1891, when the plaintiffs brought the present suit charging that the defendant had excluded them from the right of management, and claiming that they should make good sums lost to the institution by reason of breaches of trust alleged to have been committed by them. Some of the breaches of trust took place before 1884. Of the others, which took place subsequently, some consisted in improper dealings with the temple property to the detriment of the temple and to the advantage of certain relations of the defendants. The plaintiffs also asked for an injunction to restrain the defendants from excluding them from the management: *Held* that, in the absence of evidence of an absolute denial by the defendants of the plaintiff's right to act as trustee, the suit for an injunction was not barred by limitation (4).

Removal or alteration of memories or religious marks in a temple amounts to an interference with property and will be a ground for action in the civil courts. The trustees of a temple may be restrained by injunction from making unjustifiable changes which would affect the character of the temple as a religious institution. Where, in a temple in which two rival sects following two rival *gurus* have interests and worship, the trustee introduces a new metal idol, in addition to the existing stone idol of one of the rival *gurus*, such introduction when not effected at the expense of the temple, and when it does not interfere with the worship of the rival sect, is not inconsistent with the usage of the institution and ought not to be restrained by an injunction (5).

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(1) *Protapchandra* v. *Brojonath*, 19 C. 275.

(2) *Syed Amin Sahib* v. *Ibram Sahib* 4 M. H. C. 112.

(3) *Samaram* v. *Krishna Swami*, 4 Ind. Cas. 847 = 19 M. L. J. 513.

(4) *Ganga Pai* v. *Bahu*, 20 M. 398.

(5) *Krishna Sami* v. *Samaram*, 30 M. 158.

In a suit against the trustee of a religious institution under Act XX of 1863 for alleged breaches of trust and neglect of duty by reason of the non-performance of ceremonies, it is not necessary, in order to give jurisdiction to Civil Court, for the plaintiffs to show that there are any special funds constituting an endowment of the institution. If it be proved that the ceremonies in question have been conducted as a custom for a series of years and that the defendant trustee was not absolutely unable, owing to lack of funds, to carry on those ceremonial observances in the customary manner, he must be held to have been guilty of neglect of duty rendering him liable to a suit under s. 14 of the Act. Where it has been usual for the trustee to celebrate with the aid of voluntary contributions it is a breach of duty on the part of the trustee to refuse to celebrate them without adequate reasons if funds are available, and the trustee ought not, contrary to usage, to refuse to receive such offerings and perform the ceremonies for which they are tendered (1). In the above case *Subramania Ayyar* in delivering his judgment observed : "Having regard to the fact that in the case of public religious institutions like the present funds voluntarily given have often largely contributed and do still contribute not only to make the institutions richer but also to promote the interest of public worship, it must be regarded as part of the trustee's proper functions to utilize this sort of income for the purposes of the institution, whenever it is available. It is the trustee's duty to accept the money and apply it for the specified purpose, unless there are proper ground for rejecting the offer. No doubt the trustee has some discretion in the matter. If, in the exercise of that discretion, he acts (borrowing the words employed by *Muttuswami Ayyar, J.* with reference to analogous matter in *Murugesa Mudaliar* v. *Nagamony Mudaliar* (2) cited on both the sides) 'with an absence of indirect motives, with honesty of intention and with a fair consideration of the subject', no misconduct can be imputed to the trustees so acting. But if, on the contrary, the trustee from corrupt or improper motives refuses to allow voluntary contributions offered for purposes not inconsistent with the principles, rules or usages of the institution to be applied for those purposes, in such a case surely persons interested in the institution must be held entitled to proceed against the trustee. And this view of the law is implied by *Muttuswami Ayyar J* in the case to which allusion has already been made and on which the learned vakil for the defendant laid much stress, it would follow from the above that the defendant acted contrary to his duty, should it be proved that though the funds required to carry on the festivals were forthcoming during the period in question, yet he refused to celebrate them without any adequate ground for doing so. *A fortiori* would he be guilty had it been usual to celebrate them with the aid of voluntary contributions. And of course the courts are bound to restrain a trustee from injuring the interests of the institution under his charge by corruptly, arbitrarily

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(1) *Elayalwar Reddiar* v. *Namperumal*, 23 M. 298.

(2) Civil suit No. 213 of 1879 unreported.

or wantonly departing from the ordinary course of procedure in regard to essential or important matters connected with the institution. That such departure on the part of a trustee amounts to a breach of legal duty incumbent on him is the ground on which the Court exercises jurisdiction over him. Therefore, the decisions, cited for the defendant, dealing with or withholding of mere honours and courtesies have no application to cases like this. Still less in point are those cases which were cited and which show that Courts cannot be called upon to decide questions of ritual and worship unconnected with civil rights, since it is perfectly competent to the Courts to adjudicate upon such questions also when the adjudication is necessary for the determination of civil rights."

The Religious Societies Act (1) was enacted to simplify the manner in which certain bodies of persons associated for the purpose of maintaining religious worship may hold property acquired for such purposes, and to provide for the dissolution of such bodies and the adjustment of their affairs and for the decision of certain questions relating to such bodies (2) But the Act is not applicable to Hindus, Muhammadans or Budhists or to any person whom the Local Government may from time to time, by notification in the Local "Official Gazette" exclude from the operation of the Act (3).

In England a court of equity will upon applications for injunctions with respect to ecclesiastical trusts, if necessary, in order to enable it to ascestain who are *cestuis que trust*, decide upon the doctrines of the particular church or religious community, and will interfere to prevent any breach of trust by acts of violation of those doctrines. Thus it will remove trustees who have concurred by breaches of trust for any particular religious community (4). The Court will restrain trustees of a chapel from electing as minister a person not eligible to act as such with reference to the tenets of the endowment (5). A dissenting minister placed in possession of the chapel and dwelling house by trustees is only their tenant at will, and if a trust of a public nature is created, it is essential to the purposes of the trust that a majority of the trustees should have the power, both at law and in Equity, of binding the minority, and the Court will restrain such a minister removed by a majority of the trustees from officiating and the minority of the trustees from permitting him to do so (6). So the Court will restrain the trustees of an advow son from presenting to be bishop for induction, and the bishop from inducing a minister of a parish, where the right of electing the minister has been exercised by a body not having the right (7). It may also restrain the person so appointed or any person other than the person

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(1) Act I of 1880.
(2) Vide preamble to Act I of 1880.
(1) Vide S. 1 of Act I of 1880.
(2) *Drummond* v. *Att. Gen.* 2 H. L. C. 837 ; *Att. Gen.* v. *Drummond* 1 D. & War. 353.
(5) *Milligan* v. *Mitchell*, 1 My & K 446 ; Joyce on Doctrines p 302.
(6) *Perry* v. *Shipway*, 4 De G & J. 353 ; see also *Cooper* v. *Gorden*, 8 Eq. 249 ; Joyce Doctrines 303 ; Kerr on Injunction p. 509.
(7) *Carter* v. *Croply*, 8 De G M & G. 680 ; Joyce on Doctrines 303.

properly appointed, from performing divine service in the church (1). Equity will restrain the use of a place of worship for any other religious worship than that of its foundation (2). The Court will restrain the trustees from using the church for any other purposes than those specified in the deed itself, and in the words of that deed (3). The Court is unquestionably bound to administer trusts for the benefit of Protestant dissenting congregaations, consisting in the application of trust property to the maintenance of a preacher to the congregration (4). Pending a suit for the regulation of a dissenting meeting house, the minister if performing his duty, will, in general be continued, whether duly appointed or not (5).

Where persons who were merely hirers and occupiers of seats or pews in a dissenting meeting house, which was held in trust for the use of the congregation, but who did not take the sacrament there, had been excluded from voting at the election of a minister to officiate in the meeting house, an application for injunction to restrain the individual so elected from acting as minister or receiving emoluments attached to his office was refused (6). The elders and deacons of the French Protestant Church of London, which formed a section of the corporation of the foreign Protestant church founded by Edward VI, dismissed their pastor:—*Held* on a bill filed by the pastor, praying to be reinstated in his office, that the elders and deacons had no power to dismiss him without alleging a sufficient cause and that as they failed to show that he had violated the discipline of the church, his dismissal was void, and the governing body was restrained from hindering him in the discharge of his office (7). But a Court of Equity will not interfere where the congregation having power to remove a minister at discretion, exercised that power oppressively (8). Although a Court of Chancery has no jurisdiction to order an incumbent of a church, who has made alteration, in the building by removing the pews, and substituting chairs, to take the necessary proceedings to obtain a faculty from the bishop of the diocese for the restoration of the church, yet it will grant injunction to restrain the alteration of the walls or brick work of a church without the authority of the archdeacon or bishop, on the plaintiff's undertaking to apply to the proper Ecclesiastical Court for authority to restore the church to its original state (9). On the principle of protecting property pending litigation, the Court will, in a suit to impeach a conveyance of an advowson, restrain the institution of a clerk, even as against a defendant claiming to be a purchaser for valuable consideration, without notice under

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(1) *Att. Gen.* v. *Earl* of *Powis*, Kay, 186; *Milligan* v. *Mitchell*, 1 My & K. 446; Kerr on Injunction p. 509.

(2) *Att. Gen* v. *Welsh*, 4 Hare 572; Joyce Doctrines, 303.

(3) *Att. Gen* v. *Munro* 9 Jur. 461; Joyce Doctrines, 234.

(4) *Att. Gen* v. *Pearson*, 3 Mer. 353, 396.

(5) *Foly* v. *Woutner*, 2 Jac & W. 245, 247.

(6) *Leslie* v. *Bernie*, 2 Russ. 114.

(7) *Daugers* v. *Rivaz*, 28 Beav. 233; *Att. Gen.* v. *Daugers*, 33 Beav. 621

(8) *Dean* v. *Bennett*, 40 L. J. Ch. 452.

(9) *Cardinal* v. *Molyneux*, 4 De G. F. & J. 117.

it (1). A Court of Equity in a case of obstruction to the induction of a party to a benefice will restrain by injunction all interference therewith (2). So the Court will grant an injunction to restrain a bishop from inducting a party to a living, who is alleged to be a devisee in trust to present the plaintiff (3).

Charitable Trusts and Injunctions—Courts of equity have jurisdiction to see that a charitable gift is applied in the manner designated by the donor, and that conditions of the gift are observed by the donee (4). In case of charities, the jurisdiction of courts of equity proceeds upon the ground of trust and the courts will carry out so far as it is legal, the intention of the creator of the trust (5). A court of equity will decide of what denomination of religion an endowed school is, and of what church the trustees and master ought to be members, and to what religious denomination of scholars the institution is open (6). And where an endowment is made for a certain church, equity will restrain its appropriation for the maintenance of a church of a different faith (7). So one who has conveyed land on which a church stood, upon condition that the grantee should always permit the church to remain, may enjoin a school district from converting the church into a school house (8). If the revenues of a charity grammar-school have increased largely, it will restrain the appointment of a new master until something has been settled as to a new scheme (9). Where the master of a free-hold grammar-school has an estate

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(1) *Greenslade* v. *Dare*, 17 Beav. 502.

(2) *Jenkins, Inre*, L. R. 2 P. C. 258 ; Joyce Doctrines p. 304.

(3) *Potter* v. *Chapman*, Dick 146, Joyce Doctrines p. 304.

(4) *United States* v. *Worlds' etc. Exposition*, 56 Fed. 630 646, per *Wood, J* : "It has been held in a large number of cases that gifts for educational purposes, gifts for the advancement of learning, gifts for the diffusion of useful knowledge, gifts for the civilization of the Indians, gifts for assisting literary persons in their pursuits, are all such gifts as come within the clause. *British Museum* v. *White*, 2 Sim & St. 594. So also, it was held in England that a gift by an English subject to the President of the United States in aid of the Smithsonian Institute at Washington came within the definition of a gift for a charitable purpose, and was within the jurisdiction of a Court of Chancery to see that that money was appropriated and bestowed for that purpose. *President* v. *Drummond* cited in *Whicker* v. *Hume*, 7 H. L. Cas. 124. There is an observation by *Lord Justice Selwyn* in *Beaumont* v. *Oliveira*, 4 Ch. App. 309, which states the doctrine thus : In the case now before us, both bequests are bequests to corporations, the objects and purposes of which are the diffusion and improvement of particular branches of knowledge. They subsist for those purposes and no others ; therefore for public purposes ; therefore for the advancement of objects of general public utility ; therefore for purposes analogous and similar to those mentioned in the Statute of Elizabeth ; therefore for charitable purposes ; and therefore they come within the jurisdiction of the court of chancery ; court of chancery has inherent jurisdiction to see to it that the gift is applied in the manner designated by the donor, and that the conditions of the gift are observed by the donee. In India 'charitable purposes" include relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship. Vide s. 2 of Act VI of 1890.

(5) H. C. Joyce on Injunction § 915.

(6) *Att. Gen* v. *Clifton*, 32 Beav. 596.

(7) *Knis Kern* v. *Lutheran Churches*, 1 Sand f. Ch. 439 ; see also *Gable* v. *Miller* 10 Paige, 627 ; *Att. Gen* v. *Pearson*, 3 Meriv. 352 395 ; *Field* v. *Field*, 9 Wend 401.

(8) *Howe* v. *School District*, 43 Vict 282.

(9) *Att. Gen* v. *Warden*, 14 Beav. 201.

of free hold in his office, and is not removable at the pleasure of the patrons of the school, the court will restrain an ejectment brought by the patrons to evict the master from the possession of the school house (1). The mode set forth in the instrument creating the trust, or required by the Statute, with respect to the removal of a school master, must in all cases be observed (2). A Court of Equity will decide whether or not an election of an object for a charity shall or shall not be set aside. where there is a charge that the election has been obtained by colourable means, and not *bona fide* (3).

In case of disagreement among trustees whether receiver should be appointed—In case of disagreement amongst the trustees, a Court of Equity helps the administration of trust by the appointment of a receiver (4). A receiver may also be appointed where one of the trustees has been excluded by the others from administering the trust (5).

Who can sue—Section 92 of the Civil Procedure Code lays down that "in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable nature, or where the discretion of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situate to obtain a decree,—

(*a*) removing any trustee ;

(*b*) appointing a new trustee ;

(*c*) vesting any property in a trustee ;

(*d*) directing accounts and inquiries ;

(*e*) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust ;

(*f*) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged ;

(*g*) settling a scheme ; or

(*h*) granting such further or other relief as the nature of the case may require.

(*2*) Save as provided by the Religious Endowments Act 1863 no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in comformity with the provisions of that sub-section."

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(1) *Willis* v. *Childe*, 13 Beav. 117 ; Joyce on Doctrines p. 252.

(2) Kerr on Injunction p. 510 citing *Crisp* v. *Holden*, 54 S. J. 784 ; *Mitchell* v. *East Essex*, 109 L. T. 778 ; *Blanchard* v. *Dunlop* (1917) 1 Ch. 165 ; *Harris* v. *Crawford*, 87 L. J. Ch. 465 ; *Sadler* v. *Sheffield Corporation*, 93 L. J. Ch. 209 ; *Short* v. *Poole*, 93 L. J. Ch. 110 ; *Fennell* v. *East Ham*, 93 L. J. Ch. 119.

(3) *Etherington* v. *Wilson*, 45 L. J. Ch. 153.

(4) *Wilson*, v. *Wilson* 2 Keen, 249 ; *Hart* v. *Denham*, (1871) W. N. 2 ; *Swale* v. *Swale*, 22 B. 584.

(5) *Swale* v *Swale*, 22 B. 584.

"The real object of the special promises of this section seems to us to be clear. Persons interested in any trust were, if they could all join, always competent to maintain suit against any trustee for his removal for breach of trust; but where the joining of all of them was inconvenient or impracticable, it was considered desirable that some of them might sue without joining the others, provided they obtained the consent of the Advocate General or of the Collector of the District and this condition was imposed to prevent an indefinite number of reckless and harassing suits brought against trustees by different persons interested in the trust" (1). In England also if the act complained of affects public interest, the remedy is by action in the nature of an information at the suit of the Attorney-General (2).

Limitation—Section 10 of the Limitation Act (3) enacts. "Notwithstanding anything herein before contained, no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time." A *quasi* trust, or an obligation in the nature of trust, is not a trust properly so called. A resulting trust or a constructive trust, is only a *quasi* trust. Implied trusts or trusts which the law would infer merely from the existence of particular facts or fiduciary relations, are not "trusts" within the meaning of this section (4). This section applies only to a trust for a specific purpose which means "a purpose that is either actually and specifically defined in the terms of the will or the settlement itself or a purpose which, from the specified terms can be certainly affirmed (5).

Injunctions relating to burial grounds, etc.,—In England persons who have purchased family graves in perpetuity, in a private burial ground attached to a dissenters' chapel closed by an order of the Queen in Council (6), are entitled to an injunction to restrain the trustees from removing, obliterating, or defacing the graves or gravestones, or monuments belonging to them, and from applying the ground to other purposes (7). So where land has been set apart as a burial ground, in which burial places, graves and vaults have been purchased in perpetuity, a Court of Equity will restrain the holders of the legal estate, though claiming as mortgagees, from destroying or defacing the graves, or doing any act which may prevent future interments, or from applying the ground purchased to any other purpose than those of

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(1) *Sajedar* v. *Gour*, 24 C. 418, 425; see also *Budree* v. *Chooni*, 33 C. 789, 804; *D'cruz* v. *D' Silva*, 32 M. 131, 135.

(2) Kerr on Injunction 93 citing *Bermandsely* v. *Brown*, 1 Eq. 204; Story Eq. Jur. § 119. As to regards private endownnts vide *Brojomohan* v. *Hurrolall*, 5 C. 700.

(3) Act IX of 1908.

(4) *Kherodemoney* v. *Doorgamoney*, 4 C. 455; Mittra's Limitation p. 455; *Bhuvabhai* v. *Bai Ruxmani*, 32 B. 394.

(5) *Annamalal Chettiar* v. *A. M. K. C. T.* 35 C. W. N. 145 P. C; *Khaw Sive Tek* v. *Chuah Hooi Neoh*, 49 I A. 37 (43) =26 C. W. N. 495.

(6) See 15 & 16 Vict C. 85.

(7) *Moreland* v. *Richardson*, 22 Beav. 505 cited in Joyce on Doctrines p. 306.

burial (1). If there has been a legal appropriation of ground, as a dedication of land to public and pious uses within the doctrines of the Statute of Elizabeth relating to charities, a Court of Equity in England will restrain the dispossession of the trustees of the property, and the removal of the tombstone and graves (2). In *Shamasuddin Khan* v. *Abdul Aziz* (3) the plaintiffs sued for perpetual injunction against the defendants restraining them from using the plot in dispute from leasing the same for the purpose of drying chillies or for doing any other act by which the graves and the plot might be desecrated. Plaintiffs alleged that the plot in question was the grave yard of their ancestors, the sheiks of Panipat of Taraf Afghan, and was in their possession and defendants 1 to 9 had leased the same to the other defendants. Defendants 1 to 9 pleaded that the plot in question was not the plaintiffs' grave yard, that the graves in the plot belonged to the anscestors of the defendants and they had exclusive title thereto, that the defendants had every right to let the land, that at most the plot in dispute was *shamilat* and that they were not entitled to the injunction prayed for and that the suit was barred by time. Issues being framed, the findings of the lower appellate Court were that the plot in dispute was not the exclusive property of the plaintiffs or of the defendants, but was the burial ground of all Mahomedans of Shamilat, Taraf Afghan. It was held therefore that it was a public *Wakf* and not the private cemetry of the particular family of the plaintiffs. It was further held that the defendants had no exclusive title to the same and that the plot contained the graves of both the plaintiffs and of the defendants, the plot itself being not a separable portion, but a small portion of a large area which was the common graveyard of the parties. On appeal to the High Court the Court in delivering, the judgment said : "The defendants have come in second appeal and the contentions urged on their behalf by the learned counsel has been that once it is found that the plot in question was part of a public *wakf* the plaintiffs have no *locus standi* to ask for any injunction against the defendants who were equally entitled along with them. His contention is that the cemetry being a public trust the only persons who could ask for injunction or for possession of any portion of the trust property were the trustees and that a mere beneficiary under the trust was not entitled to ask for injunction or possession. He cited *Saklat* v. *Bella* (4) and *Sherif Husain* v. *Haidar Husain* (5) in support of his proposition. On the other hand, the learned counsel for the plaintiffs contends that the *wakf* is not public, but a private *wakf* of the Muslim Community of *Shamilat* Taraf Afghan and that in the case of graveyard an injunction could be granted, and he referred to Mulla's C. P. Code at p. 276, *Anandrao* v. *Shankar* (6) and A. I. R. 1931 Oudh 45. He further contended that at any rate the declaration could be given to the

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(1) *Ibid.*
(2) *Beatty* v. *Kurtz*, 2 Pet. 566, 579; Joyce on Doctrines p. 306.
(3) A. I. R. 1932 Lah. 423=138 Ind. Cas. 691.
(4) A. I. R. 1925 P. C. 298=92 Ind. Cas. 200=3 Rang. 582 (P. C.)
(5) A. I. R. 1922 All. 337=67 Ind. Cas. 320.
(6) 7 B. 323.

plaintiff even if no injunction was granted him and he cited A. I. R. 1928 Cal. 368 in support of this proposition. In reply the learned counsel for the appellants cited A. I. R. 1931 Oudh 293 and pointed out that A. I. R. 1931 Oudh 45 was in his favour and not against him, that *Anandrao* v. *Shankar* (1) was a case of trespass on the person and that Mulla at p. 276 referred to certain rulings which only allowed a declaration, but did not give injunction or possession. The rulings in question are rulings of the Allahabad High Court and I have seen them. I do not think they throw light on the question at issue in the present case. The point is not free from difficulty, but after considering the matter I have come to the conclusion that *Saklat* v. *Bella* (2) has no application to the facts of the case. It is assumed by the learned counsel for the appellants that because the learned District Judge used the words 'public *wakf*' it therefore follows that there is public trust. I do not think in the case of a village graveyard reserved for the inhabitants of a particular community in that village there is strictly speaking any trust whether express or constructive on behalf of any body. I have never heard that in such cases there are ever any trustees appointed. On the finding of the learned District Judge the parties appear to be co-owners in the land which has been dedicated to the graveyard and I am unable to see why a co-owner should not ask for an injunction against other co-owners who are perverting the use of the common property. Secondly, even if it be held that there is a public trust of some kind or other, it seems to me that this is a case of trespass on a person as much as a trespass on the land. There is no doubt primarily a trespass on the land, but the result of that trespass on the land is also a trespass on the person in the sense that feelings and sentiments of the persons are outraged by seeing the graves of their ancestors desecrated. It is difficult to see why such a result should not be considered as much a trespass on the person as in the case of *Anandrao* v. *Shankar* (1), which was approved of by their Lordship of the Privy Council in *Saklat* v. *Bella* (2)".

Confidential relation and injunctions—Analogous to the jurisdiction to restrain breaches of trust is the jurisdiction, well established but somewhat undetermined in its limits, to restrain a person from his disclosure or unfair use of knowledge which came to him in the course of a confidential employment or another (3). The Court will, in the exercise of its equitable jurisdiction to correct abuse of confidence, restrain by injunction the disclosure of confidential communications, papers, and secrets (4). In all cases where there exists confidential relationship, a contract is implied on the part of the person to whom confidential communication is made, that he would not use the information against the interest of the person so communicating. In such cases equity imposes upon the recipient a strict obligation not to divulge such knowledge

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(1) 7 B. 323.
(2) A. I. R. 1925 P. C. 298=90 Ind Cas. 200.
(3) Pomeroy's Equity Jurisprudence § 1688.
(4) Kerr on Injunction p. 487.

and enforces the obligation when necessary by injunction (1). Upon this principle, injunction is a peculiarly appropriate remedy to restrain those occupying confidential relations from disclosing or making public secrets which have been imparted to them or papers, documents, or copies of books which have come into their possession during such relation or employment (2). Not only persons who have directly acquired the information will be restrained, but injunction will be granted against others, to whom they have been communicated, so that they may not use the information improperly (3). Numerous illustrations might be given such as of attorneys and special agents, having custody of the books and documents of their principals (4). To justify the writ it must appear that the confidential communications were such as the communicant had a right not only to impart but to have considered confidential (5). But where a fraudulent transaction has come to the knowledge of the person occupying the confidential relation equity extends no protection (6). "An employer" said *Lord Hatherley* (7) "can have no property in inequitious secrets."

Confidence between client and legal adviser.—In the course of A's employment certain papers belonging to his client B, come into his possession. A, threatens to make these paper public, or to communicate their contents to a stranger. B may sue for an injunction to restrain him from doing so (8). A solicitor will be restrained from communicating to a party who is suing a former client, documents, or matters of evidence, which came to his possession or knowledge as solicitor in respect of his employment for such client; and the party will be restrained from using in any action, or otherwise, any documents or matters of evidence which he has so obtained (9). But a clerk of a solicitor, commencing practice for himself will not be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having, in his former service, acquired information likely to be prejudicial to the clients of his master (10).

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(1) Kerr on Injunction p. 487; Spelling on Injunction and other Extra-ordinary Remedies § 565.

(2) Kerr on Injunction p. 487; Spelling on Injunction and other Extra-ordinary Remedies § 565, *Symonds* v. *Hallet*, 24 Ch. D. 346; *Morrison* v. *Moat*, 9 Hare, 255; *Bear* v. *Ward*, Jac. 80; *Lewis* v. *Smith*, 1 Mac & G. 417; *Merryweather* v. *Moore*, (1892) 2 Ch. 518; *Robb* v. *Green*, (1895) 2 Q. B. 1; *Summers* v. *Boyce*, (1907) 97 L. T. 505.

(3) Halsbury vol. 17 p. 255 citing *Lewis* v. *Smith*, 1 Mac & G. 417; *Morison* v. *Moat*, 9 Hare 241; *Exchange Telegraph* v. *Gregory*, (1896) 1 Q. B. 147 CA; *Tipping* v. *Clarke*, 2 Hare, 383 *Robb* v. *Green*, (1895) 2 Q. B. 16.

(4) *Evitt* v. *Price*, 1 Sim 483; *Morrison* v. *Moat*, 9 Hare, 255; *Prince Albert* v. *Strange*, 1 Mac. & G. 25; *Davies* v. *Clough*, 8 Sim. 262; *Goodale* *Goodale*, 16 Sim. 316; *Lewis* v. *Smith*, Ib 417; *Williams* v. *Prince of Wales*, 23 Beav. 340.

(5) *Stein* v. *National Life Asson.*, 105 Ga. 821.

(6) Spelling on Injunction and other Extraordinary Remedies citing *Gartside* v. *Outram*, 3 Jur. N. S. 40; see also *Weld Blundel* v. *Stephens* (1919) 1 K. B. 527.

(7) *Gartside* v. *Outram* supra, cited in Kerr on Injunction p. 489.

(8) Specific Relief Act s. 54 illustration (h).

(9) *Lewis* v. *Smith*, 1 Mac. & G. 417; Joyce on Doctrines p. 283.

(10) *Bricheno* v, *Thorp* Jac. 300; Joyce Doctrines, 283.

An attorney is prevented from communicating his client's secrets, even by striking off the roll (1). A solicitor who has been discharged by his client, cannot be afterwards concerned against him in the same suit (2). The jurisdiction to restrain a solicitor from acting for the antagonist of his former client is founded upon tha principle that a man ought to be restrained from doing any act contrary to the duty he owes to another ; and will be exercised at the instance of former client, irrespective of the question whether the solicitor was discharged by him or had discharged himself, whenever the transaction in reference to which the injunction is sought, so flows out of or is connected with that in which the solicitor was formerly retained that the same matter of dispute may probably arise (3). But the court of appeal decided that while an attorney may not be enjoined from acting for the opponent of his former client, he may be enjoined from communicating to him anything which has come to his knowledge while acting for the former client and in reference to the same transactions (4). In a latter case (5) the decision of *Hall V. C.* was overruled. In that case it was held that there was no general rule that a solicitor who had acted for some person either before or after the litigation began could in no case act for the opposite side but the court must be satisfied in each case that mischief would result from his so acting.

The court will not permit a solicitor to disclose any communications made to him in that character, and will not speculate about their materiality. There is no distinction between the cases of a discharged solicitor, and of one who refuses to act (6). So where a solicitor who had negotiated and concluded an agreement on behalf of a woman, after a dispute with her over the payment of his bill for services, began a suit for another to set aside the agreement he was restrained by injunction from acting as a solicitor for the plaintiff in that suit and from communicating any information to him which had come to his knowledge confidentially as the woman's solicitor (7). A solicitor can not dissolve their partnership so as to enable the retiring partner to act against a former client, under circumstances in which the firm could not act (8). The application to restrain a solicitor may be made by motion in the cause in respect of which such injunction is sought, and need not necessarily be made by petition (9). The injunction goes to restrain the client from employing the solicitor, as well as the solicitor from being employed (10). In *Beer* v. *Ward* (11), the court upon motion, refused to restrain a solicitor from giving evidence of confidential matters, the propriety of his being examined being left to the consideration of

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(1) *Cholmondeley* (*Earl*) v. *Clinton*, (Lord) 19 Ves 268.

(2) *Hutchins* v. *Hutchins*, 1 Hog. 315.

(3) *Little* v. *King Wood Collieries Co*, 20 Ch. 733 Hall V. C. following *Hutchins* v. *Hutchins*, 1 Hogan 315 ; *Biggs* v. *Head*, Sausse & S 335.

(4) Ibid.

(5) *Rakusen* v. *Ellis*, (1912) 1 Ch. 831=81 L. J. Ch. 403.

(6) *Biggs* v. *Head*, Sau & S. 335 ; *Hobhouse* v. *Hamilton*, Id. 359 n ; *Keen* v. *Nezbitt*, Id. 365 n.

(7) *Davis* v. *Clough*, 8 Sim 262.

(8) *Cholomondely* v. *Clinton*, 19 Ves. 261.

(9) *Biggs* v. *Head*, Sau & S. 335.

(10) Kerr on Injunction p. 491 citing *Hobhouse* v. *Hamilton*, Sau & Sc. 359 n.

(11) Jac. 77.

the court before which he might appear as a witness. Though if a solicitor, who has been discharged, voluntarily makes communications of what has come to his knowledge confidentially, it is great breach of his duty and as such the court would restrain the solicitor from making such communication (1).

Where an attorney has been employed in a cause, and is afterwards discharged by his client, not on the ground of misconduct, the court will not restrain him from acting for the opposite party, unless it clearly and distinctly appears that he has obtained information in his former character which it would be prejudicial to the cause of his former client to communicate (2). The court refused to restrain a defendant's attorney from acting for him in the cause, on the alleged ground that thay had, in the character of solicitors for the defendant and others interested (jointly with the plaintiff) in a chancery suit, in attendance upon a master, obtained a knowledge of the plaintiff's case, and of the evidence upon which it was to be supported ; the defendant's attorneys deposing that they in that suit acted also for the defendants, and had not thereby obtained any further knowledge of the plaintiff's case that would be disclosed by a particular demand (3). The court refused to restrain at the instance of an administratrix, a solicitor who had acted on behalf of the administratrix in the affairs of her intestate's estate, from acting as the solicitor of some of the next of kin in a suit for the administration of the estate (4). The obligation to keep secret confidential communications does not cease with the death of the client (5).

A Court of Equity will restrain by injunction a counsel from divulging secrets of a former client (6). If the parties do not take the usual means of securing the professional assistance of counsel, the court will not interfere in a question arising upon the practice of retainer, and will decline to restrain a particular counsel who has acted for one party in a cause, from acting as counsel for another and opposite party in the cause (7). An attorney who has acted for a party to a suit, and has discharged himself, can not afterwards act for the opposite party ; and the court will restrain him from doing so on an application made for that purpose (8).

Disclosure of Trade Secrets—Injunction—An important application of principle of the last topic is seen in the well-established jurisdiction (9) to enjoin the disclosure or use of secrets of trade, such as secret processes

(1) Joyce on Injunction 694 ; see also *Lewis* v. *Smith*, 1 M & G. 417.

(2) *Jhonson* v. *Marriott*, 2 C & M. 183.

(3) *Grissell* v. *Peto*, 2 M & Scott 2.

(4) *Hutchison* v. *Newark*, 3 De G & Sm. 727.

(5) *Bigg's* v. *Head*, Sau & Sc. 335.

(6) *Bayles* v. *Grant*, 2 My & K. 316 ; *In re Joiner*, Mont 69.

(7) *Thornhill* v. *Evans*, 2 At k. 332 ; Joyce Doctries p. 282.

(8) *Ramlal* v. *Moonia*, 6 C. 79.

(9) In the earliest reported case on the subject, *Newbury* v. *James* 2 Mer. 446, *Lord Eldon* refused to enjoin a breach of an agreement not to impart a secret, unpatented process of manufacture, on the ground that the court could not, without having it disclosed, ascertain whether it had been infringed ; but the same chancellor in a later case unhesitatingly granted an injunction against one who had obtained knowledge of such a secret by a breach of trust. *Yovatt* v. *Winyard*, 1 Jacob & W. 394 ; *Williams* v. *Williams*, 4 Mer. 157 and the jurisdiction has since been undoubted in England.

of manufacture, communicated to one in the course of confidential employment. Different grounds have indeed, been assigned for the exercise of the jurisdiction (1); in some cases it has been referred to a right of property in the secret unpatented process—not an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it, but a property which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third parties (2). In other cases the jurisdiction has been referred to breach of an implied contract inferred from the nature of employment (3); in others it has been founded upon trust or confidence (4); more often it is spoken of as resting on both of the last two grounds combined (5). Not only the person acquiring the knowledge by breach of contract or of confidence will be enjoined, but also all persons to whom he has disclosed the secret. The protection of injunction is, of course, extended only to that which is really the plaintiff's secret, and not to knowledge or information which is accessible to all the world (6). So it is well settled that under the head of confidential and fiduciary relations, the violation of which equity will enjoin, may be classed trade secrets learned in the course of confidential employment (7). The confidential relations warranting injunction against diclosure of trade secrets arise from the fact of employment without regard to its character (8). An injunction will issue at the suit of one owning and operating a secret for manufacture of leather, to restrain his former employees from divulging such secrets, and rival manufacturers from using it, but not to restrain such employees from telling where he buys his materials, and to whom he sells them when manufactured (9). But it has been held that an injunction would not lie to restrain the defendant from disclosing

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(1) *Morrison* v. *Moat*, 9 Hare, 241.

(2) *Peabody* v. *Norfolk*, 98 Mass. 452; *Kirchener* v. *Gruban*, (1909) 1 Ch. 413.

(3) *Mackbeth Evans Glass Co* v. *Schnelbach*, 239 Pa. St. 76. The following dictum of Wigram V. C. in *Tepping* v. *Clarke*, 2 Hare, 393 has often been referred to with approval: "It is clear that every clerk employed in a merchant's counting house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk."

(4) *Yovatt* v. *Wingard* 1 Jacob & W. 394.

(5) *Merryweather* v. *Moore* (1892) 2 Ch. 518, 522, *per Kekewitch J*: 'Perhaps the real solution is that the confidence postulates an implied contrat; that when the court is satisfied of the existence of the confidential relation, then it at once infers or implies the contract arising from that confidential relation." See also *Ambersize & Chemical Co. Ltd.* v. *Menzel*, (1913) 2 Ch. 239.

(6) See *Reuters Telegram Co.* v. *Byron*, 43 L. J. Ch. 661 opinion of *Jessel M. R.*; *Williams* v. *Williams*, 3 Mer. 15; Pomeroy's Equity Jurisprudence § 1689.

(7) *Cholomondely* v. *Clinton*, 19 Ves. 261; *Prince Albert* v. *Strange*, 1 Mac & G. 25; *Morrison* v. *Moat*, 9 Hare 255; *Evitt* v. *Price*, 1 Sim 483; *Williams* v. *Williams*, 3 Mer. 159; *Greon* v. *Floghamb*, 1 Sim. & D. 398; *Yovatt Winyard*, 1 Jac & *Walk*. 394; *Lewis* v. *Smith*, 1 M. & G. 417; *Williams* v. *Prince of Wales*, 23 Beav. 340; *Liquid Verner* v. *Scott*, (1912) 29 P. R. C. 639, *Litholite* v. *Travis*, (1916) 33 R. P. C. 266; *Alperton* v. *Manning*, 86 L. J. Ch. 377.

(8) *Louis* v. *Smellie*, 73 L. T. 226.

(9) *Saloman* v. *Hertz*, 40 N. J. 400.

an art or invention, although it was taught him by the plaintiff under a sworn promise not to divulge (1).

Where a party had obtained the knowledge of a secret from one of the former partners in a trade, in breach of confidence, the *Lord Justices*—confirming the decision of Vice-Chancellor *Sir G. J. Turner* upon an interlocutory motion—restrained him from making use of it, the secret here being the compounding of a medicine, not being the subject of a patent, and restrained the sale of such medicine, the knowledge of the secret having been acquired in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence; the plaintiffs, by their counsel, undertaking to be answerable for damages or compensation, and subsequently the defendant submitted to an order making the injunction perpetual (2). The Vice-Chancellor said that he conceived that the Court, in interfering in such cases, fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against the party to whom the benefit is given, the obligation of performing a promise upon the faith of which the benefit has been conferred (3).

If a partner in a business, in which a secret process of manufacture and composition of materials is used, who has not, under the partnership contract, a right to the knowledge of the secret, should openly take part in the manufacture, and should, with the knowledge and concurrence of his partners, be permitted to acquire a knowledge of the process and ingredients; the Vice-Chancellor said that it would be difficult for any of those partners afterwards to restrain him from using any knowledge so acquired, or any secret so disclosed; they would, he thought, in such circumstances, be considered to have waived any right to preserve the secret for their separate benefit (4). In this case the injunction was granted restraining the sale of medicine by the defendant, under the name of the medicine prepared according to secret prescription, not on the ground of the use of the name alone, but because it was by the name that the defendant was availing himself of the breach of faith and contract (5). A debtor may be ordered to disclose to his trustees in bankruptcy *formulae* for manufacturing patented articles, in order that the latter may sell the same for the benefit of the creditors. Even if these *formulae* are not written down, but are in the knowledge of the debtor, he may still be ordered to disclose them; for, if used regularly in the manufacture, they are not debtor's personal skill and knowledge; but part of the goodwill of the business, and so property available for creditors within the meaning of the Bankruptcy Act, 1914 s. 38. (6).

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(1) *Deming* v. *Chapman*, 11 How. (N. Y.) Pr. 382; Spelling on Injunctions § 568.

(2) *Morrison* v. *Moat*, 28 L. J. N. S. Ch. 248 affirming, 9 Hare 255.

(3) Joyce on Injunction p. 480.

(4) *Morison* v. *Moat*, 21 L. J. N. S. Ch. 248 affirming S. C. 9 Hare 241; Joyce on Injunction p. 480.

(5) *Ibid.*

(6) *Re Keen* (1922) 2 Ch. 475=91 L. J. Ch. 484.

Hearing in Camera—An appeal from an injunction to restrain the defendant from disclosing confidential information was ordered to be heard in private without the consent of the defendant, the plaintiff stating that a public hearing would defeat the object of the action, and make success on the appeal useless to him (1).

Confidence in other cases—In a contract of service involving confidential relations, there is, in the absence of an express stipulation to the contrary, an implied promise of fidelity and good faith on the part of the servant, which is broken when the latter surreptitiously copies from his master's order book a list of his master's customers, for his own use after he shall have left and set up a rival business. The servant who so makes and uses the copy is guilty both of a breach of contract and of a breach of trust, and the master is entitled to (i) damages (ii) delivery up to him of all copies and contracts made from his list by the servant, (iii) an injunction restraining the servant from making use of the information thus improperly obtained (2). The good faith which exists between an employer and those in his employ renders it illegal, even in the absence of any stipulation to the contrary, for the persons so employed to make use after termination of the employment of any materials or any information acquired by them while they were in that confidential relationship; and the court will grant an injunction to restrain such use, in addition to awarding damages (3). A draughtsman in the employ of a firm of manufacturers of fire-engines, a few days before leaving his employer's service, prepared a table of the several dimensions of various types of fire engines made by the firm, which he took away with him. Upon motion on behalf of the firm, for an *in terim* injunction to restrain the publication or use of this table: *Held*, that a confidance that the servant would use the opportunities of gaining information which his service gave him for the purpose of that service alone rose out of the mere fact of the employment; and that abuse of this confidence was shown by the preparation of the table at a time when, by the termination of the employment, it could be of no advantage to the employer. In this case injunction was also granted (4). Agents are not entitled to use the materials gained or collected by them in the course of their employment to the detriment of their principal (5). By an agreement in writing dated 1st April 1902, B entered into the service of W. S. and Co, and agreed not at any time without the consent in writing of W. S. & Co. to "divulge or make known any of the trusts, secrets, accounts, or dealings of or relating to the business of the company. On 21st September, 1905, B wrote to K & Co. asking if they had a vacancy for a traveller, and stated that he could introduce some execllent accounts. On 30th September

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(1) Kerr on Injunction 492; see also *Mellor* v. *Thompson*, 31 Ch. 55; *Scott* v. *Scott*, (1913) *Ac.* 448, 482; *Reddaway* v. *Flynn*, (1913) 3 R. P. C. 16.

(2) *Robb* v. *Green* 64 L. J. Q. B. 593=(1895) 2 Q B. 315.

(3) *Louis* v. *Smellie*, 73 L. T. 226 (C. A.).

(4) *Merry weather* v. *Moore* 61 L. J. Ch. 505=(1892) 2 Ch. 518.

(5) *Lamb* v. *Evans*, 62 L. J. Ch. 404 =(1893) 1 Ch. 218.

B left W. S. & Co and entered into the service of K & Co ; he communicated to them lists of customers of W. S. & Co. and called on these customers of W. S. & Co. to K & Co. K. & Co. had notice of the agreement : *Held* that an injunction must be granted against both defendants, restraining them from acting in breach of the agreement, and that the lists of customers made by B must be given up to W. S. & Co. and that W. S. & Co. were entitled to damages against both B and K. & Co. (1). If a servant, while in the employ of his master, makes an invention, that invention belongs to the servant, and not to the master (2). A is B's medical adviser. He demands money of B which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing (3). The principle on which the court acts in restraining an employee from divulging matters relating to his master's business that there is an implied term in the contract of service not to use, to the master's detriment, information obtained in the course of his service (4).

Writings of a Literary character—confidential correspondence— In restraining the publication of private letters the equity is so evident and the breach of confidence and social duty frequently so flagrant as to require no elucidation (5). The doctrine of courts of equity in such cases is not founded upon the fact that the publication of the letters would be painful to the feelings of the writer, but upon a civil right of property which the Court is bound to respect (6). In the above case *Lord Eldon* said : "That the property is qualified in some respects ; that, by sending a letter, the writer has given, for the purpose of reading it, and in some cases of keeping it, a property to the person to whom the letter is addressed (7) ; yet that the gift is so restrained, that, beyond the purposes for which the letter is sent, the property is in the author ; under such circumstances, it is immaterial whether the intended publication is for the purpose of profit or not. If for profit, the party is then selling ; if not for profit, he is then giving that, a portion of which belongs to the writer." There seems never to have been any serious question as to an author's property right in letters, having the character of literary composition (8). By sending them the writer does not part wholly with his property in the literary composition, nor give the receiver the power of publishing them. The receiver has at most

(1) *Summers* v. *Boyce*, 97 L. T. 505.
(2) *Bloxham* v. *Elsee*, 1 Cr. & P. 558.
(3) Specific Relief Act s. 54 illus (i).
(4) *Kirchner* v. *Gurban*, 78 L. J. Ch. 117 (1909) 1 Ch. 413=99 L. T. 232 ; see also *Robb* v. *Green*, (1895) 2 Q. B. 315.
(5) Woods Lect 56 p. 415 ; *Pope* v. *Curl*, 2 Atk. 342 ; Spelling on Injunctions § 567.
(6) *Gee* v. *Pritchard*, 2 Swanst. 413, 416.
(7) *Oliver* v. *Oliver*, 11 C. B. N. S. 139 ; *Thurston* v. *Charles*, (1905) 21 T. L. R. 659 ; *Pope* v. *Curl* 2 Atk. 342 ; *Howard* v. *Gunn*, 32 Beav. 462 ; *Labouchere Hers*, 77 L. T. 559 ; *Macmillan* v. *Dent*, (1907) 1 Ch. 107 ; *Philip* v. *Pennel*. (1907) 2 Ch. 577.
(8) *Pope* v. *Curl*, 2 Atk. 342 ; *Gee* v. *Pritchard*, 2 S. W. 402, 425 ; *Lyton* v. *Devey*, 54 L. J. Ch. 293 ; *Pollard* v. *Photographic. Co*, 40 Ch. D. 352 ; *Macmillan* v. *Dent*, (1907) 1 Ch. 129 *Philip* v. *Pennel*, (1907) 2 Ch. 577 ; section 5 of the Copyright Act of 1914.

a special property in them, and may possibly possess property in the paper upon which the writing has been done. But this does not give a license to any person to publish them to the world. The proprietorship of the receiver is joint with that of the writer. Whatever the extent of such joint interest, letters having the character of literary composition must be treated as within the laws protecting the rights of literary property ; and a violation of these rights in that instance is affected with the same legal consequences as in the case of unpublished manuscript of an original composition of any other description (1). On the question of preventive relief against publication of mere private letters on business or on family affairs or on matters of personal friendship, it is well settled upon English cases that the writers and sendors are entitled to protection (2). The writer of a letter is clearly the author and, therefore, the owner of the copy-right unless he is under a contract of service and apprenticeship (3). or is a mere amannuesis (4). By mere sending a letter to his correspondent a writer does not authorise him to publish it. But under certain circumstances such licence is implied, *e.g.*, sending letters to a news paper. In case of business correspondence such licence is more readily implied than in private correspondence (5).

"Under the old law it was clear that letters might be published if the object of doing so is to vindicate the character of receiver (6) ; but not for the purpose of representing to the public as true that which the receiver has, in legal proceedings upon the very question, admitted to be false (7). It is doubtful if this doctrine, which receives no support from the Act of 1911 (= Act III of 1914), can now stand where the action is founded upon infringement of copy-right as distinguished from breach of confidence ; it could only do so upon the ground of an implied licence or consent, and it seems difficult to imply such a consent under the circumstances of necessity existing (8)" (9). Publication of letters and communication of their contents can be restrained on the ground of breach of trust or confidence as well (10). A is a very eminent man, with letters on family topics to B. After the death of A and B , C. who is B's residuary legatee, proposes to make money by publishing A's letters. D who is A's executors, has a property in the letters ; and may sue for an injunction to restrain C from publishing them (11).

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(1) Story's Eq. Jur. § 944 ; *Pope* v. *Curl*, 2 Atk. 342 ; *Lord Perceval* v. *Phepps*, 2 V. & B 19, 24 ; *Thompson* v. *Stanhope*. Ambler, 739, 740 ; *Gee* v. *Pritchard* 2 S. W. 403, 414, 415 422 425. Now statutory copyright can also be aquired in unpublished literary work vide s. 1 (2) (*a*) of the Copyright Act III of 1914.

(2) Spelling a Injunction and other Extraordinary Remedies § 567.

(3) Section 5, subsection 1 (b) of the Copyright Act (III of 1914) ; Copinger on Copyright p. 38.

(4) *Walter* v. *Lame* (1900) A. C. 539.

(5) *Perceval* v. *Phepps*, 2 V. & B. 19 ; Copinger on Copyright p. 39.

(6) *Earl of Lytton* v. *Devy*, 52 L. T. 121, *Labouchere* v. *Hers*, 77 L. T. 559 ; *Tolsom* v. *Marsh*, 2 Story (Am) 100 ; *Howard* v. *Gunn*, 32 Beav. 462.

(7) *Palin* v. *Garther Cole*, 1 Coll. C. C. 565.

(8) *British Oxygen Co* v. *Liquid Air Co* (1925) 1 Ch. 383.

(9) *Copinger on Copyright* p. 39.

(10) Copinger on Copyright p. 39 ; See also *Pope* v. *Curl*, 2 Atk. 342 ; *Thompson* v. *Stanhope*, Amb 737 ; *Granard* v. *Dunkin*, 1 B. & B. 207.

(11) Section 54 illustration 2.

CHAPTER X

Injunctions between partners.

The Indian Partnership Act—In British India the law relating to partnership has been laid down by the Indian Partnership Act (1). Prior to the passing of this Act, the law relating to partnership was to be found in Chapter XI of the Indian Contract Act, 1872, which was based on the rules included in the Report of the Indian Law Commission presided over by Lord Romily, in 1866. These rules were based on English precedents. The main object then in view was, in the words of Sir James Fitz James Stephen who piloted the Indian Contract Bill through the Council, 'that of providing a body of law to the Government of the country so expressed that it might be readily understood both by English and Indian Government servants without extrinsic help from the English law libraries' With that object in view the Select Committee on the Indian Contract Bill, in its Report dated 22nd February 1879, said that many important matters relating to partnership were left unnoticed in Chapter XI. In addition to these omissions the development of trade in India has shown further matters on which legislation is now required. In the absence of clear and definite rules on these points Indian Courts have held that Chapter XI of the Indian Contract Act is not exhaustive and relied on analogies drawn from the English law. The law, which the English Partnership Act contains, has been adopted in nearly all the British Dominions and Colonies and it also forms the basis of a uniform Partnership Act which is in force in the United States of America. The Indian Partnership Act does not differ in any substantial way from the English law of partnership or the Indian law of partnership which is based thereon (2).

Partnership defined—Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually 'partners' and collectively "a firm" and the name under which their business is carried on is called the "firm name" (3). The definition of "partnership" contains three elements—(*i*) there must be an agreement entered into by all the persons concerned, (*ii*) the agreement must be to share the profits of a business, and (*iii*) the business must be carried on by all or any persons concerned acting for all. All these elements must be present before a group of associates can be held to be partners. These three elements may appear to overlap but they are nevertheless distinct. The first element relates to voluntary contractual relationship of partnership ; the second gives the motive

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(1) Act IX of 1932.

(2) Vide Report of the Special Committe to the Indian Partnership Bill.

(3) Vide s. 4 of the Indian Partnership Act.

which leads to the formation of firms, *i.e.*, the requisition of gain ; and the third shows that the persons of the group who conduct the business do so as agents for the persons in the group, and are therefore liable to account to all (1).

"It is a contract of some kind undoubtedly—a contract, like all contracts involving mutual consent of parties ; and is undoubtedly a contract for the purpose of carrying on a commercial business,—that is, a business bringing profit and dividing the profit in some shape or other between the partners. That certainly partnership is. Whether it is anything more or not has been a question between various authorities ; but it is that certainly (2). The sharing of losses is regarded as consequential upon the sharing of profits. So an agreement to share profits and losses in a business constitutes a partnership (3). The partners when carrying on business of the firm are agents as well as principals. "The real ground of the liability of a partner is that the trade has been carried on by persons acting on his behalf. When that is the case he is liable to the trade obligations, and entitled to its profits, or a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the something which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on, on his behalf, *i.e* , that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made (4)". In the same case the learned Judge said : "I find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it and when therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents." In the same case *Lord Wensleydale* at p. 312 said : "The law as to partnership is undoubtedly a branch of the law of principal and agent ; and it would tend to simplify and make more easy of solution, the question which arises on the subject, if this principle were more cautiously kept in view. *Mr Justice Story* lays it down in the first section of his work on Partnership. He says 'Every partner is an agent of the partnership'' (5).

The relationship of partnership arises from contract and not from status ; and in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business (6).

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(1) Notes on clauses to Partnership Bill.

(2) Per *Jessel M. R.* in *Pooly* v. *Driver*, 5 Ch. D. 472-473.

(3) *Green* v. *Beesley*, 2 Bing. N. C. 108 ; *Brett* v. *Beckwith*, 28 L. J. Ch. 130 ; Lindley on Partnership, 6th Ed. 48.

(4) *Per Lord Cromworth in Cox* v. *Hickman*, 8 H. L. C. 306.

(5) See also *Mallow* v. *Court of Words*, L. R. 4 P. C. 419 ; *Pooly* v. *Driver*, 5 Ch. D. 419 ; *British Homes Assurance* v. *Paterson* (1902) 2 Ch. 404 ; *Beckham* v. *Drake*, 9 M. & W. 79.

(6) Section 5 of the Indian Partnership Act, 1932.

Partners entitled to action of account—The most extensive and generally the most operative remedy at law between partners is an action of account. This is the appropriate and except under very peculiar circumstances is the only remedy at the common law for the final adjustment and settlement of partnership transactions. But this remedy was quite inadequate because proceedings in actions of account was dilatory, cumbrous and inconvenient. And in addition to the common difficulties in ordinary cases, the death of either partner put an end, at the common law, to any means of enforcing this remedy by account ; for it being founded in privity between the parties, no suit lay by or against the personal representative of the deceased partner to compel an account (1).

Relief to be granted by courts of Equity—The remedial justice administered by courts of Equity is far more complete, extensive, and various, adopting itself to the particular nature of the grievance, and granting relief in most beneficial and effectual manner where no redress whatsoever, or very imperfect redress could be obtained at law. In the first place they may decree a specific performance of a contract to enter into a partnership for a specific term of time ; and to furnish a share of capital stock, which a Court of Law is incapable of doing (2). In like manner after the commencement and during the continuation of a partnership Courts of Equity will in many cases interpose to decree a specific performance of other agreements in the articles of partnership. If for instance there be an agreement to insert the name of the partner in the firm name, so as to clothe him publicly with all the rights of acting for the partnership, and there be a studied, intentional, prolonged, and continued inattention to the application of the partner to have his name so used and inserted in the firm name, Courts of Equity will grant a specific relief by an injunction against the use of any other firm name not including his. But remedy in such cases is strictly confined to cases of studied delay and omission, and relief will not be given for a temporary, accidental or trivial omission (3). So injunction will always be granted, if necessary in all controversies between partners (4). So the court will restrain a partner from violating the terms of his partnership contract, or acting inconsistently with his duties as a partner, both duing the partnership, and whether or not dissolution is also sought, and also after dissolution (5). In partnership transactions the Court of Chancery is sometimes called upon to interfere by injunction to restrain interference with or receiving the partnership funds by one or more partners ; to restrain one partner from drawing bills in the name of the firm ; to restrain one partner from excluding another from his share of management ; or generally to restrain any member of a complete partnership, from doing acts inconsistent

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(1) Story's Equity Jurisprudence §§ 899, 900.

(2) Anon, 2 Ves 629, 630 ; *Hercy* v. *Birch*, 9 Ves. 357 ; *Buxton* v. *Lister* 3 Atk. 385.

(3) *Marshall* v. *Coleman*, 2 Jac & W. 266 ; Story's Equity Jurr. § 905.

(4) Pomeroy's Equity Jurisprudence § 1345.

(5) Halsbury vol. 17 page 249.

with the terms of the partnership agreement, or with the duties of a partner. Thus where one partner filed his suit against another, alleging great abuses, and the defendant was in contempt, an injunction was granted (1). Although the court will not, as a rule, enforce a contract to enter into partnership while it remains executory, it will, when the partnership has been constituted and when the ends of justice require it, enforce by injunction the performance of particular terms, though it may be incompetent to enfore all the terms, and the partnership is terminable at will (2).

Power to enjoin without dissolving no longer disputed—Anciently courts of equity declined to interfere in partnership affiairs, except where dissolution as well as relief by injunction against further interference with partnership assets, was sought, pending the final hearing during liquidation after dissolution. But evident as it is that the necessity for applying for relief virtually imperils the success of a partnershtp enterprise, the jurisdiction to enjoin a partner from doing that which seriously interferes with the business, or which is a breach of the express terms of the co partnership agreements, on a bill, which does not seek a dissolution, is now well settled (3). Where a partner

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(1) *Read* v. *Bowers*, 4 Br. C. C. 440 ; Drewry on Injunction p. 270.

(2) *Karri* v. *Kolu*, 32 M. 76.

(3) In *Marshall* v. *Coleman*, 2 Jac. & W. 266, it was held that an injunction will not be granted to restrain the breach of a covenant in articles of partnership which have been infringed for any length of time where the bill does not pray a dissolution of the partnership ; and the *Lord Chancellor* (*Lord Eldon*) dobuted wheather the court would in any case grant such an injunction unless there was granted for, and the bill prayed, a dissolution of partnership. *Lord Eldon* in his judgment said : "There is only this point in the case before me which I wish seriously to consider, viz, that although this Court will interfere where there is a breach of covenants in articles of partnership so important in its consequences as to authorize the party complaining to call for a dissolution of the partnership whether (and it is a matter that will deserve a great deal of consideration before it goes so far) it will entertain the jurisdiction of pronouncing a decree (for this is what is to be done in the cause in which the motion is now made) for a perpetual injunction as to a particular covenant, the partnership not being dissolved by the court. There is one case which is constantly occurring, that of a partner raising money for his private use on the credit of the partnership firm and the court interferes then because there is a ground for dissolving the partnership ; but then the danger must be such—there must be that abuse of good faith between the members of the partnership—that the court will try the question whether the partnership should not be dissolved in consequence. But it is quite a different thing, and it would be quite a new head of equity, for the court to interfere where one party violates a particular covenant, and the other party does not choose to put an end to the partnership. And (*Forman* v, *Homfray*, 2 V. & B. 329 ; *Smith* v, *Jeyes* 4 Beav. 503) in that way there may be a separate suit and a perpetual injunction in respect of each covenant ; that is a jurisdiction we never decidedly entertain." But in *Fairthorn* v. *Weston*, 3 Hare, 387 it was held that a bill for partnership account and a receiver, during the existence of the partnership, is not demurrable merely on the ground that a dissolution is not prayed. In that case *Wigram V. C.* said : "If it were the rule of the court that a bill would in no case lie to compel a man to observe the covenants in a partnership deed unless the bill seeks a dissolution of the partnership, it is obvious that a person fraudulently inclined, might, of his own mere will and pleasure compel, his co-partner to submit to the alternative of dissolving a partnership, or ruin by a continued violation of the partnership contract :" See also *Harrison* v. *Armitage*, 4 Mad. 143 ; *Richards* v. *Davis*, 2 Russ & My 347 ; and the unequivocal expression of the opinion of *Lord Cottenham in Taylor* v. *Davis*, 4 L. J. N. S. Ch. 18 and in *Wall*

who had been suffering from temporary : insanity had recovered but was excluded by his co-partners from the management of the affairs of the partnership, the Court restored him to his position in the firm by granting an injunction restraining the other partners from preventing him from transacting the business of partnership (1). Where under the terms of a partnership, terminable at will, between A and B, A is bound to hand over to B who furnished all the capital, all moneys, or cheques received by him in the course of the partnership business, irrespective of the state of the general accounts and A omits to deliver to B one of the cheques so received, B can maintain a suit against A to compel A to deliver such cheque, whether such payment be regarded as a claim for damages or for partial account (2).

Jurisdiction founded upon the trust Relation—Jurisdiction to grant preventive relief in co-partnership matters, while on occasions it may rest upon one or more of several grounds, is usually due to the trust (3) or contractual relation between the partners, the violation of which will be prevented to avoid irreparable injury and vexatious or interminable litigation. During the continuance of the co-partnership, any act by one or more of the partners, less than all, which is greatly injurious to the common interest, as by indorsing notes in the firm name and the like, will be enjoined, although a dissolution of the co-partnership be not included in the same bill. If a bill would in no case lie to compel a man to observe the covenants of a partnership deed, unless the bill sought a dissolution of the partnership, it is obvious that a person fraudulently inclined might of his mere will and pleasure compel his co-partner to submit to the alternative of dissolving a co-partnership, or ruin him by a continued violation of the partnership contract (4).

Partnership at will—Grant of Injunction—There is no doubt that courts of equity interfere by injunction between parties where the conduct of the defendant, either by misapplying the moneys of the co-partnership or by

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Worth v. *Holt*, 4 My & Cr. 619 ; of V. C. In *Miles* v. *Thomas*, 9 Sim 606 ; of *Lord Langdale* in *Richardson* v. *Hastings*, 7 *Beav* 301 ; *Watney* v. *Trist*, 45 L. J. Ch. 412 ; Spelling on Injunctions and Extraordinary Remedy § 587 : Kerr on Injunction p. 513 ; H. C. Joyce § 952.

(1) Anon X v. X, 2 K. & J. 441.

(2) *Karri* v. *Kollu*. 32 M. 76.

(3) "There can be no question but that the law holds each member of a partnership to the highest degree of good faith in his dealings with reference to any matter which concerns the business of common engagement, and that each partner, being the agent of the firm, must be held, during the existence of the relation, to the same accountability as other trustees, in all matters, which affect the common interest. He owes : his partner the stuctest good faith, and as an agent of the firm is under obligation to keep accurate account of moneys which passed through his hands. *Uberrima fides* is the rule which applies to agents, partners and trustees. Each partner occupies a dual relation : he is a trustee in respect of his dealings with the firm assets, and a *cestui que trust* in respect to the dealings of his co-partner with his assets. Out of this dual relation arises: the reciprocal duty on the part of all the partners to refrain from all concealment in the transaction, affecting the community interests ; and, if any one or more of them, by fraud or concealment, derive a benefit to the exclusion of his associates, equity will treat the offender as a trustee, for the firm, and compel him to account for it" —Story's Equity Jurisprudence § 898.

(4) Per Wigram V. C. in *Fairthorne* v. *Western*, 3 Ha. 387.

excluding from the business a partner entitled to join in it, is practically violating the partnership contract. This will sometimes be granted where the partnership is dissoluble by will (1) but always where it is a partnership for a definite period (2).

Acts warranting interference by injunction—The acts which will be restrained are such as will work substantial injury to the firm interests, and an injunction will not be granted to prevent the doing or continuance of mere trivial and unimportant acts, which though annoying and vexatious, do not substantially impede the success of common enterprise (3). Some acts must be established, as being or about to be done, which are not only injurious to partnership interest, but inconsistent with the articles of agreement, or the relation and duty as a partner ; such for instance, as engaging in business injurious to the firm (4) ; severing connection with the firm and forming a partnership with a third party (5) ; or conducting the same business for his own benefit at a different place than that agreed upon (6). In partnership engagements a covenant, that the partners shall not carry on for their private benefit that particular commercial concern, in which they are jointly engaged, is not only permitted, but is the constant course (7). Partners, therefore, even in the absence of express covenants may be restrained from engaging in another concern of such a character as will necessarily give rise to a conflict of interests (8). In *Glossington* v. *Thwaites* (9), *Vice Chancellor Leach* observed : "The principles of courts of equity would not permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit should, any of them, engage in another concern, which necessarily gave them a direct interest adverse to that undertaking". "It is thus clear that one partner can restrain another from carrying on business in rivalry with the partnership when that business could only be carried on to the detriment of the original business (10). But the mere temptation to the abuse of partnership obligations is not sufficient to induce the court to grant an injunction (11). In the above case all the partners in a publication (a morning news paper), except one, being also partners in another publication (an evening news paper), and as to which circumstances, between two such publications, the Vice-chancellor observed

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(1) Vide Section 54 illustration (l). Ordinarily where there is no prayer for dissolution of partnership which is determinable at will court does not interfere by injunction. *Peacock* v. *Peacock*, 16 Ves. 19 ; Kerr on Injunction 515 ; Halsbury Vol. 17 p. 249. But the court interferes where the act complained of is one which tends towards the destruction of the partnership property, even when the dissolution is not prayed. *Miles* v. *Thomas*, 9 Sim 606, 609.

(2) *Virdachela* v. *Rama Swami*, 1 M. H. C. R. 341 (348).

(3) Spelling on Injunction § 589, *Goodman* v. *Whitcamb* 1 J. & W. 392 ; see also *Anderson* v. *Anderson*, 25 Beav. 190, 194 ; *Baxter* v *West*, 1 Dr. & Sm. 173.

(4) *Hall* v. *Hall*, 12 Beav. 414 ; *Blisset* v. *Daniel*, 10 Ha. 493.

(5) *England* v. *Curling*, 8 Beav. 129.

(6) *Marshall* v. *Johnston*, 33 Ga. 550.

(7) Banerjees T. L. L. 1906 p. 618.

(8) Ibid, cited with approval in *Mumtaz Ali* v. *Kassim Ali*, 11 A. L. J. 423 = 19 Ind. Cas 250.

(9) 1 Sim & St. 124 = 24 R. R. 153.

(10) *Mumtaz Ali* v. *Kassim Ali*, supra.

(11) *Smith* v. *Mules*, 9 Hare, 556.

there is necessarily some rivalry, an injunction to restrain the using of the effects of the former partnership to assist the latter, in consideration of an annual sum, was refused where had been an agreement permitting the use on those terms, which had been acted on for many years ; but the injunction was granted to restrain the use of partnership effects not included in the agreement (1). So where there is an agreement not to raise money in the name or on the credit of the firm for the private use of any one partner, courts of equity will, from the manifest danger of injury to the firm, interpose by injunction to stop such an abuse of the credit of the firm (2). So where there is an agreement by the partners not to engage in any other business, courts of equity will act by injunction to enforce it, and if profits have been made by any partner in violation of such an agreement in any other business the profits will be decreed to belong to the partnership (3). So if it is agreed that upon the dissolution of a partnership a certain partnership book shall be long to one of the partners and the other shall have a copy of it, courts of equity will decree a specific performance (4). Equity will also enjoin the taking away of the partnership books (5). In like manner courts of equity will interfere by way of injunction to prevent a partner, during the continuation of the partnership, from doing any acts injurious thereto ; as by signing or indorsing notes to the injury of the partnership, or by driving away customers, or by violating the rights of the other parties, or his duty to them, even when a dissolution is not necessarily contemplated (6). The court will restrain a purchaser from doing acts of waste and destruction, and will restrain a partner from doing an intentional serious injury to the partnership property (7). Mere temptation to the abuse of partnership effect is not sufficient to induce court to grant injunction (8). Two persons having agreed to work a coach from Bristol to London, one provided horses for a part of the road, and the other for the remainder ; and in consequence of the horses of one having been taken in execution, the other provided horses for that part which had been undertaken by the first, and claimed the whole profits of the journey ; the court refused an injunction against continuing to provide horses (9). The court will restrain one of the several partners in a patent from publishing a book containing an account of the invention (10). If A, obtains a patent, and

(1) Spelling on Injunctions and other Extraordinary Remedy § 589.

(2) *Marshall* v. *Coleman*, 2 J & W. 206, 269 ; Story Eq. Jur. § 905.

(3) See *Somerville* v. *Mackay*, 16 Ves. 382, 387, 389 ; *Lock* v. *Layman* 4 Ir. Ch. 188 ; *Dean* v. *Mc. Dowell*, 8 Ch. D. 345 ; *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26 ; Story Eq. Jur § 905.

(4) *Lingen* v. *Simpson*, (Sin & Stu. 600 ; *Richard son* v. *Bank of England*, 4 Myl. & Cr. R. 165, 172, 173 ; *Fether stone raugh* v. *Turner*, 25 B. 382.

(5) *Taylor* v. *Davis*, 3 Beav. 388 note ; *Greatrex* v. *Greatrex*, 1 Deg. & S. 692.

(6) *Charlton* v. *Poulter*, 19 Ves. 148 n ; *Goodman* v. *Whitcomb*, 1 Jac & Walk. 589 ; *Marshall* v. *Watson*, 25 Beav 501 ; *England* v. *Curling*, 8 Beav. 129 ; *Hall* v. *Hall*, 12 Beav. 414 ; Story Eq. Jur § 907.

(7) *Marshall* v. *Watson*, 25 Beav 501.

(8) *Glassington* v. *Thwaites*, 1 Sim & S. 214.

(9) *Smith* v. *Fromont*, 2 Swanst 330.

(10) *Hawkins* v. *Blachford*, 1 L. J. (O. S.) Ch. 142.

enters into an agreement with B, the effect of which is to make B a partner in the patent, B is entitled not merely to share in the profits, but to interfere in the management of it ; and if, upon a bill being filed A insists that he alone is entitled to act in the management, and that such was the true intent of the agreement, an injunction will be granted against A (1). Under a deed of partnership, it was provided, that the assignees of any bankrupt proprietor should not become proprietor, but might procure some person to become a proprietor in respect of the bankrupt's shares ; and that, between the time of bankruptcy and of some person becoming a proprietor of such shares, the rights and privileges attending such shares should remain in suspense ; *Held* that the solvent proprietors were entitled to an injunction against the assignee of a bankrupt proprietor, to restrain him from interfering with the partnership property, or with the management of the business of the partnership. The solvent proprietors being entitled to the possession of the partnership property and effec's, a manager or receiver was refused (2).

Amount of attention to be given to the affairs of the firm—The time and attention which the partners are to give to the affairs of the firm should be expressly mentioned ; especially if one of them is to be at liberty to give less of his time and attention than others. An affirmative covenant by a partner to devote his whole time to the business should be accompanied by a negative stipulation not to engage in any other business, in order that a remedy by injunction may be available (3). Inattention to business by reason of illness is, however, no breach of an agreement to attend to it (4).

Withdrawing partnership property—Each partner occupying the relation of a trustee for the benefit of his co partner, with reference to the firm property that may come into his hands, it follows that he is liable to the partnership for the improper use or application of any property that may be under his control. He has no right to use the firm property in the payment of his individual debts (5). An injunction will be granted to restrain a member of a co-partnership who holds notes for the benefit of the firm from pledging them for his own private debts (6). An injunction will also be granted restraining a partner from applying the partnership fund to any other purpose (7). A Court of Equity will interfere by injunction in cases of partnerships constituted by verbal agreements, and will, where necessary, protect the partner-

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(1) *Blachford* v. *Hawkins*, 1. L. J. (O. S) Ch. 141.

(2) *Francis* v. *Spittle*, 9 L. J. Ch. 230.

(3) Lindley on Partnership 508 citing *Whit wood Chemical Co.* v. *Hardman* (1891) 1 Ch. 416 ; *Grimston* v. *Cunningham*, (1894) 1 Q B. 125 ; cf. *Davis* v. *Farnan*, (1894) 3 Ch. 654 ; *Kircher & Co.* v. *Gurban*, (1909) 1 Ch. 413, where agreements negative in form were held to be affirmative in substance. *Metropolitan Electric Supply Co* v. *Girinder*, (1901) 2 Ch. 799, where an agreement affirmative in form was held to be negative in substance.

(4) Lindley on Partnership p. 508 citing *Boast* v. *Firth*, L. R. 4 C. P. 1 ; *Robinson* v. *Davison*, L. R. 6 Ex. 269.

(5) Story's Equity Jurisprudence § 909.

(6) *Stockdale* v. *Ullery*, 37 Pa. St 486.

(7) *Hall* v. *Hall*, 12 Beav. 414.

ship property from being received by the partners, pending the taking of the accounts upon a dissolution of the partnership (1). So also, one partner was restrained from pulling down, altering or adding to the partnership premises without the consent of the other partners (2). A partner can bring an action against his co-partner for restraining him from using the name of the firm in a separate business (3). So one member of a firm engaged in business may be enjoined from using force, to the obstruction or interruption of the trade, such for instance, as displacing servants employed by the other partners, and from withdrawing from the places where property is kept and books and papers relating to the business (4). The court will restrain a partner from doing one intentional serious injury to the partnership property (5). Where defendant denies charges in a bill of fraud and misconduct in partnership, and explains others away, and alleges his inability to put in a full answer by reason that plaintiff withheld improperly the partnership books, court would not even grant an injunction prayed by bill, but refused it without prejudice (6).

Excluding partner from taking part in partnership business— An injunction will be granted where one partner excludes his co partners from the premises where the firm business is being conducted (7), and from participation in the business (8); and in such case the defendant will be enjoined from receiving and collecting debts due to the firm (9). The ordinary right of inspection of partnership books conferred on a partner by articles of partnership or under the English Partnership Act, 1890, s. 24, subsection 9, may be exercised by an agent to whom no personal objection can be made as well as personally. An injunction restraining the defendants from the exercising of this right by the plaintiff was accordingly granted (10). A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners (11). The power of exclusion must not be exercised for the exclusive benefit of one or more partners individually but for the benefit of the whole partnership (12). The power of expulsion must be exercised *bona fide* (13). A partner who is to be expelled should be given opportunity to meet the charge against him (14).

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(1) Joyce on Doctrines p. 235; *Peacock*, v. *Peacock*, 16 Ves. 49.

(2) Kerr on Injunction p. 513 citing *Elmslia* v. *Beresford*, (1873) W. N. 152.

(3) *Aas* v. *Benham* (1891) 2Ch. 244 =65 L. T. 25.

(4) *Brewers Case*, 19 Ves. (2nd Ed) 148 n; *Taylor*. v. *Davis*, 3 Beav. 388 n; *Greatrex* v. *Greatrex*, 1 De G. & Sm. 692.

(5) Spelling on Injunctions and other Extra-ordinary Remedies § 591.

(6) *Littlewood* v. *Caldwell*, 11 Price, 97.

(7) *Blisset* v. *Daniel*, 10 Hare 493; *Ganpat* v. *Anaje*, 23 B. 144.

(8) *Hall* v. *Hall*, 12 Beav. 414. Exclusion of a partner is also a ground for the appointment of a receiver. *Wilson* v. *Greenwood*, 1 S. W. 481; *Blakenes* v. *Dufaur*, 15 Beav. 40; *Const* v. *Harris*, Turn & R. 517.

(9) *Walbert* v. *Harris*, 3 Halst. (N. J) 605.

(10) *Bevan* v. *Webb*, (1901) 2 Ch. 59; Kerr on Injunction p. 514.

(11) Section 33 of the Indian Partnership Act (IX of 1932).

(12) *Blisset* v *Daniel* 10 Hare 493, (522); *Stuart* v. *Gladstone*, 10 Ch. D. 626, 650; Halsbury Vol XXII, page 88.

(13) Lindley pages 516, 517; see also *Barnes* v. *Youngs*, (1898) 1 Ch. 414; *Carmichael* v. *Evans*, (1904) 1 Ch. 486; *Crean* v. *Howell*, (1910) 1 Ch. 504.

(14) *Barnes* v. *Youngs*, (1898) 1 Ch. 414; *Wood* v. *Wood*, L. R. 9 Ex. Ch. 190; *Russell* v. *Russell*, 14 Ch. D. 471.

Interference by third parties—Since the jurisdiction in partnership is based to a great extent upon the trust relation between the parties, relief will not be extended to parties not in any way connected with, or interested in, the conduct of the partnership enterprise, unless their claim to relief, or the claim against them is based upon independent grounds such as would warrant relief against the partners or others in their individual capacities. Accordingly, an injunction was refused in a suit between partners for a settlement of firm affairs, against a third party not shown to be in any manner connected with the partnership affairs, restraining him from using or disposing of real estate to which he had a legal title, upon an allegation that it was transferred to him fraudulently by one of the partners (1) But on the ground, not of a violation of any trust relation, but because of the irreparable injury likely to result, the holding out of a person as a partner by another, without the former's consent or authority, was held to warrant an injunction (2). On the other hand, one will be enjoined from intruding into the place of business of co-partnership and holding himself out as one of the firm (3). And a purchaser at a sale, under a judgment obtained in an action against an individual partner, was enjoined from proceeding in an action of ejectment against the complainants (members of the firm of which such partner was one) who were in possession of premises adjudged to be partnership-assets by decree of the Court (4).

Interference by creditors.—The same general rule applies to creditors as to others not directly connected with the partnership enterprise. They cannot interfere or be interfered with, with respect to their demands against the partnership or individual members, except upon equitable grounds distinct from the trust relation between the partners. A court of equity will not enjoin a sale under an execution of the interest of an individual partner in a firm for his individual debt, unless necessary to enable an account to be taken in order to ascertain such partner's interest (5). It will not be granted in order to give an opportunity to liquidate the partnership affairs (6). Nor will an injunction be granted, at suit of creditors who cannot be affected by the proceedings, under an execution, unless they can show that the sale will be conducted so as to cause them irreparable injury with respect to their claims against the co-partnership (7). An injunction was refused where sought for the purpose of restraining the sale of locomotive owned by three railroad companies in partnership under a judgment against one of the companies (8). But where a debt was contracted fraudulently; an individual partner

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(1) *Mc Kee* v. *Griffin*, 23 La. An. 417; Spelling § 592.

(2) *Routh* v. *Webster*, 10 Beav. 561; Spelling § 592; see also *Bullock* v. *Chapman*, 2 De G. & S. 211; *Walter* v. *Ashton*, (1902) 2 Ch. 282, 291.

(3) *De Groot* v. *Peters*, 57 P. 209.

(4) *Etlenborough* v. *Bishop*, 26 N. J. Eq. 262; Spelling on Injunction etc. § 592.

(5) *Place* v. *Sweetzer*, 16 Ohio. St. 142; Spelling on Injunction § 593.

(6) *Moody* v. *Payne*, 2 Johns. Ch. 548.

(7) *Saunders* v. *Irwin*, 17 Hun 342.

(8) *Lamville Vally R R. Co.* v. *Benby*, 55 Vt. 235.

and the creditor participating in the fraud, the latter will be enjoined from prosecuting an action commenced by attaching the partnership property (1).

Conveyance taken in name of Individual partner.—Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm or for the purpose and in the course of the business of the firm, and includes also the good-will of the business. Unless the contrary intention appears property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm (2). Property given to some only of the partners to replace lost partnership property is not partnership property (3). In the leading case of *Davis* v. *Davis* (4) *North J.* said: "It is not the law that partners in business, who are the owners of the property by means of which the business is carried on, are necessarily partners as regards the property. That conclusion is indeed expressly negatived by sub-section 1 of section 2 of the Act of 1890, and there are many cases (5) before the Act to the same effect." So also any statutory right such as patent right or copyright acquired by a partner during the continuance of partnership does not become partnership property but remains his exclusive property, although the usufruct of the same is enjoyed by partnership (6). But property

(1) *Franckenstein* v. *North*. 79 Ill. App. 669.

(2) Section 14 of the Partnership Act. This section contains the substance of subsection (1) of section 20 and section 21 of the English Act, and of section 253 (1) of the Indian Act, but the matter has been rearranged. An important difference is the introduction of the good will of the business which is now specifically included among the property of the firm. It will, subject to contract between the partners, be included automatically in all accounts for the determination of shares. —*Notes on Clauses.*

(3) *Campbel* v. *Mullet*, 2 Swan. 551.

(4) (1894) 1 Ch. 393.

(5) *Fromont* v. *Coupland*, 2 Bing. 170; *Steward* v. *Blakway* L. R. 4 Ch. 603.

(6) *Belcher* v. *Whittemore*, 134 Mass. 330 (1883) *Per W. Allen* J: 'This is a bill in equity in which the plaintiff claims an interest in letters patent issued to the defendant, *John R. Whittemore* for inventions made by him. When the inventions were made and the letters patent issued, the parties were co-partners in the business of manufacturing and selling agricultural implements and in the foundry business and the patents were for improvements in agricultural implements. The inventing and patenting of new and improved machines was no part of the business of manufacturing and selling them, and did not come within the scope of the partnership business. The facts do not disclose any contribution of means by the co-partnership which would give it an interest in the result. The time, labour and materials belonging to the co-partnership, which were used by *Whittemore* in perfecting his inventions, with the knowledge and without the objection of the other partners, were clearly not regarded by any one as contributions to work by the firm which would give it a property in the inventions which might be made. It is true that by the articles of co-partnership each partner was to give his time to the business of the firm, and not to engage in any other speculation or business in his own name and on his own account to the detriment of the firm; that *Whittemore* used his time and labour and materials belonging to the firm in making improvements in machines manufactured and sold by it; and that for some of the improvements so made he procured at his own expense, and in his own name and for his own benefit letters patent. But this did not make such inventions the property of the co-partnership. If he violated his agreement, or used the property of the firm without the consent of his co-partners, he was liable therefor. But it does not appear that he did anything

acquired with partnership money is partnership property (1). The facts that properties were purchased in the name of a firm, the purchase money being paid out of the partnership assets and considerable amounts spent on constructing buildings thereon, is a strong indication that the properties were purchased and treated as partnership properties (2). Where one member of a partership, holding the title of immoveable property belonging to the firm, attempts to convey it in satisfaction of his individual indebtedness, a Court of equity will, on proper application, restrain him from doing so (3). But an injunction which had been allowed on the allegations in a bill that complainant and two of the defendants were partners and purchased lands for partnership purposes, and that the defendants fraudulently and without the knowledge and consent of the complainant took the conveyance in their own names, and on the dissolution of the partnership sold and mortgaged the lands to the other defendants, was dissolved after answer alleging that the defendants were employed at wages to be measured by a proportion of the profits, and denied that the title was taken in the names of the defendants without the knowledge of the complainant (4). A deceased partner having contracted in his own name for a lease of premises to be employed in the partnership trade, the Court refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner (5).

Complainant must not himself be in wrong or acquiesce.—A partner seeking the extra-ordinary remedy by injunction against his co-partners will be denied relief if it be shown that he has not performed his part of the duties imposed by the partnership agreement, but has violated or departed from its terms (6). Acquiescence on the part of the complaining partner also disentitles him from obtaining injunction. Where all the proprietors of the M paper being also, with the exception of one, proprietors in the E paper, an injunction to restrain using effects of former partnership, to assist latter, in consideration of an annual sum, was refused where there had been agreement permitting use on those terms which had been long acted under (7).

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to the detriment of the firm, or without the consent of his co-partners. The improvements he devised, whether patented or not were a benefit to the firm by increasing its business, and no objection was made by any member of it either to the making use by *Whittemore* of the facilities furnished by the business for making experiments and improvements, or to the procuring of letters patent by him for inventions so made. We know of no principle or decision which, upon the facts in the case, could give to the co-partnership a right in the patents." See also ss. 5 and 31 of the Indian Copyright Act III of 1914.

(1) *Tibbets* v. *Phillips*, 10 Hare. 355 ; *Wray* v. *Wray*, (1905) 2 Ch. 349 ; *Helmore* v. *Smith*, 35 Ch. D. 436 C. A.

(2) *Ismail* v. *Tayaballi*, A. I. R. 1929 Sind. 182.

(3) *Frankenstein* v. *North*, 79 Ill. App. 669 ; Spelling on Injunctions etc. § 594.

(4) *Mc Mahon* v. *O'Donnell*, 20 N. J. Eq. (5 C E.) Gr. 306 ; Spelling on Injunction etc. § 594.

(5) *Alder* v. *Fouracre*, 3 Swan. 489.

(6) *Const* v. *Harris*, T & R. 524 ; Spelling on Injunctions § 595 ; Kerr, 521 ; *Smith* v. *Fromant*, 3 Swan. 330.

(7) *Glassington* v. *Thwaites*, 1 Sim & S. 124.

Illegal association.—An association of artizans for the purpose of enhanceing the price of their work by bringing all the business of the trade into one shop and dividing the price of the work done amongst the members according to their skill, is an association that has for its object the acquisition of gain, and if consisting of more than twenty persons must be registered. Where more than twenty artizans signed an agreement whereby they constituted themselves an association for the above purpose, but which association was not registered as a company under Act X of 1866, *held* that the Court would not grant an injunction to restrain the breach of such agreement (1)

Question of partnership in dispute—Relative inconvenience.—An injunction should not be perpetuated where at the hearing, any doubt remains as to whether a partnership exists ; but in a proper case a temporary injunction may be granted pending a determination of that question, though in dispute, if necessary to prevent irreparable injury or multiplicity of suits (2). An injunction will not be granted however in the first instance, when all the equities of the bill are denied (3), or where it would be of no avail or would cause a disproportionate injury or inconvenience beyond the particular exigency against which relief is sought (4).

Remedy on Partnership contract.—The insertion in the co-partnership articles of a provision for the adjustment and settlement of controversies between the partners may warrant a Court of equity in refusing relief by injunction until they have availed themselves of the remedy so provided (5). And where an injunction has been granted to restrain a partner from interfering with the partnership rights of another it will be dissolved by mutual consent (6). A person having, in articles of partnership, covenanted not to do certain acts after a specified period of time, the Court will not, before the arrival of that period, grant an injunction to restrain him from acting in breach of this agreement, nor for mischief, which is no breach at law of the covenant between the parties (7). Injunction was granted against a co-partner interfering in the management of the business (which was under a contract with Postmaster-General for the service of the mail) where the effect of suffering him to interfere would be irreparable injury to partnership business, by causing the contract to put an end to (8).

Dissolution—Injunction and Receiver.—Although the granting of an injunction and appointment of a receiver in partnership matters are distinct remedies, yet when the dissolution of a partnership is decreed on account of disagreements among the partners, it is the usual, and in fact may be said to be the invariable practice of courts of equity, to appoint a receiver to wind up the business ; and the granting of an injunction restraining the partners from further

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(1) *Bhekaji* v. *Bapu Saju*, 1 B. 550.
(2) *Coville* v. *Gilman*, 13 W. Va 314 ; Spelling on Injunction etc. § 596.
(3) *Wellman* v. *Harker*, 3 Oreg. 253 ; Spelling on Injunction § 596.
(4) *Smith* v. *Froment*, 3 Swanst. 330.
(5) *Carlen* v. *Drury*, 1 Ves & V, 154.
(6) *Van Kuren* v. *Trentan Co*, 2 Beas. 302 ; Spelling on Injunction and other Extra-ordinary Relief § 598.
(7) *Coates* v. *Coates*, 6 Madd. 287.
(8) *Anderson* v. *Wallace*, 2 Moll. 504.

participating in the business or dealing in the firm property follows the appointment of a receiver as a matter of course (1). In the appointment of a receiver and granting of an injunction the court should take into consideration not only the specific terms of the contract between the parties, but also the duties and obligations which are incident and implied in every such undertaking and relation. And since the injunction is granted upon the appointment of a receiver to preserve the partnership property from waste, the injunction is regarded as auxiliary to the principal relief, therefore, upon the removal of the receiver and appointment of another, the injunction originally granted will be continued almost as a matter of course (2). But where a temporary injunction has been granted pending an application for the appointment of a receiver and at the hearing the appointment of a receiver is refused, the injunction must be dissolved (3).

Two remedies are not inseparable.—On the other hand, the appointment of a receiver is not necessarily adjunctive to the granting of a preliminary injunction upon *ex parte* application with a view to dissolution. And, as has been previously stated, the case presented may entitle a party to an injunction though no dissolution is contemplated. The appointment of a receiver in such case would be equivalent to a dissolution against the will of both parties to the proceeding. But where it is apparent that the conduct of a partner defendant has been such as to destroy that mutual confidence and respect between the partners which is an essential element of the success of the partnership enterprise, that fact will go far to induce the appointment of a receiver and granting an injunction (4). The effect of appointment of a receiver is to exclude both the plaintiff and the defendant from taking part in the partnership affairs and as such the relief by appointment of a receiver operates as an injunction. The court in granting or refusing an order for a receiver does not act upon the same principles as when it grants or refuses an order for an injunction (5).

Facts warranting Injunction etc., with a view to dissolution.—Where a contract of partnership has been entered into as a result of false representations, it may be set aside by a court of equity at the suit of the one who was so induced to enter into the contract. And in such a case a Receiver may be appointed in which event it is declared that an injunction follows as a matter of course (6). Where a partner has failed to contribute his share to the capital stock of the firm as agreed by the articles, and has sold his in-

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(1) *Van Rensellaer* v. *Emery*, 9 How Pr. 135 ; Spelling on Injunction and other Extraordinary Remedies § 599.

(2) *Williamson* v. *Wilson*, 1 Bland. 418 ; Spelling on Injunction and other Extraordinary Remedies § 600

(3). *Walker* v. *House*, 4 Md. Ch. 39 ; Spelling on Injunction and other Extraordinary Remedies. § 600.

(4) *Smith* v. *Jeyes*, 4 Beav. 503 ; Spelling on Injunction and other Extraordinary Remedies § 601.

(5) Kerr on Injunction p. 521 citing *Evans* v. *Coventry*, 3 Drew 82 ; *Baxter* v. *West*, 1 Dr & Sm. 173 ; *Hall* v. *Hall*, 3 Mac. & G. 79.

(6) *Jones* v. *Weir*, (Pa. 1907) 66 Atl 550 ; H. C. Joyce on Injunction § 962.

terest in the firm to a third party without the knowledge and consent of the other partner, and refuses to pay any of the indebtedness of the firm considered in connection with his insolvency, and that his vendee has taken possession of the firm assests, clearly warrants an injunction and receiver (1). And such relief is also properly granted pending an action by a partner against his co-partner for an accounting where it appears that the partnership property is in the possession of the latter and the allegation that he is insolvent is not decided (2). And where the disagreements between the partners, as disclosed by the pleadings, appear to be serious and irreconcilable, and it also appears that such disagreements relate to the control and disposition of the partnership property and effects, and to their respective demands against the partnership property and against each other, the appointment of a receiver and granting of an injunction are entirely proper (3). So where the acts of the defendant partner clearly evince a deliberate determination to break up and ruin the firm business, and it is apparent that his conduct has produced such personal relations between the partners that they cannot carry on the business with mutual advantage and profit, a proper case is presented for a receivership and injunction (4).

Where in a suit for dissolution of partnership and accounts, a receiver of the partnership assests was appointed and a temporary injunction was granted restraining the defendants *inter alia* from recieving certain payments from Government, and the Government which was no party to the suit made payments to one of the defendants in the alleged exercise of power reserved to it by Statute, and subsequently the injunction was dissolved. the plaintiff's case having failed. *Held* that an injunction although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts (5). That although the injunction could not bind the Government not to pay, or make the Government responsible for that obedience to the law which the Court was entitled to expect, the man who received it in breach of the order was guilty of contempt in no way cured by the payment by Government. It is the duty of the Crown and of every branch of executive to abide by and obey the law. If there is any difficulty in ascertaining it, the courts are open to the crown to sue and it is the duty of the executive in cases of doubt to ascertain the law in order to obey it, not to disregard it (6).

Injunctions during or after an action for dissolution.—In an action for dissolution, a partner will be restrained from improperly obstructing the partnership business (7). Where it is insisted that the conduct of one

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(1) *Heath cot* v. *Ravens croft*, 2 Halst Ch. 115; Spelling on Inj. § 602.

(2) *Taylor* v. *Rusell*, 119 N. C 30; H. C. Joyce on Injunction § 962.

(3) *Whitman* v. *Rolinson*, 21 Md 30; Spelling on Injunction and other Extraordinary Remedies § 602.

(4) *Whitman* v. *Robinson*, 21 Md. 30; Spelling on Injunction and other Extra-ordinary Remedies § 602.

(5) *The Eastern Trust Co* v. *Mackenzie Man & Co Ltd*, 20 C. W. N. 457 (P C) = 35 Ind. Cas. 378 (P. C.)

(6) Ibid.

(7) *Charlton* v. *Paulter*, 19 Ves. 147n; Kerr on Injunction p. 516.

partner entitles the other to a dissolution, the court must consider, not merely the specific terms of the express contract, but also the duties and obligations which are implied in every part (1). An injunction was granted restraining the defendant from interfering with the management of the receiver and manager appointed by the court with a view to dissolution of partnership (2). Injunction was granted against a surviving partner proceeding by ejectment to obtain possession of a firm of which a joint lease had been made to himself and his deceased partner (3). So also injunction was obtained to restrain a surviving partner from disposing of the joint stock and receiving the outstanding debts (4). But injunction to restrain a surviving partner from using the name of a deceased partner in the firm of trade, refused (5). Plaintiff and defendant (partners) agreed to dissolve, and the defendant, on payment of half value of effects, should take the whole ; though defendant took possession, but failed to make the payment, and had began to pull down part of buildings, injunction to restrain him was refused (6).

Where an action for dissolution of partnership had been commenced against a lunatic partner, and he had subsequently drawn cheques and interfered in other ways with the business of the partnership, an injunction was granted to restrain him from so doing until the trial of the action or further order (7). By the partnership articles the partners were allowed to draw a fixed sum quarterly out of the net profits, with a proviso that, if at the end of the year the net profits should not have amounted to the sum drawn, each of the partners should be debited in the partnership accounts with, and should at the end of the partnership repay to the co-partnership the difference between the amount of the sums received in respect of such quarterly payment and the sum he could have been entitled to receive as his share of net profits. The partnership for the first two years proved a dead loss, and the drawings, consequently, came out of the capital. The plaintiffs wished for an immediate dissolution, but the defendant wished to carry on the partnership a little longer. The plaintiff commenced an action for dissolution, and applied for an *interim* injunction to restrain the defendant for drawing out of the capital until the hearing. *Held* that the drawing out of capital was, notwithstanding the proviso for repayment at the end of the partnership, such misconduct within the meaning of the partnership articles as justified the court in granting the injunction, but that the plaintiff also must undertake not to draw out of capital (8). The court has an equitable jurisdiction to grant an injunction, or to order the delivery up of an instrument, though it may be, at the time of the motion, the subject of an action then was going on (9). Section 53 of the Indian Partnership Act lays down : "After a firm is dissolved, every partner

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(1) *Smith* v. *Jeyes*, 4 Beav. 503.
(2) *Dixon* v. *Dixon*, 89 L. T. 272, Swinfen Eddy.
(3) *Elliot* v. *Brown*, 3 Swanst 489
(4) *Hartz* v. *Schrader*, 8 Ves. 317.
(5) *Webster* v. *Webster*, 3 Swanst 490.
(6) *Crofton* v. *Horner*, 5 Price, 537.
(7) J. V. S. (1894) 3 Ch. 72.
(8) *Leman* v. *Beger*, 34 L. T. 235.
(9) *Jervis* v. *White*, 7 Ves. 413.

or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from suing any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up : provided that where any partner or his representative has bought the good will of the firm, nothing in this section shall affect his right to use the firm name'' (1). In an action instituted for the purpose of having a partnership dissolved or of having an account taken after a partnership has been dissolved, it has never been doubted that an injunction will not be granted to restrain one of the partners from doing an act which will impede the winding up of the concern (2). For example, one partner will be restrained from carrying on the concern for any other purpose than winding up (3) ; for damaging the value of the good-will if it ought to be sold for the benefit of all (4), or if it solely belongs to his co-partners (5), from getting in the assets if he is likely to misapply them (6) ; a surviving partner will be restrained from improperly ejecting the representatives of his deceased co-partner (7).

"Again in an action for a dissolution, a partner will be restrained from improperly interfering, with or obstructing the partnership business (8), from drawing, accepting, or indorsing bills of exchange in the partnership name for other than partnership purposes (9) ; from getting the debts owing to the firm (10) ; from withholding the partnership books (11) ; and generally on a dissolution one partner will be restrained from injuring the property of the firm (12) ; or misapply its assets (13)." (14).

So after dissolution the court instantly interferes by injunction to restrain breaches of special agreement entered into between the partners ; such for example as agreements not to carry on business (15), not to get in debts of the firm (16), not to divulge a trade secret (17). In a suit brought in by the widow of a deceased partner to wind up the partnership the surviving partner was prohibited by the court, at the instance of the plaintiff, from collecting debts due to the firm ; but leave was given to apply for the recovery of debt which became time barred (18).

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(1) Section 53 of Act IX of 1932.

(2) A person who only shares profits is by no means necessarily in the same position as a partner in these respects, see *Walker* v. *Hirsch*, 27 Ch D. 460.

(3) *De Tostel* v. *Bordenan*. Jac 516.

(4) *Dixon* v. *Dixon*, (1904) 1 Ch. 161 ; *Turner* v. *Major*, 3 Giff. 442 ; *Bradbury* v. *Dickens*, 27 Beav. 53 ; *The David* and *Mathews*, (1899) 1 Ch. pp. 383, 384.

(5) *Trego* v. *Hunt*, (1896) A. C. 7.

(6) *O'Brien* v. *Cooke*, Ir. Rep. 5 Eq 51

(7) *Elliot* v. *Brown* 3 Swanst 489 ; Lindley on Partnership p. 637.

(8) *Smith* v. *Jeyes*, 4 Beav. 503 ; *Charlton* v. *Poulter*, 19 Ves. 148 n.

(9) *Williams* v. *Bingley*, 2 Vern, 278 note ; *Jervis* v. *White*, 7 Ves. 412 ; *Hood* v. *Ashton*, 1 Russ, 412.

(10) *Read* v. *Bowers*, 4 Bro. C. C. 441.

(11) *Taylor* v. *Davis*, 3 Beav. 388 note ; *Charlton* v. *Poulter*, 19 Ves. 148 n.

(12) *Marshall* v. *Watson*, 25 Beav. 501.

(13) *Garret* v. *Moore*, Seton 6th Ed. p. 697.

(14) Lindley p. 638.

(15) *Whittaker* v. *Howe*, 3 Beav. 383.

(16) *Davis* v. *Amer*, 3 Drew. 64.

(17) *Morrison* v. *Moat*, 9 Ha. 241.

(18) *Shunmugam* v. *Madin*, 8 M. 22) ; *Rajarathnam* v. *Shevalayammal* 11 M. 103.

Position of partners after dissolution.—The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm" (1). A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners (2). A firm is dissolved—(a) by the adjudication of all the partners or of all the partners but one as insolvent, or (b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership (3). Subject to contract between the partners a firm is dissolved – (a) if constituted for a fixed term, by the expiry of that term ; (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof ; (c) by the death of a partner ; and (d) by the adjudication of a partner as an insolvent (4). When the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. The firm is dissolved as from the date mentioned in the notice at the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice (5). A partnership may also be dissolved by the court at the instance of one or more of the partners, when (a) a partner has become of unsound mind ; (b) when a partner other than the partner suing, has become in any way permanently incapable of performing his duties ; or (c) guilty of conduct prejudicially affecting the interest of partnership : or (d) commits breach of agreements relating to the managements of the affairs of the firm or the conduct of its business ; or (e) transferred his whole interest in the firm to a third party or has allowed his share to be charged under the provisions of rule 49 of Order XXI of the first schedule to the Code of Civil Procedure, 1908 etc ; (f) that the business of the firm cannot be carried on save at a loss ; or (g) on any other ground which renders it just and equitable that the firm should be dissolved (6).

After dissolution of partnership, in the absence of express stipulation, each partner is entitled to use the old firm name, provided such use does not expose the other partners to liability or risk (7).

Section 55 provides : "(i) In settling the accounts of a firm after dissolution, the good will shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with the property of the firm ; (ii) where the good will of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer (8) and he may advertise such business, but subject to agreement between him and the buyer

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(1) The Indian Partnership Act, 1932, s. 39.
(2) Ibid, s. 40.
(3) Ibid s. 41.
(4) Ibid s. 42.
(5) Ibid s. 43.
(6) Ibid s. 44.
(7) *Burchell* v. *Wilde*, 64 L. J. Ch. 314 = (1900) 1 Ch. 551.
(8) Inspite of the sale of the good-will of a firm any partner may set up a competing business along side the old premises of the firm, and may even advertise the business. *Kennedy* v. *Lee*, 3 Mer. 452 ; *Hookham* v. *Pottage*, 8 Ch, D. 91 ; see also *Untwell* v. *Lee*, 17 Ves. 335 ; *Davis* v. *Hodgson*, 25 Beav. 177 ; *Curl Brothers* v. *Webster* (1904) 1 Ch. 687 ; *Harrison* v. *Gardner* 2 Madd. 198 ; *Shackel* v. *Baker*, 14 Ves. 468.

he may not—(a) use the firm name (1), (b) represent himself as carrying on the business of the firm (2) or (c) solicit the custom of persons who were dealing with the firm before its dissolution (3)" "The above propositions are fairly simple and follow naturally from the sale of the good will of the business, for, though the seller is entitled to carry on a competing business, yet he must not do so in a way by which he would derive any direct benefit from his connection with the business whose good will he has sold for value. These simple rules do not exhaust the English rulings on the subject, which have introduced many refinements and distinctions, particularly in connection with clause (c). This Act does not propose to adopt any of these. In particular it does not include the proposition that where a partner has been adjudicated insolvent, he is not prevented from soliciting the old customers of the firm. This is based on *Cruttwell* v. *Lege* (4) and *Walker* v. *Mattram* (5) which are derived from the general consideration that the insolvent's share in the assets of the firm including the good will, is sold over his head, for the benefit of his creditors, and he himself is in no way privy to the sale and should not therefore be bound by a condition which amounts to a personal undertaking, It seems to us that the better rule is to provide that the value of the good-will should be left unimpared for the benefit of the creditors of the insolvent. The English rulings go further than this and would extend the rule in *Crutt well* v. *Lege* to expelled partners (6), and to sales by a Court in an auction for dissolution and sales by a trustee of a deed of assignment for the benefit of the creditors (7), but in these cases the sale usually follows from what was originally a voluntary act by the seller and the seller derives some benefit to this extent. In any case, these matters are expressed to be subject to agreement by the buyer and the partner concerned and where there is no agreement, any loss to the seller arising from the absence of these agreements which are all in favour of the seller, will be balanced by the enhanced value of the good will (8)." A retiring partner has had ever the right to say, in the absence of an express agreement to the contrary, that he lately belonged to a certain firm and may advertise the fact (9) or may advertise that he is no longer connected with the concern (10). The retiring partner must not carry the new business in the name in which it was carried on before he sold it, or in any other name so like it as to lead the public to believe that it is the old business (11). At the same time if the name happens to be his own, he cannot be restrained from carrying on business in his own name, though he may be restrained from making a

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(1) *Churton* v. *Douglas*, Jons 174.
(2) Ibid ; *Hukman* v. *Pottaze*, 8 Ch. 91 ; *Trego* v. *Hunt*, (1896) A C. 27.
(3) *Trego* v. *Hunt*, (1896) A C. 27 ; *Jennings* v. *Jennings* (1898) 1 Ch. 378 ; *Gillingham* v. *Beddow*, (1900) 2 Ch. 242 ; *Curl Brothers* v. *Webster* (1904) 1 Ch. 685.
(4) 17 Ves. 335.
(5) 19 Ch. D. 335.
(6) *Dawson* v. *Beeson*, 23 Ch. D. 504.
(7) *Green* v. *Morris*, (1914) 1 Ch. 562 =83 L. J. Ch. 559 ; Lindley p. 547 footnote.
(8) Notes on clause to the Indian Partnership Bill.
(9) *Trego* v. *Hunt*, (1896) A. C. 27.
(10) *Bradbary* v. *Dickens*, 27 Beav. 53.
(11) *Churton* v. *Douglas*, Johns 174 ; *Hookham* v. *Pottage*, 8 Ch. 91 ; *David and Mathews Inre*, (1899) 1 Ch. 378.

dishonest use of it (1). But the late owner or partner must do nothing, other than make an honest use of his own name which is calculated to suggest that he is carrying on the old business (2).

"It has been settled", said *James V. C.* in *Hudson* v, *Osborne* (3), "that there is no implied covenant of any kind in the sale by an individual himself of the goodwill of his business ; but it seems to be well settled that a trader, whose business, and the good will of whose business have been sold by himself, or by any person deriving title under him, has no right to represent himself as carrying on that identical business ; he has no right to use the trade marks which were the marks of that business, or, by the use of the name, or of a title of the firm, to represent himself as being the continuee of that identical business which has been sold (4)". And, in *Churton* v. *Douglas*, (5), a partner, who after he had sold his share in the business of "John Douglas & Co 'to his co-partners, continued to trade as "Churton, Bankart, and Hirst, late John Douglas & Co" was restrained from trading as "Jonn Douglas & Co." or representing that his new business was a continuation of the old business (6). At the same time if the name happens to be his own, he cannot be restrained from carrying or business in his own name, though he may be restrained from making a dishonest use of it (7).

Any partner may, upon the sale of the good will of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specied local limits, and notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable (8). But in the United States of America, a covenant in a partnership agreement that upon withdrawing from the firm no partner shall thereafter carry on the same kind of business in such manner as to interfere with, draw any customers from, be in opposition to, or in any way hurt or damage the business already established and carried on by the said firm" does not prevent a retiring partner from carrying on the business in the same locality, but means only that he shall not do so in a manner to interfere with or draw any customers from or damage the old firm and as the covenant is so indefinite as to what shall constitute a violation thereof, equity will not enforce the same only so far as its meaning is not in doubt and it will merely enjoin direct or indirect solicitation of the customers of the

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(1) Lindley Partnership p. 537 ; Kerly on Trade Marks and Trade Names etc 613.

(2) *May* v. *May*, (1914) 31 R. P. C. 324 ; Kerly on Trade Marks etc 614.

(3) (1869) 39 L. J. Ch. 79,

(4) Kerly on Trade Marks and Trade Names p 614.

(5) John 174=28 L. J. Ch. 841

(6) Kerly on Trade Marks and Trade Names p. 615.

(7) See also *Pomeroy* v. *Scale*, 22 T. L. R. 795 ; 23 T. L. R. 170, where the effect of the sale of the good will was considered. In *Vernon* v. *Hallan*, 34 Ch. D. 748, there was a covenant not to carry on business under a particular name which happened to be that of the defendant.

(8) The Indian Partnership Act, s. 55 (3).

firm by a retiring partner (1). In England an agreement by a retiring partner not to commence business in opposition to his late partner will be enforced, if the restriction imposed upon him is reasonable in reference to the interest of both parties and of the public ; if it is not greater than will afford adequate protection to his late partners having regard to the nature and extent of the partnership business it will be reasonable as between the partners and will be enforced provided it is not injurious to the public (2). An agreement entered into when a partnership is formed, to the effect that a retiring partner shall not carry on business carried on by the firm, can not be invalid for want of consideration (3). Very frequently the agreement provides for the payment of a sum by way of liquidated damages on breach of an agreement. In such a case the person entitled to the benefit of the agreement cannot claim an injunction as well as liquidated damages (4).

It is convenient to note here, in passing, that the purchaser of the goodwill of a business, or a partner succeeding to it under agreement upon dissolution of partnership, has a right to use the trade name and trade marks under which it was conducted (5). And this even though it comprises the personal name of the late partner (6) or if any other late owner of the goodwill, but not so as to cast any risk of liability upon the late partner or owner (7) by using his personal name in such a manner as to represent that he is still a member of the firm, or carrying on the business (8).

D being one of the proprietors and the editor of a weekly periodical, called "Household Words" was not on a dissolution of partnership, justified in advertising that the publication would be discontinued ; for the right to use the name must be sold for the benefit of all the partners, it being a part of the

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(1) *Sanford* v. *Sanford*, 114 App. Div. (N. Y) 862 ; H. C. Joyce on Injunction § 954 A.

(2) Lindley p. 533 ; see generally as to covenants not to carry on business, *Mitchell* v. *Reynolds*, 1 Sm. L. C. ; *Avery* v. *Longford*, Kay 663. In modern times there has been considerable change in the application of the law on the subject, if not in the law itself. The leading modern cases are *Nordut filt* v. *Maxim*. (1894) A. C. 535 ; *Mason* v. *Provident*, (1913) A. C. 724 ; *Att. Gen.* v. *Adelaide*, *Ibid*, 781 ; *Herbert Morris* v. *Saxelbey*, (1916) A. C. 689 ; *Att wood* v. *Lamat*, (1920) 3 K. B. 571 ; *Haynes* v. *Doman*, (1899) 2 Ch. 13 ; *Dowden* v. *Pook* (1904) 1 K. B. 45 ; *Williams* v. *Williams*, 2 Swanst. 253.

(3) Lindley on Partnership p. 533 ; *Austen* v. *Boys*, 2 De G. & J. 626.

(4) *General Accident* v. *Noel*. (1902) 1 K. B. 377 ; Lindley p. 533.

(5) *Levy* v. *Walker*, 10 Ch. D. 436.

(6) *Condy* v. *Mitchell*, 37 L. T. N. S. 268 ; *Chappel* v. *Griffith*, 53 L. T. N. S. 459.

(7) Kerly on Trade Marks and Trade Names p. 612 citing *Chattris* v. *Isaacson* 57 L. T. N. S. 177. In *Burchell* v. *Wilde*, (1900) 1 Ch. 521, it was held that, upon the division of a solicitor's business between the partners on dissolution, the partner whose name was Burchell would run no risk by reason of the use by the other of the old name *Burchell & Co.* Notice of the change had been given to all the clients. The defendant in fact, undertook to carry on business under a different name, viz. *Burchell, Wilde & Co.* ; see also *Townsend* v. *Jarman*, (1900) 2 Ch. 98 ; *Routh* v. *Webster* 10 Beav. 561 ; *Prudential Assurance* v. *Knott*, L. R. 10 Ch. 140 ; *Rosher* v. *Young*, So. Jo. Vol. 45, p. 344.

(8) *Dickson* v. *Mc. Master & Co*, 18 Ir. Jur. 202 ; *Scott* v. *Rowland*, 26 L. T. N. S. 391 ; *Gray* v. *Smith*, 43 Ch. D. 208 C. A ; Kerly on Trade Marks and Trade Names p. 613.

partnership assets, but he might advertise the discontinuance of the publication as regards himself (1). On a dissolution of partnership between S and R, all the property of the partnership was bought by R and paid for on a valuation but did not pay for good will nominatim. S was living and not a bankrupt : *Held* that R was not entitled to continue to use the name of S the style of the firm and as such R was restrained from using S's name (2). E and H were partners under articles. One of the terms was, that on the decease of either partner, his personal representative should have the power within three months, of electing to continue the share of the deceased partner, and if he declined, then the business, stock in trade, etc., were to be valued, and the surviving partner was to take the whole, giving security for the moiety belonging to the deceased partner. E died : *Held* that during the three months, or until E's personal representative should elect, the survivor, H was to be prevented by injunction from carrying on the business in any other firm name but what had been used in the life of E (3). Where two partners carry on business in partnership in some shops under the personal name of one of the partners, and at the dissolution of the partnership, one partner buys the other shops and good-will thereof, nothing being said about the trade name of the firm, the partner in whose name the shops were conducted before the dissolution can restrain the other partner from carrying on business in the old name provided, by so doing the latter does not expose his former partner to any risk of liability. Whether there will be any such risk is a matter to be decided having regard to the circumstances of each case (4). The *prima facie* rights of every man to use his own name in his trade cannot be questioned ; and before restraining him in this, the Court should be clearly satisfied that the similarity to the assigned trade-name was such as its use would be under the peculiar circumstances, a derogation from the grant. Where the partners at the time of dissolving the partnership make no stipulation about goodwill every one of the partners has a right to carry on the trade in the identical name under which the firm had traded prior to the dissolution ; because the good-will of the business is an asset of the partnership, to which one member of the firm has no higher right than the other (5).

Arbitrator proceedings between partners.—The Court has jurisdiction to grant an injunction to restrain proceedings it an arbitration between partners when an action has been commenced in which the agreement that contains the arbitrator clause has been impeached (6). Articles of partnership between the partners A, B and C provided that, as to any question in relation to the partnership, the decision of the majority should prevail ; and further

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(1) *Bradbury* v. *Dickens*, 28 L. J. Ch. 667=27 Beav. 53.

(2) *Scott* v. *Rowland*, 26 L. T. 391.

(3) *Evans* v. *Hughes* 18 Jur. 691.

(4) *Morarji* v. *Madanji*, 5 Bom. L. R. 545 ; see also *Burchell* v. *Wilde*, (1900) 1 Ch. 551.

(5) *Mancherji* v. *Framji*, 2 Bom. L. R. 1026 ; see also *Chappel* v. *Griffith* 53 L. T. 459 ; *Burchell* v. *Wilde*, (1900) 1 Ch. 551.

(6) *Kitts* V. *Moore*, (1895) 1 Q B. 253 ; See also *Mausell* v. *Midland G. W. Ry. Co.*, 1 H & M. 130 ; *Mylne* v. *Dickinson*, G. Cooper. 195 ; *Coney* v. *Becker*, (1916) 2 Ch. 98, 99.

that, in case of any dispute between the partners, they should appoint three arbitrators, one to be appointed by each partner, and that the partners should abide by the award. Subsequently A and B gave notice of their appointment of two arbitrators, and requested him to appoint a third to decide disputes which they alleged had arisen between themselves and C. C denied the existence of any dispute requiring arbitrator, and requested A and B to furnish him with particulars of the alleged disputes, which, however, they declined to do until C had apppointed his arbitrator, and they threatened that if he did not appoint his arbitrator they would proceed to arbitration before their own arbitrators. On a motion by C to restrain A and B from proceeding to arbitration :—*Held* that as in C's absence any arbitration proceedings would be futile and in no way binding upon him, the court ought not to grant an injunction (1). The court will decide whether matters in dispute between partners are not within arbitration clauses (2). When, however, there is a *bonafide* dispute within the meaning of an agreement to refer, and there is no satisfactory reason why such dispute should not be settled by arbitration, legal proceedings will to stayed (3).

CHAPTER XI.

Injunctions pertaining to mortgages.

Fraud and mistake the usual ground of Interferencee.—The right of parties under a mortgage being usually fixed and easily ascertainable by reference to its written terms, it is plain that except in cases of fraud or mistake in its inception or execution, or arising out of collateral matters connected with it, or fraudulent attempt to pervert and abuse the powers therein conferred, there is no room for equitable interference. The legal right of a mortgagee in a valid mortgage to have his security preserved until the maturity of the mortgage indebtedness, and afterwards to enforce his claim by strict foreclosure or by exercising directly or through a designated trustee his power of sale conferred by the writing will not to interfered with by a court of equity so long as no fraud, unfairness, or oppresion is imputable to him, whatever the resulting loss or hardship to the mortgagor. The latter cannot invoke the aid of a court of equity in his behalf upon grounds other than equitable (4). The principle upon which the Court restrains persons filling a fiduciary character from having any dealings

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(1) *Farrar* v. *Cooper*, 59 L J. Ch. 506.

(2) *Piercy* v. *Young*, 14 Ch. D. 200 ; *Revenshaw* v. *Quem Anne*, (1897) 1 Q B. 662 ; *Parry* v. *Liverpool*, (1900) 1 Q B. 339 ; Lindley p. 553.

(3) Lindley p. 554 citing *Russel* v. *Russel*, 14 Ch. D. 471 ; *Kirchner* v. *Gunban* (1910) 1 Ch. 413 ; *Plews* v. *Baker*, 16 Eq. 564 ; *Willsford* v. *Watson*, 8 Ch. 473 ; *Randegger* v. *Holmes*, L R. 1 C P. 679 ; *Hirsch* v. *In Thurn*, 4 C. B. N. S. 569.

(4) *Mott* v. *United States Trust*, 19 Barb. (N. Y.) 568 ; Spelling on Injunction and other Extra ordinary Relief § 442.

for their benefit, does not apply to the case of mortgagor and mortgagee (1). Although the court will not, unless under special circumstances, grant an injunction to restrain a mortgagee from selling under a power in the mortgage deed, it is otherwise where there is a trustee for sale and he proceeds precipitately and without a notice to both parties (2).

Fraud in execution of mortgage.—Fraud in the inception of a mortgage properly alleged will generally warrant a court of equity in restraining a sale under it until its validity can be tested (3). But the fraud must affect the immediate parties to the transaction and must be imputable to the mortgagee; and an injunction should not be granted on the ground of fraud in the procurement of title by the mortgagor where the mortgagee is a *bona fide* creditor without notice of such fraud (4). The facts constituting a fraud must be clearly established by evidence; but this rule will be released somewhat where the parties sustain a fiduciary relation, as where the mortgagee was at the time of taking the mortgage the solicitor of the mortgagee (5).

Different kinds of mortgages recognized by the Transfer of Property Act—"(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called the mortgagor, the transferee the mortgagee the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called the mortgage-deed.

"(b) Where, without delivery of possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of the sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

"(c) Where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or

On condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by condition sale:

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(1) *Dobson* v. *Land*, 8 Hare 221; Joyce on Doctrines p. 128.

(2) Anon. 6 Madd. 10; Joyce on Dotrines p. 128.

(3) *Southampton Boat Co.* v. *Muntz* 12 W. R. 330; Spelling on Injunction etc. § 443.

(4) *Putney* v. *Kopler*, 84 Ga. 523; Spelling on Injunction etc. § 443.

(5) *Mc Leod* v. *Jones*, 24 L. R. Ch. D. 289=49 L. T. 321=53 L. J. Ch. 145.

"Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale (1).

"(d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same, in lieu of interest or payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money, the transaction is called the usufructuary mortgage and the mortgagee an usufructuary mortgagee.

"(e) Where the mortgagor binds himself to re-pay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmien, Bassin, and Akayab, and in any other town which the Governor General in council may, by notification in the Gazette of India, specify in this behalf, delivers to a creditor or his agent documents of title of immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds.

(g) A mortgage which is not a simple mortgage, a mortgage by conditional sale a usufructuary mortgage, an English mortgage or mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage (2).

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(1) 'Section 58 (c) contains the definition of mortgage by conditional sale. It is with the greatest difficulty in many cases that such mortgages can be distinguished from sale with condition of repurchase. As clause (c) of section 58 indicates, the real point of difference between the two kinds of transaction is that, in the case of a mortgage by conditional sale, the sale is only ostensible, whereas in the case of an out and out sale it is real, The ostensible or real nature of the transaction can, however, be only determined by finding out the intention of the parties. In order to escape the liability of accounting for the profits of the property and other liabilities imposed on a mortgagee and also to escape the provisions of some of the local laws enacted for the benefit of agriculturists, creditors resort to the mode of having a mortgage which is in form an out and out sale. Since the decision of the Privy Council in *Bal Kishen Dass* v. *Legge* (I. L. R. 22 A. 149), it has been a well-settled rule that it is not open to the courts to allow any extraneous evidence in order to find out the intention of the parties. Such intention must therefore, be gathered from the document itself which purports to effect the transaction. These transactions have given rise to a great deal of litigation and courts are compelled to enumerate and consider all the various criteria which have been laid down for the purpose of determining whether a transaction is a mortgage or an out and out sale. In order to avoid difficulties indicated above, we think it desirable to lay down a statutory test by which the intention is to be gathered. We therfore propose that no transaction should be deemed to be a mortgage by conditional sale unless the condition is embodied in the document which operates or purports to effect the sale."—*Report of the Select Committee.*

(2) Section 58 of the Transfer of Property Act, IV of 1882.

Rights and liabilities of mortgagee—Section 67 of the T. P, Act enacts : "In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

"A suit to obtain a decree that a mortgagor shall be absolutely debarred of the right to reduce the mortgaged property is called a suit for foreclosure.

"Nothing in this section shall be deemed—

(a) to authorize any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure (1), or a usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale ; or

(b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative and who may sue for a sale of the property, to institute a suit for foreclosure ; or

(c) to authorize a person interested in part only of the mortgage money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage."

(I) The mortgagee has a right to sue for the mortgage-money in the following cases and in no others, namely—

(a) where the mortgagor binds himself to repay the same ;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so ;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor ;

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor :

Provided that, in the case referred to in clause (a) a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

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(1) "We, therefore, consider it desirable to confine the remedy of foreclosure to the case of a mortgage by conditional sale or an anomalous mortgage where, by the express terms of the deed, the parties have stipulated for foreclosure ; and to disallow it in all other cases." Report of the Special Committee.

(II) Where the suit is brought under clause (a) or clause (b) of sub section (1) the Court may, at its discretion stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, retransfers the morgtaged property (1).

Injunction on behalf of mortgagor where mortgagor acts under power of sale. A sale of lands will be restrained on an interlocutory motion, where, although the conveyance is absolute on its face, there are probable grounds of belief that it was intended only as mortgage (2). Section 69 of the Transfer of Property Act (3) recognises the validity of a power of sale, on the part of a mortgagee without the intervention of the court. Such a power is valid only (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhummadan or Buddhist or a member of any other race, sect, tribe or class who may be excluded from the operation of this section by the local Government (4); (b) where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage deed and, the mortgagee is the Secretary of State for India in Council; (c) where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgaged property or any part thereof was on the date of the execution of the mortgage deed situate within the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmien, Bassin, Akayab or in any other town or area which the Governor General in Council may by notification in the Gazette of India, specify in this behalf. There was an idea at one time that the mortgagee was a trustee of the power for the mortgagor, but it is now settled law that the mortgagee exercises the power for his own benefit and the court will not interfere simply because the mortgagee is actuated by some indirect motive. But the power must not be used for fraudulent purpose "(5). No such power shall be exercised unless and until— (a) Notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or (b) Some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming

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(1) Vide Section 68 of the Transfer of Property Act (IV of 1882).

(2) *Peeler* v. *Barirger*, 2 Wins. (N. C) No 2 Eq. 5.

(3) Act IV of 1882.

(4) The provisions contained in sections 6–19. of the Trustees and Mortgagees' Powers Act. 1866 (XXVIII of 1866) no longer applies to such mortgages, Vide S. 69. The procedure laid down in section 69 of the Transfer of Property Act differs from that prescribed in XXVII of 1866. In several particulars Act XXVIII. of 1866 was based on Lord Cranworth's Act (23 & 24. Vict. c. 145) which was repealed by the Conveyancing Act 1881 (41 & 42 Vict C. 41). In order to make it clear that the Trustees and Mortgagees' Powers Act, will no longer apply to mortgages the words 'Notwithstanding anything contained in the Trustees and Mortgagees' Powers Act, 1866" have been inserted at the beginning of section 69 by Act XX of 1929.

(5) Ghose's Mortgage, p. 335 citing *Warner* v. *Jacob*, 20 Ch. D. 220.

due (1). Where a mortgage deed which gave the mortgagee a power of sale contained also a proviso that the remedies of the mortgagors, their heirs, administrators, and assignees in respect of any breach of the clauses or provisions (relating to such sale) or of any impropriety or irregularity whatever in any such sale should be damages, held, on the authority of *Prichard* v. *Wilson* (2) that the court would not grant an injunction to restrain the mortgagee from selling the mortgaged property (3). The court will upon an interlocutory application, restrain a mortgagee from enforcing his power of sale under the mortgage deed, where he does not deny that he has committed a breach of trust (4).

The general rule is that a sale by a mortgagee will be restrained only on payment into court by the mortgagor of the amount which the mortgagee swears to be due to him, but this does not apply where the court can see on the terms of the deed that this amount can not be due on the security (5). A mortgagee of a testator will be restrained from exercising his power of sale, where he has threatened to do so unless the executor of the testator will also redeem a mortgage made by a devisee of the testator (6). The court has no jurisdiction to restrain a mortgagee from selling under a power of sale, provided he keeps within the terms of the power and no case of fraud be made out (7). By a deed of arrangement, endorsed upon a mortgage-deed which contained the usual power of sale upon notice, the mortgagee was appointed receiver of the mortgaged premises without prejudice to his rights and powers under the mortgage deed; and it provided that upon the mortgagee giving three months' notice to the mortgagor to put an end to trusts, he should be at liberty to exercise the power of sale and other powers contained in the mortgage deed. Upon motion, the mortgagee was restrained from exercising his power, of sale, he not having given notice to determine the trust of the deed of arrangement (8). Such injunction is also granted where the mortgagee attempts to sell without satisfying the conditions of a Statute (9).

The ordinary rule, that court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into court the sum sworn by the mortgagee to be due

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Martinson v. *Clowes*, 21 Ch. D. 857, *Ferrar*. v. *clours* 21 Ch. D. 857 ; *Frrar* v. *Frrars*, 40 Ch. D. 395 ; *Kamedy* v. *De Trafford*, (1897) A. C, 180. *Nut* v. *East*, (1899) 1 Ch, 877, *Haddington* v. *Huson* (1911) A. C. 729.

(1) Vide section 69 of the Transfer of Property Act (IV of 1882).

(2) 10 N. G. 330=11 L. T. 437. Where a covenant in a mortgage deed not to exercise the power of sale except after three months' notice was followe l by a proviso that the purchaser should not be affected by the absence of such notice, and that the remedy of the mortgagor should be by an action for damage—*Held* that the court had no jurisdiction to restrain the mortgagee from selling without giving the required notice. *Ibid.*

(3) *Muncherji Furdoonji* v. *Noor Mahomedbhoy*, 17 B. 711

(4) *Merest* v. *Murray*, 14 L. T. N. S. 321 Joyce on Doctrines p. 128.

(5) *Hickson* v. *Darlov*, 23 Ch. D. 690 =48 L. T. 449.

(6) *Whitworth* v. *Rhodes*, 20 L. J. N. S. Ch. 105

(7) Kerr on Injunction 524 citing *Jenkins* v. *Jone*, 2 Giff. 99 ; *Adams* v. *Scott*, 7 W. R. 213 (Eng).

(8) *Gill* v. *Newton*, 12 Jur. N. S. 220.

(9) Kerr on Injunction p. 524 citing *Woodifield* v. *Bond*, (1922) 2 Ch. 40; *Evans* v. *Horner*, 94 L. J. Ch. 220,

on principal, interest, and costs does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee (1). A puisne incumbrancer offered to pay off the first mortgagee, which being declined he filed a bill to compel a transfer. The first mortgagee, having afterwards proceeded to sell the property, was restrained from transferring the first mortgage and parting with the legal estate and title deeds (2).

Injunction to restrain the exercise of a power of sale given to secure a balance to be ascertained by an arbitrator, was refused, although the award was made after the plaintiff had executed a deed for the purpose of revoking his authority (3). Where a mortgagee had a power, on default of payment, on notice, to sell the premises, together or in lots, by private contract or by public auction, subject to such special or other conditions of sale as he might think fit, and he proceeded to a sale after ample notice, but under special conditions of sale, directed against certain defects of title which the mortgagor himself had, since executing the mortgage, insisted upon, the court refused to interfere to prevent the sale under such stringent provisions (4). Motion by mortgagor for injunction to restrain completion of sale of mortgaged premises by mortgagee under power of sale, on the ground of surprise and under value was refused, mortgagor having acted unfairly, and in some degree sanctioned the transactions relating to sale (5). On a bill by a mortgagor to restrain a mortgagee from enforcing his power of sale under the mortgage-deed, and where no answer had been put in, but it was alleged by the bill that a breach of trust had been committed by the mortgagee, the court on motion, granted an injunction until the filing of the answer or further order (6).

In the case of a mortgage in the English forms, the mortgagee can exercise a power of sale contained in the mortgage-deed, and cannot be restrained from exercising such power, merely because the mortgagor has filed a suit for redemption (7). The case of *Rhodes* v. *Buckland* (8) does not establish any such proposition. In that case the court did restrain the exercise of the power of sale ; but the case was a peculiar one, and the person seeking to redeem was not the mortgagor, but a puisue incumbrancer claiming to be entitled to pay off a prior mortgage. As a general rule, when a power of sale has become absolute, the exercise of the power cannot be suspended by the filing of a bill to reduce (9). If it could be so suspended, the mortgagee might be deprived of his remedy and kept out of his money, for an indefinite time. The owner of the equity of

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(1) *Macleod* v. *Jones*, 53 L. J. Ch, 145=24 Ch. D. 289.

(2) *Rhodes* v. *Buckland*, 16 Beav. 212.

(3) *Harcourt* v. *Ramsbothom*, 1 J. & W. 505.

(4) *Kershaw* v. *Kalow*, 1 Jur. N. S. 974.

(5) *Ferrand* v. *Clay*, 1 Jur. 265.

(6) *Merest* v. *Murray*, 14 L. T. 321.

(7) *Jagjivan Nanabhai* v. *Sridhar*, 2 B. 252.

(8) 16 Beav. 212.

(9) *Adams* v. *Scott*, 7 W. R. 213 (Eng).

redemption can only stay the sale *pendente lite* by paying the amount due into court, or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage (1). In the above case *Pinhey J.* at p. 256 said : "Where a mortgagee has in pursuance of a power of sale given to him under his instrument of mortgage, served the mortgagor with notice of his intention to exercise this power, the mortgagor is not entitled to file a suit for redemption, and then ask the court for an injunction restraining the mortgagee from exercising his power of sale, unless fraud is charged against the mortgagee. To grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed, and to annul one of the chief securities on which persons advancing money on mortgage rely. It would, of course, be otherwise if the notice of sale had been given by the mortgagee after the suit for redemption had been filed. The mortgagor is entitled to have the sale of the property suspended if he can show either that he has paid off the mortgage-lien, or that he has made tender of the amount due which has been refused. In the case before us there is no *prima facie* ground shewn at present for considering that the mortgage lien has been paid off."

The jurisdiction of a court of equity to restrain by injunction the execution of a power of sale in a mortgage should be exercised only when on account of fraud, want of consideration or other sufficient reason, the enforcement of the mortgage debt is against good conscience and would work irreparable injury (2).

Waste by mortgagee in possession.—A mortgagee in possession shall not be permitted to waste the estate (3). If he improperly proceed to fell timber, an account will be decreed and the produce applied, first in the payment of the interest, and then in sinking the principal, and the court will enjoin him, unless the security prove defective, in which case the court will not restrain him from felling timber, the produce being, of course, applied in liquidation of the debt of the estate (4). But an injunction will not be granted where the waste is committed by other persons under an alleged custom, and not by the mortgagee or by his authority (5). The plaintiffs made a usufructuary mortgage of certain shops in favour of defendants. At the time of the mortgage the shops were let out to tenants who paid Rs. 30-8 as. rent. The mortgagees were to realise this amout in lieu of interest. According to the stipulation in the deed the mortgagors had a right to enhance or reduce the rent and they were liable to make good the deficiency in case of reduction of rent and were entitled to receive the excess, month by month in case of enhancement. Sometime after the mortgage, the mortgagors, alleging that they could let out the shop at an enhanced rent of Rs. 4-12 as per month, gave notice to the tenants to vacate and to mortgagees to compel them to vacate. The notice not being complied with,

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(1) *Jagjivan v. Shridhar*, 2 B. 252.
(2) H. C. Joyce on Injunction § 1264 citing *Glover* v. *Hemfree*, 82 Ala. 324.
(3) *Hanson* v. *Derby*, 2 Vern. 392.
(4) Coote's Law of Mortgage p. 823 citing *Witherington* v. *Bankes*, Sel. Ca. in Ch. 31.
(5) *Ibid* citing *Anon.* I L. J. Ch. 119

this suit was brought (i) for an injunction to direct the mortgagees to enhance the rent, and (ii) in the event of their failing to do so, to declare that from the month of September the plaintiffs shall be entitled to have the sum of Rs. 4-12 per month credited to the reduction of the mortgage debt. *Held* that the suit was not maintainable in the absence of any allegation that for over a specified period of time the mortgagees have persistently and without reasonable cause been letting the shops for less than letting value. *Held* also that the declaration being an impossible one could not be given (1).

Injunction on behalf of the mortgagee.—Where the security of the mortgagee is being seriously impaired or diminished by any act of the mortgagor, the latter may upon a proper showing be restrained from so doing (2). "So a mortgagor in possession while enjoying freedom from liability to account must not be guilty of voluntary waste, if the security is insufficient or is likely to be rendered insufficient by his acts (3); and he may also render himself personally liable, for instance, upon a covenant to repair the mortgaged premises which was intended for the protection of the mortgagee's security (4)" (5). Section 66 of the Transfer of Property Act (6) enacts: "A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate, but he must not commit any act which is destructive or permanently injurious thereto if the security is insufficient or will be rendered insufficient by the act. A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or if consisting of building, exceeds by one half, the amount for the time being due on the mortgage." So, whenever, therefore, any act of the mortgagor is likely to impair substantially the value which was the basis of the contract between the parties, the court will interfere for the protection of the mortgage by restraining the commission of such act (7). Where it is shown that a mortgagor in possession is committing or is about to commit waste upon the mortgaged premises so as to impair the security, and that the mortgagor is insolvent, the mortgagee will be entitled to an injunction to restrain the further continuance of waste or its commission if threatened (8) So there is no doubt that if the mortgagor attempts to commit voluntary waste, he may be restrained by injunction; but the burden of proof that the security is inusfficient or is likely to become insufficient if the threatened act is committed, will rest on the mortgagee (9). Thus a mottgagor may be restrained if he attempts to remove valuable fixtures where such removal is likely to reduce the value of the security (10).

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(1) *Reshan Lal* v. *Moolchand*, 13 A. L. J. 85=27 Ind. Cas. 697.
(2) H. C Joyce on Injunction § 1271
(3) *Kekewich* v. *Marker*, 3 Mac. & G. 329; *Humphreys* v. *Harrison*, 1 J. & W. 581; *Harper* v. *Aplin*, 54 L. T. 383.
(4) *Sha Shivlal* v. *Sha Ramdas*, P. J. (1880) 240.
(5) Ghose's Mortgage p. 261.
(6) Act IV of 1882.
(7) Ghose's Mortgage p. 262.
(8) Spelling on Injunction § 461
(9) Ghoses Mortgage, p. 26.
(10) Ibid citing *Ackroyd* v. *Mitchell*, 3 L. T. N. S. 236; *Huddersfield* v. *Lister*, (1895) 2 Ch. 273.

The mortgagor may not also impose on the mortgaged property any easement which is likely to render the security insufficient (1).

The court will not on the application of a mortgagee out of possession, restrain the mortgagor from felling timber growing upon the mortgaged estate, unless the security is insufficient; if the security is sufficient, the court will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber. There must be a special case made out before the court of equity will interpose (2). But the Vice-Chancellor Sir J. Wigram said : "the difficulty he felt was in discovering what was meant by a 'sufficient security "(3)." and he said "he thought the question which must be tried was, whether the property the mortgagee took as a security was sufficient in this sense—that the security was worth so much more than the money advanced—that the act of cutting timber was not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time, it was entered into (4)". And so in *Hippesle* v. *Spencer* (5) it was ruled that no injunction would be granted unless it be proved that the security is insufficient. In *Usborne* v. *Usborne* (6) a mortgagor was restrained from committing any waste or spoil on an allegation that he had cut down several trees, and threatened to cut down more, by means whereof the mortgage security would be lessened. But a mortgagee is entitled to an injunction to restrain a mortgagor in possession from cutting down timber, if the land without it is a scanty security, and it may be extended to cutting down under-wood contrary to the usual course of husbandry, but not to under-wood generally, although the mortgagor is insolvent (7). In *Scarle* v. *Sawyer* (8) *Morlon J.* said : "If a mortgage be of a dwelling house, the mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of the realty, which would not be wrongful, because within the license implied from the relations of the parties. If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession, it is with the contemplation of the parties that he is to carry on his farm in the usual manner and a licence to do so is implied. In such a case it is clear that he is entitled to take the annual crops and wood for fuel. And we do not think that the implied licence is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If, in carrying on similar farms, it is usual and is good husbandry to

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(1) Ghose's Mortgage p, 262; see also Act V of 1882 s. 10 : "Subject to the provisions of section 8...a mortgagor may impose, on the property mortgaged any easement that does not render the security insufficient. But a mortgagor cannot, without the consent of the mortgagee impose any other easement on such property, unless it be to take effect on the termination of the redemption of the mortgage"

(2) Joyce on Injunction p. 196.

(3) But in British India, section 66 of the Transfer of Property Act, lays down what is meant by 'sufficient security'

(4) *King* v. *Smith* 2 Hare, 239, 243-4

(5) 5 Madd. 422

(6) Dick. 75

(7) *Humphreys* v, *Harrison* 1 Jac & W, 581: Joyce on Injunction 196.

(8) 127-Mass 491, 494 cited in Ghose's Mortgage p. 263; Jones on Mortgage § 692

cut down and carry to market wood and timber to a limited extent, a licence to do this might be implied from the relation of the parties."

Where after a decree in a foreclosure suit, a mortgagor in possession began to commit waste, he was restrained by injunction though no injunction was prayed by the bill (1). The plaintiffs were mortgagees of a free hold farm, the mortgagor remaining in possession until his trustee in liquidation entered and managed the farm business. The mortgagees having demanded possession, to which they were entitled under their mortgage deed :—*Held*, that, from the date of their demand, possession of the mortgagor by his trustee was wrongful, and that, without either ejectment or foreclosure, the mortgagees were entitled to the property as it was at the time of their demand, and the trustee must accordingly be restrained by injunction from cutting and removing the growing crops (2).

An equitable mortgagee can obtain *ex parte* injunction restraining the mortgagor from parting with the legal estate (3). A mortgagee by deposit of title deeds may obtain an injunction, or the appointment of a receiver for the protection of his security (4).

Mortgaged security-Injunction against third party.—One holding a mortgage on a street rail-road may enjoin the city from so constructing a sewer as to cause unnecessary damage to the road where the company is insolvent and will not be able to repair the damage and its property after the construction of the sewer will not be adequate security for the mortgage debt ; and where also the city, by reason of constitutional restrictions, is in such a condition that a judgment against it would not be collectible (5). A mortgagee of a business good will, and right to use the name, but who has never used it, can have an injunction against a person claiming under the mortgagor to prevent his using the name (6). A debenture holder whose charge is specific, is entitled to an injunction against a judgment creditor who has issued execution against property charged by the debenture although the time for the payment of moneys secured thereby has not arrived (7). If a tenant commits waste after a receiver has been appointed, it is not necessary to bring an action to restrain the waste, but an injunction will be granted on motion in a summary way though the tenant is not a party to the cause (8). A mortgaged land to B as either agent or *benamdar* for C. B sued on the mortgage and obtained a decree. C now sued A and B for a declaration that he was entitled to the benefit of the decree and had the right to execute it, and for an injunction restrains A from paying the money

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(1) *Goodman* v. *Kine*, 8 Beav. 379 ; Joyce on Injunction 161.

(2) *Bagnall* v. *Villar*, 48 L. J. Ch. 695=12 Ch. D. 812.

(3) Cootes on Mortgage p 691 citing *London & County Bank* v. *Lewis*, 21 Ch. D. 490 C. A.

(4) Kerr on Injunction p. 530 citing *Meux* v. *Bell*, 7 Jur. 821 ; *Bodger* v. *Bodger*, 11 W. R. 160 (Eng).

(5) H. C. Joyce on Injunction § 1271 citing *Clapp* v. *Spokane*, 53 Fed. 515.

(6) Cootes on Mortgage p. 691 citing *Beazeley* v. *Soares*, 22 Ch. D. 660.

(7) *Legg* v. *Mathieson*, 2 Giff. 71 ; *Wildy* v. *Mid Hants Rail*, 16 W. R. 409 ; Cootes on Mortgage p. 1140.

(8) *Walton* v. *Johnston*, 15 S. 352 ; *Casamajor* v. *Stroch* 1 S. & St. 381 ; Cootes on Mortgage p. 969.

to B and B from receiving money from him. *Held* that the plaintiff was entitled to the declaration, but not to the injunction (1). A usufructuary mortgagee sued to recover the mortgaged premises and for an injunction preventing the defendant from interfering with his possession He further prayed for such other relief as the Court may think proper. It was found that the mortgagor had no right to mortgage the premises. The question was whether under the general prayer in the plaint the plaintiff was entitled to get a decree for money in lieu of a decree for po session. *Held* that the plaintiff's claim for possession and injunction was inconsistent with any claim for money. The only relief he was entitled to in such an action was relief *ejus dem generis* with his claim. In the absence of any claim for money, the plaintiff was not entitled to a judgment for the mortgage money (2).

CHAPTER XII.

Injunctions between Landlord and tenant.

Relationship of Landlord and tenant.—Chapter V of the Transfer o Property Act (3) contains the law regulating the relationship of landlord and tenant, in British India. But none of the provisions of the above chapter apply to leases for agricultural purposes, except in so far as the Local Government may by notification (4) published in the Local Official Gazette declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force (5). In the absence of a contract or a local usage to the contrary, the lessor and lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in Chapter V of the Transfer of Property Act (3). The law regulating agricultural tenancies can be found in the various Tenancy Acts in force in British India. In British India relationship of landlord and tenant may be created by (*a*) conduct (6) (*b*) contract and (*c*) operation of law (7). The rules applicable to the relation of landlord and tenant in England, may be applicable in this country, whenever no precise rule regulating the subject is to be drawn from

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(1) *Sethurayar* v. *Shanmugam Pillai*, 21 M. 353.

(2) *Chinnasami* v. *Kuppusami*, 7 M.L. J. 50.

(3) Act IV of 1882.

(4) For notification issued by the Government of Bombay under this section vide Bombay Government Gazette, 1910 Pt I p. 59. For notification as to Sind, see *Ibid.*

(5) Vide s. 117 of Act IV of 1882.

(6) *Nityanand* v. *Kisen Kishore*, W. R. Gap. 1864, Act X Rulings p. 82; *Rance Lalun Monee* v. *Soma Monee*, 22 W. R. 334 ; *Amir Sirdar* v. *Ram Lal*, 25C. 324 ; *Cazee* v. *Chundee*, 7 W. R. 250 ; *Surnomoyee* v. *Denonath*, 9 C. 908.

(7) Field's Digest of the Landlord and Tenant, Art 4 ; Sinha's Law of Landlord and Tenant p. 59.

Hindu or other common law, and certainly where those principles appear to be equitable (1).

Liabilities of non-agricultural lessee.—The lessee many use the property and its products (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings, belonging to the lessor or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto (2). He must not without the lessor's consent erect on property any permanent structure, except for agricultural purpose (3). So when there is an impending breach of any of the obligations on the part of the lessee in possession and the injury is irreparable the Court will interfere by issuing injunction. The lessee may, even after the termination of the lease, remove, whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth : provided he leaves the property in the state in which he received it (4). The lessee is bound to keep,, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition ; and when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left (5).

Injunction in favour of lessor.—A tenant will be restrained from using the demised premises for any purpose which would be violation of the covenants of his lease (6). Such injunction may be of a mandatory or of a non-mandatory character (7). In a suit for a perpetual injunction against the principal defendants to stop the business of brick-making carried on by them on lands which they had taken under temporary leases from their co-defendants, who were holders of small *jotes* within the plaintiff's zemindary, and to recover damages for alleged injury done to lands, where the evidence showed such a continued use of the land for twenty-five years for the purpose of brick-making, as raised a strong presumption of acquiescence on the part of the landlord, and that so far from injuring the land, the defendant had placed it in a better condition than it had been in previously : *Held* that no case had been made out for the issue of an injunction (8). Where a tenant acquired by prescription a right to hold the land as a permanent tenant, the sub-soil in respect of which no prescriptive right had been made out by the tenant, remained with the landlord.

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(1) *Tara Chand* v. *Ram Gobind*, 4C. 778=4 C. L. R. 20.
(2) T. P. Act s. 108 (o)
(3) *Ibid* s. 108 (p)
(4) *Ibid* s. 108 (h)
(5) *Ibid* s. 108 (m)
(6) *Steward* v. *Winters*, 4 Sandf (N. Y.) Ch. 587.
(7) Woodroffe on Injunction p. 323.
(8) *Tarinee Charan Bose* v. *Ramjee Pal*, 23 W. R. 298.- In the absence of any specific agreement to the contrary, it is

In such a case the tenant may be restrained from getting mineral from the sub-soil (1).

An implied obligation exists, arising out of the relation of landlord and tenant, that the tenant will use reasonable care to prevent the injury to the inheritance. The cutting of trees by a tenant for years except under especial circumstances, is an act of waste. Waste by a tenant for life may consist in cutting and removing timber, and in permitting the premises to go to ruin for want of proper care. A tenant is not justified in making alterations in the demised premises without express permission from the landlord. Thus taking down partitions is apparently a waste (2). Where a tenant is threatening to commit on such lands waste which tends materially to lessen the value of the land, and which cannot be compensated by damages, an injunction will lie to restrain him therefrom (3). In restraining pure waste, irrespectively of agreement, the Court proceeds upon the ground of irreparable damage, and will not interfere if the damage be small (4) A court of equity may enjoin the commission of waste by a tenant. An injunction is the proper remedy to prevent such alterations by a lessee or sub-lessee as will serve to weaken or change the appearance of the demised premises and in such a case the omission to allege in the bill that alterations were attempted to be made for the purpose of converting the premises to uses inconsistent with the terms of the lease is not itself sufficient to justify the refusing of an injunction (5).

A mining lessee is in arrears as to royalties and so the lease to him is annulled ; the lessor cannot enjoin him from further mining, as he has his legal remedy by suit for the arrears or in ejectment from the land (6). But the breach of a covenant in a lease not to underlet, will be enjoined when it appears it would be impracticable to accurately ascertain the damages caused by the breach, and no facts are shown which make it inequitable to enforce it (7).

A court of equity will restrain a tenant from pulling down a house and building another which his landlord dislikes It is no defence to shew that the house proposed to be built is a better house and that the landlord does not know his own interest (8). "It is not sufficient" said *Lord Romilly M. R.* in the above case, "that the house proposed to be built is a better one. The landlord has a right to exercise his own judgment and caprice, whether there shall

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not competent to a tenant to change the nature of the land, or make permanent alteration in the state of the landlord's property. The making of bricks should be subject of special agreement between lessee and lessor, in the same way as when land is taken for building purposes. *Anund Coomar* v. *Bissonath*, 17 W. R. 416.

(1) *Bagdu Majhi* v. *Raja Sri Sri Durga Prosad*, 9 C. W. N, 792.

(2) H. C. Joyce on Injunction § 1167.

(3) *Arment* v. *Hensel*, 5 Wash. 152.

(4) Kerr on Injunction 68 citing *Att. Gen.* v. *Sheffield Gas Co*. 3 De G. M & G. 321 ; *Doherty* v. *All man*, 3 A. C. 722.

(5) *Baugher* v. *Crane* 27 Md. 36.

(6) *Hoch* v. *Bars*, 133 Pa. St. 328 ; H. C. Joyce on Injunction § 28.

(7) *Sloan* v. *Marten*, 54 N. Y. Super 87 ; H. C. Joyce on Injunction § 486.

(8) *Smith* v. *Carter*, 18 Ves. 78 ; Joyce Doctrines. 270 ; Kerr on Injunction p. 56 ; *Mausell* v, *Hort*, 1 L. R. Ir. 88 ; *Hyman* v. *Rose*, (1911) 1 K. B. 254=80 L.:J. K.:B. 1024 ; (912) A. C. 623=81 L. J. K. B. 1062 ; but see *Periyan* v. *Gobind*, 62 M. L. J. 496=A. I. R. 19 32 Mad. 328.

be any change ; if he objects, the court will not allow a tenant to pull down one house and build another in its place." At law the tenant is guilty of waste if he pulls down doors, windows, wainscots, or in any way alters the material form and features of the demised buildings (1). But under certain circumstances re-construction is allowed. Two leases were granted of pieces of land, with some buildings on them, one granted for 999 years and the other granted for 988 years. There was no reservation of a power of re-entry for breach of covenant, nor was there any negative covenant obliging the lessee not to change the use of the premises. There was a power of re-entry for rent in arrear, and no sufficient distress on premises. In each lease there was a covenant by the lessee that he, his executors, etc., "will during the term granted preserve, uphold, support, maintain, and keep the demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition ; and at the end or sooner determination of this demise, shall and will so leave and deliver up the same unto" the lessor, his heirs etc. The premises had fallen into disrepair ; it became necessary to repair them ; the lessee thought it would be beneficial to convert the store buildings into dwelling houses, which would much increase their value, and was proceeding to convert them accordingly, when the lessor filed a bill to restrain him alleging waste. But the court held that this was not the case of enforcing a negative covenant where the words of contract were clear and indisputable ; that the waste alleged was meliorating waste, and that, under the circumstances in due exercise of its discretion in the matter, refused to interfere by injunction (2). Injunction was granted in the case of express covenant, against tenant removing articles contrary to the custom of the country (3).

Defendants were permanent tenure-holders under a lease in perpetuity granted by plaintiff's predecessor. Upon a suit brought by the land-lord for a declaration of his title to the mineral rights in the lands, and for an injunction restraining the defendants from working the mines : *Held* that although the tenants had a permanent interest in the tenure, in the absence of any evidence by which the intention of the parties at the time of the inception of the tenancy could be known or inferred, the mineral rights must be regarded as the property of the landlord, and he was entitled to a decree declaring his proprietary right and to an injunction prayed for (4).

The presumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the Zemindar, and that the tenant has no right to cut and remove such timber. But in the absence of a custom or of a contract to the contrary, a Zemindar has no right to interfere with the enjoyment by his tenant of the trees upon his holdings as long as the relation of landlord and tenant subsists. Hence where the

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(1) *North* v. *Guinan*, Beat. 343.
(2) *Doherty* v. *Allman*, 3 App. Cas. 709=39 L. T. 129.
(3) *Kimpton* v. *Eve*, 2 Ves & B. 349.
(4) *Jyoti Prosad* v. *Lachmi pur Coal* 14 C. L. J. 361=12 Ind. Cas. 462.

courts below granted to the plaintiff Zemindar, an injunction, to restrain the tenants from offering obstruction to the cutting down and removal of the trees upon the holding, it was held that the injunction was improper and had been rightly refused (1). But in a later Madras case it has been held that a landlord is entitled to restrain the tenant from cutting down fruit-bearing trees (2).

Waste in houses or buildings consists in pulling them down, altering their character, or suffering them to decay (3). This rule is applicable to all buildings whether they are dwelling houses or not (4). According to English law which applies to tenancies not governed by the T. P. Act, the tenant may lawfully erect buildings which improve the value of the land. So in the case of a permanent lease on a fixed and unvarying rent irrespective of the extent of cultivation, it cannot be said that the character of the holding will be changed or the landlord's interest imperilled by the erection of buildings. On the other hand it would only increase his security (5). But even according to Englsh law alterations in the construction of the building is not allowed even when it increased the value of the building (6).

In *Bhagwan Das* v, *Mahammad Yahia* (7) the High Court refused to grant mandatory injunction at the suit of the Zemindar for the removal of a well recently constructed inside their house by tenants of a house in a town ; the position of the tenants being that they and their predecessors in title had paid no rent for generations, and were liable only to ejectment in the event of the site occupied by them being cleared of buildings. In the above case in delivering his judgment *Griffen J.* said : "The plaintiff is the Zemindar of the *patti* where the defendant's house is situated. His rights as Zemindar appear to be limited by the rights which occupants of houses have acquired by custom against the Zemindar so long as the houses are in the occupation of the family. The houses only escheat to the Zemindar in case of the family dying out. I am unable to hold that the construction of the well on the premises of the defendants is a breach of any obligation existing in favour of the plaintiff whether expressly or by implication. A well on the premises is an undoubted adjunct to the convenience of the occupants, and it is difficult to see in what way the Zemindar's interests are injuriously affected by its construction ; while its removal would undoubtedly cause inconvenience to the defendants. If there be an invasion of the Zemindar's right it is of so slight and doubtful a nature as not to call for interference, more particularly in view of the fact that the chance of the Zemindar entering into possession

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(1) *Ganga Dei* v. *Badam*, 5 A. L. J 99=3 M. L. T. 194=30 A. 134.

(2) *Thimmanarayanum* v. *Rama Rayanun*, 4 M. L. T. 187.

(3) Kerr on Injunction p. 56 citing *Kimton* v. *Eve*, 2 V &B. 353 ; *Hayman* v. *Rose* (1912) A.C. 632=81 L. J. K. B. 1062.

(4) Kerr on Injunction p. 56 citing *Doe* v. *Earl of Barlington*. 5 B. & Ad. 507=3 L. J. N. S. K B.26.

(5) *Periyanan* v. *Gobinda*, 62 M. L. J. 496=A. I. R. 1923 Mad 328.

(6) See Kerr on Injunction p. 56. citing *Green* v. *Cole* 2 Wims. Sand 228 ; *City of London* v. *Graeme*, Cro. Jac. 182 ; *Ground Coal Co.*, v. *Mc Namee*, 29 L. R. Ir. 131.

(7) 35 A. 392

of the house is very remote. There appears to be some reason for holding, as held by the Court of first instance, that the plaintiff was actuated by malice in instituting the present suit. Taking all the circumstances into consideration I am of opinion that this is not a case in which the injunction asked for should be granted."

After the death of the lessee of a coal mine his sons transferred their interest in the mine to a person who also had mines in the immediate vicinity (1). The plaintiff lessor sued for a perpetual injunction to restrain the purchaser (*i*) from connecting the disputed mine with the adjacent mines; (*ii*) from raising the coal from the disputed mine through the pits of his mines, (*iii*) from ever cutting off or changing the thickness of the pillars of coal in the disputed mine. The subordinate Judge granted an injunction on the first two grounds and refused an injunction on the third ground. It appeared that under the lease the lessee was entitled to remove all the coal of the demised mine, but he undertook to manage the work according to the prevailing practice with special care and expertness. It was not suggested that the defendant had acted in breach of his covenant. The plaintiff alleged that the transfer had been made with a view to enable the purchaser to injure the plaintiff by an improper working of the mine; he further asserted that there was a conspiracy amongst the defendants who had threatened to cause him loss. The defendant denied the truth of the allegations:

Held that it is well settled that a man who seeks the aid of the Court by an injunction must show that the act complained of is in fact a violation of his right or is at least an act which if carried into effect will necessarily result in a violation of the right. The mere prospect or apprehension of injury or the mere belief that an act complained of may or will be done is not sufficient (2);

That as the defendant claimed a right to take away the entire coal, the Court was competent to grant an injunction if it was established that what the defendant asserted he had a right to do, would constitute a breach of contract between the lessor and the lessee;

That as regards the mode of removal of the coal, the plaintiff failed to prove that he had any ground for injunction in this respect, but the suit could not consequently be deemed premature in respect of all the reliefs claimed, though the objection might hold good with regard to one of them:

That the principle that a lessee who removes a barrier between the demised and adjoining mines is guilty of waste had no application to the circumstances of the present case:

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(1) *Ramjas Agarwalla* v. *Brojo Mohan*, 19 C. W. N. 887=20 C. L. J. 538.

(2) See also *Earl of Ripon* v. *Hobart*, 3 My & K. 174; *Att Gen* v. *Manchester Corporation*, (1893) 2 Ch. 87, 91; *Att Gen* v. *Pathmines*, 1 I. R. 161; *Att Gen Nothingham Corporation*, (1904) 1 Ch. 673; *Tipping* v. *Eckersly*, 2 K. & J. 264; *Cooper* v. *Whillingham*, 15 Ch. D. 501; *Hext* v. *Gill*, L. R. 7 Ch. App. 699; *Att Gen* v. *Forbes* 2 My & Cr. 132; *Shafts* v. *Balckow & Co.*, 34 Ch D. 729; *Carlton* v. *Coleman*, (1911) 1 K. B. 783; *Thornhill* v. *Weeks*, (1913) 1 Ch. 438; *Pots* v. *Levy*, 2 Drewry 272.

That it was not obligatory upon the lessee to have a barrier of coal merely to prevent communication with adjoining mines and the injunction granted by the court below restraining the defendant from breaking through the existing barrier of coal could not be supported :

That the right of instroke is the right of conveying minerals leased to the surface through a pit or shaft in the adjoining mine ; it is converse right to that of out-stroke which is the right of conveying mineral from an adjoining mine to the surface through a pit or shaft in the mine leased and a lessee is *prima facie* entitled to work by in-stroke but not by out-stroke, and if the lessor desires to deprive the lessee of his right of instroke working, he must do so by clear and unambiguous provisions :

That in the present case the original lessee had no other land in the neighbourhood and could work the mine through pits sunk therein and the original parties to the lease did not contemplate the contingency which happened and did not provide for it in the contract. There would consequently be a presumption of right in the lessee to work in the most advantageous way subject to his not committing a fraud on the lessor and no fraud on the part of the lessee having been proved, the injunction to restrain the defendant from working the mine by instroke could not be restrained :

That *prima facie* the owner of the surface has a right of support and the lessee is not entitled to work the mine so as to cause a subsidence. This right to support will be protected by an injunction if the Court is satisfied that injury is imminent and certain to result from the defendant's acts. The Court will also interfere by injunction when the defendant claims the right to do acts which must inevitably cause a subsidence. But in the present case there were no materials to show that the plaintiff had the right to the surface and till such right was established, he could have no right to claim protection against subsidence of the surface, Even assuming that the plaintiff had right in the surface, there was no evidence to show that the pillars need be maintained in the present size and number to prevent subsidence and in view of the statutory rules for the working of mines, it was extremely improbable that the defendant could alter the pillars in such a way as to endanger the surface, and the injunction in this respect was rightly refused (1).

In enjoining acts of pure waste by a tenant, courts of equity interfere on the ground of irreparable injury to the inheritance, and ordinarily will not afford injunctive relief if the damage be slight (2). But where the waste is in violation of a covenant it will be prevented irrespective of the question of damage and upon the ground that complainant is entitled to literal performance of the covenant (3). It has been adjudged in England that in order to obtain an injunction against a tenant the landlord must show that what the tenant is

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(1) *Ramjas Agarwalla* v. *Brojamohon Singh*, 19 C. W. N. 887.

(2) *Att. Gen.* v. *Sheffield Gas Co.* 3 De G. M. & G. 321 ; *Doran* v. *Caroll*, 11 Ir. Ch. 379.

(3) *Kemp* v. *Sobor*, 1 Sim. N. S. 520 ; *Tipping* v. *Eckersley*, 2 Kay & J. 264.

doing is injurious to the inheritance; that if it improves the land it is not waste. Thus, where a lessee converted a farm into a market garden and at the trial it was proved that other farms in the vicinity had been changed into such gardens, that being found to be the most profitable mode of cultivation, it was held that the lessee had not violated his covenant to manage the farm "according to the best rules of husbandry practised in the neighbourhood," and that the conversion of the farm into a market garden was not actionable waste (1).

Agricultural lease and injunction.—The mere relation of landlord and tenant creates an implied obligation on the part of the tenant to manage and use the land in a husband like manner according to the custom of the country; unless lease or agreement contains some express covenant or promise inconsistent with such custom and sufficient to exclude it (2). A tenant has no right to alter the character of the land which he holds in such a way as to permanently injure the interest of the landlord in that land (3). In *Tarani Charan Bose* v. *Debnarayan Mistri* (4) the plaintiff sued alleging that the defendants Debnarayan and others had dug a tank on his land, and thereby done him damage. Debnarayan who was the principal defendant alleged that the jote now belonged to him by transfer from Jitu, and had been in existence from the time of the Permanent Settlement, and therefore he had a right to dig this tank without the consent of the landlord. *Macpherson J.* in delivering the judgment said: "Nevertheless, it appears to me that, under the circumstances, the case which the plaintiff made out, was a sufficient *prima facie* case to put the defendant to the proof of his right to dig the tank..... On the whole the plaintiff is entitled to a decree. It is said that we ought not to order that the tank shall be filled up (5). Because the plaintiff was not entitled to *khas* possession. Whether he is entitled to *khas* possession or not, he is entitled to such an order as that made by the Munsiff, namely, that the defendant shall either fiill up the tank himself or pay the plaintiff Rs. 100 and allow the plaintiff to fill it up. The plaintiff may not be entitled to *khas* possession now; but he retains a certain interest in the land which in this case entitles him to ask that the injury done to his property may be removed, which doubtless, it can be much more easily now than hereafter (6). So where the land of a tenancy has been misused, the landlord is entitled under

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(1) *Meux* v. *Cobley*, 2 Ch. D. 253; *Jones* v. *Chappel*, L. R. 20 Eq. 539; *Doherty* v. *Allman*, L. R. 3 App. Cas. 709; H. C. Joyce on Injunction § 1170.

(2) Sinha's Landlord and Tenant p. 593 citing Wood fall (19th Ed.) p. 720.

(3) *Noyna Misser* v. *Rupikhaan*, 9 C. 609, 611.

(4) 8 B L. R. App. 69.

(5) It amounts to an order of mandatory injunction. The case was decided on the 28th July, 1871 and the Specific Relief Act (I. of 1877) was placed on the statute Book on the 7th February 1877. So at that time there was no law by which mandatory injunction could be decreed. But nevertheless the decree was one granting mandatory injunction.

(6) In the Presidency of Bengal the law on the subject has now been changed Vide ss. 76 (2) (*a*), and 77 of the Bengal Tenancy Act VIII of 1885.

s. 155, subsection 2 of the Bengal Tenancy Act (1) to have a decree compelling the defendant to remedy the misuse where it is capable of remedy. A decree which merely directs the payment of compensation is not a proper decree (2). Where a tenant mis-used an agricultural holding by growing thereupon a mangoe orchard, the landlord is entitled to a decree directing the defendant to remove the trees within a specified time, and eject him if he fails to do so. He is entitled in addition to a decree for compensation (2). In a case under the Bengal Tenancy Act, where a suit for ejectment failed, the ancillary prayer for injunction was refused (3). Where a person having a right to use the property demised to him for one purpose, viz, for agricultural purposes, perverts it to another purpose, viz. that of a tank, and a suit is brought seeking as primary relief a mandatory injunction directing the defendant to fill up the tank, and to pay the plaintiff compensation and a secondary relief for ejectment which could not follow save upon failure of the defendant to comply with that order, the case comes within the provisions of Art 32 of Sch. II of the Limitation Act (4). The tenant of an agricultural holding planted a jote with mango trees to the knowledge, but without the consent of his landlord, thus changing the character of the land. More than three years afterwards the landlord sued for a mandatory injunction to have the mango trees removed. *Held* that having stood by for more than three years and allowed the tenant to spend his labour and capital upon the land without taking any action in the matter, the landlord was not entitled to a mandatory injunction (5).

A suit by a co-sharer landlord for the purpose of compelling the tenant to fill up a tank which he had wrongfully excavated in one part of his holding and in the alterative, for damages, does not fall within the scope of section 188 of the Bengal Tenancy Act (6). A tenant holding under a lease of a permanent character has no power to make excavations of such a character as to cause substantial damage to the property demised, although by the terms of the lease he has power to make excavations. In such a case the plaintiff would be entitled to bring a suit against the defendant for an injunction to restrain him from repeating such an act in future (7).

In the absence of local custom, tenants are not entitled to convert land under cultivation into a mango grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the land lord (8). According to English law also to convert an arrable land into waste and meadow into orchard, is waste, even where the land is improved because

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(1) Act VIII of 1885.

(2) *Harak Singh* v. *Kirat Narayan*, 10 C. L. J. 595.

(3) *Pershad Singh* v. *Ram Pertab*, 22 C. 77.

(4) *Saroop Das* v. *Joggeshar Pal*, 3 C. W. N. 464=26 C. 564 (F. B.); See also *Soman Gope* v. *Raghubir Ojha*, 24 C. 160; *Gongadhar* v. *Zuhurriya*, 8 A. 446,

(5) *Noy na Missir* v. *Rupikun*, 9 C. 609.

(6) *Gobinda* v. *Kamijuddi*, 16 C. L. J. 127.

(7) *Girish Chandra* v. *Sirish Chandra*, 9 C. W. N. 255.

(8) *Lakshmana* v. *Ramchandra*, 10 M. 351.

it changes the course of husbandry as will affect the proof of title (1). There also by general law a tenant for life or for years is under no obligation to cultivate the land. If he does not cultivate properly it is only bad husbandry. To cultivate a land according to good husbandry there must be an express contract or a custom of the country. (2). A lease of a plot of moor land was granted to a lessee, who covenanted to bring it into cultivation within five years from the date of the lease, according to the most approved method of husbandry pursued in the neighbourhood of the premises, and to keep it in good farming and husbandlike condition. The former covenant was not performed by the lessee, and thirty years afterwards his assignee converted the land into a place of amusement and constructed a running path thereon, and charged for admission there to. The lessor filed a bill to have the covenants of the lease performed, and for an injunction to restrain the present holder of the lease from using the land as a place of public amusement:—*Held*, that the land not having been brought into cultivation under the first covenant there could have been no breach of the second to keep it in cultivation (3). An injunction will not be granted to restrain a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep, on the farm a proper and sufficient stock of sheep, horses and cattle (4). Injunction was granted against ploughing up pasture upon covenant to manage in a husband like manner (5) as well as to restrain a tenant from ploughing up meadow, to build on, contrary to express covenant (6). Injunction was refused against a verdict in ejectment upon a breach of covenant by lessee for years, as to the mode of cultivation, if admitting relief; the defendant having been prevented from proving other breaches, against which no relief could he had, as by assigning without licence (7). The defendant held a farm under a twenty-one years' lease from the plaintiff, which contained a covenant by the lessee to cultivate the farm in a good, proper, and husband-like manner according to the best rules of husbandry practised in the neighbourhood. The defendant claimed the right to erect glass houses on arrable land, part of the demised premises, and to cultivate tomatoes, mushrooms, grapes, and the like for the London market, a mode of cultivation which was being practised on other farms in the neighbourhood. The plaintiff sought to restrain him from so doing It was held that this mode of cultivation was not prohibited by the express provision of the lease. It was further held that whether it did or did not amount technically to waste, it was "meliorating" waste in respect of which an injunction ought not to be

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(1) Kerr on Injunction p. 54 citing *Lord Darcy* v. *Askwith*, Hob, 234; *Worsley* v. *Stewart*, 4 Bro. P. C. 377; *Simmons* v. *Norton*, 7 Bing. 647; *Goring* v. *Goring*, 3 Sw. 661; *West Ham* v. *East London*, (1900) 1 Ch. 624.

(2) Kerr on Injunction p. 54.

(3) *Musgrave* v. *Horner*, 31 L. T. 632.

(4) *Phipps* v. *Jackson*, 56 L. J. Ch. 550.

(5) *Drury* v. *Molhins* 6 Ves. 328.

(6) *De Wilton* (Lord) v. *Saxon*, 6 Ves. 106.

(7) *Lovat* v. *Penelagh*, 3 Ves. & B 24.

granted and the action was dismissed with costs (1). Injunction to restrain a tenant from breaking up land contrary to his covenant was refused, where the parties had ascertained the damages (2). An injunction to restrain a lessee from ploughing pasture lands, which had remained unploughed during the continuance of the lease for thirty years, but were ploughed within six years, prior to its commencement, was refused (3). A lets certain arable land to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seeds injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husband-like manner (4). The mere allowing the land to be wasted would not, of itself, determine the tenancy. Such procedure on the part of a tenant would, under some circumstances, be evidence of an intention to abandon the holding; under others, it would prove no such intention; for instance, in a season of drought it would be idle for a tenant to attempt to put a crop in the ground (5). In the absence of express stipulation to the contrary a tenant has right to use manure made on the demised land during the tenancy, by putting it upon the land, but has no right to remove it and will be enjoined from removing it from the land as his own property (6). The general rule is that an outgoing tenant has no right to remove manure made on a farm in the ordinary course of husbandry whether consisting only of collections from stables and yards or of admixtures of these with soil or other substances (7). A tenant will not be entitled to plant trees on the land in his holding so as materially to affect the holding. But, in the case of dry lands, a tenant may often be able to plant trees without necessarily affecting the utility of the lands for the purpose for which they are ordinarily used (8). In the absence of a local custom, tenants are not entitled to convert the land under cultivation into a mango grove without the consent of their landlord and thereby change the nature of the property (9). A tenant with a right of occupancy, a mere cultivator who has failed to show that he had, by custom or otherwise, a right to sink a well without the permission of the landlord, is not justified

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(1) *Menn* v. *Cobley*, 61 L. J. Ch. 449=(1892) 2 Ch 253.

(2) *Forbes* v. *Carney*, Wall. Lyn. 38.

(3) *Goring* v *Goring*, 3 Swan. 661. The landlord over whose waste lands the tenants have a right of free pasturage may cultivate or execute improvements on such lands, so long as sufficient pasturage is left to the raiyats and other persons entitled to right of pasturage. *Bhola Nath* v. *Midnapore Zemindary*, 31 C. 503 P. C.

(4) Specific Relief Act s. 54 ill (k).

(5) *Adiveru Dina bhandu* v. *Patrudu*, 6 M. 322.

(6) *Bonnell* v. *Allen*, 53 Ind. 130, per *Biddle J*: "The first case we can conveniently find in support of this view is *Pulteney* v. *Shelton*, 5 Ves. 147, where the injunction was allowed against carrying away from the premises manure and soil. In the case of *Onslow* v.—, 16 Ves. 173, a similar ruling was made enjoining the tenant from removing the crops and manure." H. C. Joyce on Injunction §1177.

(7) *Daniels* v. *Pond*, 21 Pick. (Mass) 367; H. C. Joyce on Injunction § 1177.

(8) *Krishna Das* v. *Venkatappa*, 9 M L J 14.

(9) *Lakshmana* v. *Ramchandra*, 10 M. 351; but see *Venkaya* v. *Ramaswami*, 22 M. 39.

in sinking one (1). Where the defendant, a tenant of the plaintiff excavated a tank on the land rendering it unfit for the purpose of tenancy, it was held that for the tort complained of, the plaintiff had three remedies, (i) damages, (ii) a mandatory injunction, and (iii) ejectment, contingent upon the tenant not complying with certain conditions (2).

According to section 23 of the Bengal Tenancy Act (3), where a raiyat has a right of occupancy in respect of any land, he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of tenancy (4). Subject to the provisions of section 23 of the Bengal Tenancy Act (3), when a raiyat has a right of occupancy in respect of any land he shall be entitled (i) to plant, (ii) to enjoy the flowers, fruits and other products of, (iii) to fill, and (iv) to utilize or dispose of the timber of, any tree on such land (5). So now the position is that an occupancy raiyat as also an under-raiyat with right of occupancy will have complete rights in all kinds of trees on their holdings. There is however this reservation that they are to exercise this right subject to the provisions of section 23 that is to say, that by such use the land may not be materially impaired or rendered unfit for the purpose of tenancy (6).

Agricultural lease—construction of building—The statutory right of occupancy cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent liable to be enhanced on certain conditions. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted; and although a liberal construction may be adopted it cannot extend to a complete change in the mode of enjoyment (7). In *Jaggut Chandra Roy Chaudhury* v. *Eshan Chandra Banerjee* (8), the court said: It may well be that, in particular places, raiyats having rights of occupancy in land for agricultural purposes may, by custom, have the right to transfer it to any person to hold for the same purpose; but that will not carry with the proposition that a person who may be desirous of erecting a large house in the midst of an agricultural mehal, can buy up the tenures and rights of several cultivators and convert the land which they formerly occupied into a dwelling house and appurtenances." A Zamindar sued for an injunction to compel the defendant who held agricultural lands comprised in the Zamindari with occupancy rights, to demolish a dwelling-house which he had erected thereon for purposes not connected with agriculture, and to restrain him from altering the character of the land. In granting the injunction prayed for the Court observed: "Another contention is that no specific

(1) *Skinner* v. *Mahtab*, 4 N. W. P. 160; but see *Mahomed* v. *Imrit*, 3 Agra. 285.
(2) *Sharoop Das* v. *Joggessur Roy*, 26 C. 564.
(3) Act VIII of 1885.
(4) Vide s. 23 of Act VIII of 1885.
(5) Vide s. 23 A *of Ibid.*
(6) Sen's. B. T. Act p. 234.
(7) *Lal Sahoo* v. *Deonarayan*, 3 C 731.
(8) 24 W. R. 220.

relief or injunction ought to have been granted in this case, and that the injury, if any, caused by the tenant's act may be adequately compensated for by an award of damages. The right in question is an interest in immoveable property, and the Zamindar is therefore, entitled to such specific relief as may be necessary to vindicate his right. As pointed out by the District Judge there is also no definite standard by which the compensation that ought to be awarded for prospective injury can be measured, the rent payable to the Zamindar depending on a number of circumstances which it is not possible to foresee. We may also observe that by the appellant altering cultivation lands into a pleasure house, the Zamindar is placed in a position worse than that which he would otherwise occupy as regards the several rights created in his favour by Act VIII of 1865 (1)". The above case was followed in a later case (2) of the same High Court, where the Court observed: "The questions whether a tenant can build on his lands were discussed in *Ramanadhan* v. *Zamindar of Ramnad* (3), and the decision arrived at in that case was that the tenant was not at liberty to turn land originally let for cultivation into a house site without the consent of the Zamindar, and that he is only entitled to raise such buildings as are not incompatible with the character of his holding as a agricultural holding:" (4).

If land is let to a tenant for purposes of agriculture and he begins putting up a building in the nature of a mosque or other permanent structure there is at once a case for relief by injunction, Damage in a case like this will be inferred at once. There is no reason why a landlord in such cases should be

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(1) *Ramanadhan* v. *Zamindar of Ramnad*, 16 M. 407.

(2) *Bhupati* v. *Rajah Rangayya Appa Rau*, 17 M. 54 (58).

(3) 16 M. 407.

(4) See also *Hari Kishore* v. *Boroda Kishore*, 31 C. 1014. The law in India as to the right of the lessee to remove the structures raised by him is laid down in s. 108 of the Transfer of Property Act. The maxim "*quid quid inaedificatur so lo so lo*" (whatever is annexed to the earth is part of the freehold, has no application to India. *Beni Ram* v. *Kundan Lal* 21A. 496 P. C.=3 C. W. N. 52=26 I. A. 58; see *Shibdas* v. *Bamandas*, 8 B. L. R. 237=18 W. R. 360. Before the passing of the Transfer of Property Act of 1882, the law of the presidency towns in this respect was the same as the English Law. In *Jaggut Mohinee Dassee* v. *Dwarka Nath Bysach*, 8C. 582, at a Sheriff's sale, one Templeton bought a Hindu widow's interest in certain land in Calcutta. After passing through several hands the land was purchased by the defendant. Between the possession of Templeton and the defendant, an intermediate holder built a house upon the land. The plaintiff, a reversionary heir to the estate after the widow's death, sued the defendant to recover possession of the house and land. The defendant admitted the plaintiff's claim of possessions but contended that he was entitled to be paid a fair price for the buildings, or to remove the materials. *Held* that he was neither entitled to compensation, nor to remove the materials, and that the question raised in the suit could not be said to be a question of either succession or inheritance so as to admit of Hindu Law being applied as directed by Geo. III. C. 70, s. 17, but that the law applicable to the case was the law of equity and good conscience as administered by the Courts of Equity in England. But in *Dunia Lal Seal* v. *Gopi Nath Khetry*, 22C. 820, it has been held that the owner of the land is not entitled to the buildings erected by the tenants without being liable to pay compensation, even if the tenancy had come to an end, because the Transfer of Property Act (IV of 1882) applied to Calcutta as well as to mofussil. So the previous rulings on the point have been made obsolete by s. 108 (*h*) of the Transfer of Property Act.

obliged to take steps in a Rent Court for the ejectment of the tenant from the entire holding. If his desire is to prevent a particular portion of the land so let being devoted to some purpose for which the land was not let there is no obstacle in the way of his coming to the Civil Court and asking for relief (1). An act, to be inconsistent with the purpose for which the land was let, must be some such act as the making of a tank, or the altering of the character of the land, as, for instance, by turning it from agricultural land to building land (2). A substantial question for decision under section 151 of the Madras Estates Land Act (3) is whether in all cases if only a part of the holding is rendered unfit for agricultural purposes or whether when the holding as a whole was rendered substantially unfit for agricultural purposes by the acts of the raiyat committed on the whole or any part of the holding, the land-holder has a right to sue. In answer to this question reference must be had to the circumstances of individual cases, to the size of the holding, to the area withdrawn from actual cultivation and to the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation, before the relief of injunction can be granted. Where it was found that $\frac{1}{4}$'s of the holding was enclosed by the erection of a compound wall, the holding as a whole is not materially impaired in value for agricultural purposes or rendered substantially unfit for the said purposes (4).

When a tenant of non-agricultural land fails to prove any permanent or protected tenure in the *bustoo* land held by him, he is not entitled to erect pucca buildings without the consent and against the wishes of his landlord on such land. The landlord in such cases, in entitled to restrain the tenant from erecting a building, by means of an injunctive order (5). Cultivable *nangal* lands does not become converted into a building site by the fact that it has not been cultivated as *nangal* for 30 years, and a tenant can be restrained by an injunction from building thereon (6). A landlord may object to the erection of brick houses on land let for the purpose of cultivation, and obtain an order restraining the raiyats from their altering the character of the tenure ; but if he remains passive, and allows the house to be built, he cannot afterwards be heard to say that the tenant had done any wrong. Should the tenancy determine, the landlord would be owner of the soil, the tenant of the house (7).

In an action of ejectment in Calcutta before the passing of the T. P. Act, the defendants set up a claim by custom to remove the materials of a house erected by him on the premises in dispute, but the Court granted an injunction

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(1) *Khuda Baksh* v. *Guru Sankar*, 23 O. C. 163=57 Ind. Cas. 476 ; see also *Lal Sahoo* v. *Deonarain*, 3 C. 781.

(2) *Madho Lal* v. *Sheo Prosad*, 12A. 414 (422) ; see also *Kunhamed* v. *Narayana*, 12 M. 320, 323 note.

(3) Mad. Act I of 1908.

(4) *Navanna Vena Rama Chetty* v. *AL. AR.M. Aruna Chalam Chettiar*, (1915) M. W. N. 801=18 M. L. T. 349= 29 M. L. J. 724.

(5) *Jagannath* v. *Prosonno*, 9 C. L. R. 221, reversed on appeal 10 C. L. R. 25.

(6) *Meera Mohidun* v. *Dubash Kadur*, 7 M. L. T. 223=6 Ind. Cas. 286.

(7) *Shibdas* v. *Bamandas*, 8 B. L. R. 237=15 W. R. 360 ; see also *Beni Ram* v. *Kundan Lal*, 21A. 496 P.C ; *Ismail*

to restrain him from doing so, though giving him leave to bring a suit to establish the special custom ; in default of such suit being brought the injunction to be perpetual (1). Where an ijara lessee erects an indigo factory with knowledge of, and without objection by, the lessor, he can remove the materials upon the determination of the ijara lease and delivery of possession (2). The landlord is entitled to insist that the land shall be used for the purposes for which it was granted, and although a literal construction may be adopted, it cannot extend to a complete change in the mode of enjoyment (3).

In a suit by all the zamindars of the village, the plaintiffs alleged that the defendants were the residents in the *abadi* of the plaintiffs' village and that they had converted the house primarily held and used under the plaintiffs for residential purposes into a *mandir* of a goddess. The plaintiffs sued for an injunction restraining the tenants from converting the place of residence into a place of public worship, such worship being carried on in the immediate neighbourhood of the plaintiffs' mosque accompanied with music and other things prejudicial to the rights and comfort of the plaintiffs. It was found that the allegations in the plaint were true. *Held* that the Court could not make an order for the removal of the idol, that it was open to the defendants, as to any other Hindu residents of the village, to keep under their roof any image or images they might please, so long as they did not convert the house from one of residence to a shrine or temple or other situs of an idol, and that the reliefs which the plaintiffs were entitled to were by way of restraint of the defendants from such use of the premises standing on the landlord's lands as would pre-

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Kani v. *Nazor Ali* 27 M. 211 ; *Ismail Khan* v. *Broughton*, 5 C. W. N. 846.

(1) *Doyal Chand* v. *Bhorubnath* Cor. 117. But in a later case the existence of such a custom was judicially recognized. *Parbati Bewa* v. *Wooma Nath*, 14 B.L.R. 201. Now section 108 of the Transfer of Property Act gives the lessee the right to remove the structures raised by him. *Beni Ram* v. *Kundanlal*, 21 A 496 P. C.=3 C. W. N. 502 P. C. A tenant who erects buildings on the land demised is not entitled to compensation on being evicted on a termination of his tenancy. *Ismail* v. *Kali*, 6 C. W. N. 134. And as to tenant's right to remove such buildings, it is well established law in England that if a stranger builds on the land of another although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by, so as to induce the belief that the owner intends to forego his right, or to an acquiescence in his building on the land. [*Ramsden* v. *Dyson*, 1 H. L. 129 at p. 170 ; *Plimmer* v. *Mayor*, 9 App. Cas. 710]. This is also the law in India with the exception that the party building on land of another is allowed to remove the building. The same law is as applicable to a tenant building on his landlord's land during his tenancy as to a stranger building on the land of another. *Shaikh Hussain* v. *Govardhan*, 20 B. 1. But where in a suit for ejectment by a landlord against a tenant, it was found that the plaintiff had been receiving rent from the defendant for a period of 25 years and had made no objection to the buildings erected by the defendant on the land let out by him, it was held that the plaintiff would be estopped from ejecting the defendant without giving him compensation for the buildings, although it was found that the land was not originally let for building purposes. *Yeshwada bai* v. *Rama Chandra*, 18 B. 18.

(2) *Kinoo Singh* v. *Narsurooddeen*, 17 W. R. 97 ; see also *Blake* v. *Savandara—thammal*, 22 M. 116 ; *Dunia Lal* v. *Gopi Nath*, 22 C. 820.

(3) *Lal Sahoo* v. *Deo Narain*, 3C. 781 = 2 C. L. R. 294 ; see also *Noyna Misser* v. *Rupikan*, 9 C. 609=12 C. L. R. 300.

judice their right in it as a place of residence, or cause any grievance or offence to him in respect of that property or their property in the vicinity (1).

Injunction against landlord.—In a proper case courts of equity lend their protection by injunction to tenants against landlords ; as where the landlord has re-possessed himself of the lessees' property, to prevent its destruction (2). Where a suit is pending for the specific performance of an agreement to grant a lease of certain property to the plaintiff, the court should grant a temporary injunction to restrain the defendant from granting a lease of the same property to any other person till the disposal of the suit (3). In delivering the judgment the court observed : "The suit was commenced on the 23rd May 1911 and seven days later, an application was presented under rule 2 of Order XXXIX of the Code of 1908 for an injunction to restrain the defendant from dealing with the property during the pendency of the litigation. The subordinate Judge has dismissed the application on the ground that as the plaintiff seeks an injunction to restrain the defendant from granting a lease to any other person till the disposal of the suit, and as that may take years, he could not justly issue such an injunction upon the person to whom the property admittedly belongs. This view has been controverted on behalf of the appellant, and it has been pointed out that the plaintiff may be seriously enbarrassed if the injunction is not granted. On behalf of the respondent, it has been contended, on the authority of the decisions in *Turner* v. *Weight* (4) and *Mati Lal Pal* v. *Preo Nath Mitter* (5), that the intended transferee would be bound by the result of the litigation, as admittedly he has notice of the present proceedings, it is, consequently, not necessary for the protection of the plaintiff that an injunction should be granted in his favour. In our opinion, this view cannot be supported.

"The principle applicable to cases of this description was lucidly stated by *Lord Cottenham L. C.* in the case of the *Great Western Railway Co.* v. *The Birmingham and Oxford Junction Ry, Co.* (6) : 'It is certain that the court will in many cases interfere and preserve property in *status quo* during the pendency of a suit, in which rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title ; but it would embarrass the original purchaser in his suit against the vendor, which the court prevents by its injunction. Such are the cases of *Echliff* v. *Baldwin* (7), *Curtis* v. *Marquis of Buckingham* (8), *Spiller* v. *Spiller* (9). It is true that the court will not so interfere if it thinks that there is no real question between the parties ; but seeing that there is a substantial question to be

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(1) *Goverdhan* v, *Abdul Ghafur*, A. W. N. 1887, 106.

(2) Spelling on Injunctions § 550 citing *Genesee & W. V. Ry. Co.* v. *Retsof Min Co.* 36 N. Y. 896.

(3) *Pramatha Nath* v. *Jagannath*, 16 Ind Cas. 359=17. C. L. J. 427.

(4) 4 Beav. 40=55 R. R. 9.

(5) 13 C. W. N. 226=9 C. L, J. 96= 3 Ind. Cas. 696.

(6) 2 Ph. 597 at 602=78 R. R. 209.

(7) 16 Ves. 267=10 R. R. 178.

(8) 3 V. & B. 168=13 R. R. 174.

(9) 3 Swanst. 556=19 R. R. 276.

decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of the plaintiff". To the same effect are the observations of *Lord Eldon L. C.* in the case of *Hood* v. *Ashton* (1): 'It is true that even if the court were not to act, they would still have the security of *lis pendens*. But it is quite a new doctrine to me that a security like that, which is far from being the best that a prudent man would wish to have, is to deprive the suitor of the non-effectual protection of an injunction, or that the court, because it acts on the doctrine of *lis pendens*, will not prevent, if possible, the necessity of proceeding on such a principle'. Our attention was, however, invited on behalf of the respondent to the case of *Turner* v. *Weight* (2), where *Lord Langdale M. R.* refused an injunction during the pendency of a suit for specific performance of a contract, on the ground that the purchaser would be bound by the doctrine of *lis pendens*. But the cases to which we have referred make it abundantly clear that the weight of authority is in favour of the contrary view. [See also *Subba Naidu* v. *Haji Badhi* (3), *Madras Railway Co.* v. *Thomas Rust* (4)]. The learned counsel for the respondents has finally contended that regard must be had to the balance of convenience of the parties. This may be accepted as the settled doctrine ; but it is not inconsistent with the rule laid down in *Hadley* v. *London Bank of Scotland* (5) where *Lord Justice Turner* observed as follows : 'I have always understood the rule of the court to be, that if there is a clear valid contract for sale, the court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be effected by *lis pendens*." [See further *Preston v. Luck* (6).] It is also true, as argued by the learned counsel for the respondent, that the subordinate judge, in the exercise of his judicial discretion, has refused to grant an injunction ; but the exercise of that discretion is liable to correction by this court as the court of appeal ; and we are clearly of opinion that, in the circumstances of this case, the injunction ought to be granted. Such injunction, however, will be granted only upon terms as to security, and upon undertaking given by the appellant to compensate the defendant for any loss that may result to him in the event of the dismissal of the suit. We make this order in accordance with the principle recognised in the cases of *Chandra Nath Pal* v. *Sree Gobind Chowdhuri* (7) *Shadiram* v. *Abdul Ali* (8) *Howard* v. *Press Printers* (9) and *Chappel* v. *Davidson* (10). We direct accordingly that in addition to the security already furnished by the appellant, he do furnish security to the extent of Rs. 1,000. If this order is carried out, we further direct that a temporary

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(1) 1 Russel 412 at p. 416=25 R. R. 93.
(2) 4 Beav. 40.
(3) 26 M. 168.
(4) 14 M. 18.
(5) 3 De G. J. & S. 63=11 Jur. N. S. 554.
(6) 27 Ch. D. 497.
(7) 6 C. W. N. 308.
(8) 1 A. L. J. 527.
(9) 74 L. J. Ch. 100=91 L. T. 518.
(10) 18 De G. M. & G. 1.

injunction be granted restraining the defendant from dealing with the subject matter of the litigation in any manner for six months from this date. We also direct the subordinate judge to take up the suit for disposal as speedily as possible. If upon the expiry of six months, it transpires that the hearing of the suit has not been completed by reason of any fault on the part of the defendant, or for any reason for which the defendant is to blame, the plaintiff will be at liberty to apply to this court for continuance of the injunction for a further period."

A lessor will also be enjoined from violating his covenants inserted in a lease for the benefit or protection of the lessee. Where a lease contains a covenant that the lessor will not rent the adjoining premises for the conduct of the same business as that in which the lessee is engaged, an injunction may be granted to enforce the covenant against the lessor and one who leased the premises with the notice of such covenant (1). So also a lessor will be enjoined from erecting a structure on premises he has leased, in such a manner as seriously to impair the lessu's use of the demised property (2). A lessor will be enjoined from cutting down, in violation of his covenant, trees on his premises adjoining the demised premises (3). He may also be required to execute a contract to lay out a garden adjacent to the lessor's club house (4). A lessor may be enjoined from a breach of a covenant giving a lessee an exclusive right of sale of certain goods (5). Where a lessee is in possession of leased premises and entitled to the natural gas underlying them, he can enjoin the lessor from drilling on the lease hold as the damage likely to result from the threatened waste would be entirely incapable of measurement at law, if not irreparable (6). On the application of a sole next of kin before grant of letters of administration the court enjoined a landlord from entering into the deceased tenant's premises and seizing his goods, even when the tenant died intestate (7). But a tenant has no equity either to compel the landlord to spend money received by him from an insurance office on an insurance by himself against fire, on the demised premises being burned down, in rebuilding the premises; or to restrain the landlord from suing for the rent until the premises are built (8). But if by fire, tempest or flood, or violence of any army or of a mob or other irresistible force any natural part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let the lease, at the option of the lessee, be void (9). In an agricultural lease where a tenant plants trees without the consent of the landlord, the trees belong to the *zemindar*, but the *zemindar* has no right

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(1) *Waldrof-Astoria Segar Co.* v. *Soloman*, 109 App. Div. (N. Y.) 65; H. C. Joyce on Injunction § 487.

(2) *Raband v Frank*; 7 Mo. App. 64; H. C. Joyce on Injunction § 487.

(3) *Nicholson* v. *Rose*, 4 De G. & J. 10.

(4) *Rankin* v. *Huskisson* 4 Sim, 13.

(5) *Altman* v. *Royal Aquarium Soc.* L. R. 3 Ch. D. 228.

(6) *Westmoreland and Cambia Nat. Gas Co.* v. *De Wilt*, 130 Pa st. 235; H. C. Joyce on Injunction § 31.

(7) Kerr on Injunction p. 625; *Cassidy, In the goods of* (1904) 2 Ir. R. 427.

(8) Joyce on Doctrines p. 270. citing *Leeds* v. *Chutham*, 1 Sm. 146.

(9) T. P. Act, s. 108 (*e*).

to enter upon the land and cut the trees during the subsistence of the tenancy. If the landlord enters upon the land and cuts trees, the tenant is entitled to an injunction restraining the landlord from interfering with his enjoyment of the land so long as the tenancy subsists (1). But in a lease under the Transfer of Property Act, when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee or growing upon the property when the lease determines and to free ingress and egress to gather and carry them (2).

Injunction against landlord by third person.—A decree for sale of a right to receive *malikana* was passed in favour of the respondent on the basis of a mortgage. Before the sale took place he applied for and obtained an order restraining the appellant from realising the dues. *Held* on appeal that the court was not justified in attaching the *malikana* dues or preventing the appellant from receiving them (3).

Landlord's suit against third person.—The defendants obtained a decree against a third person in a suit to which the plaintiff (respondents) were not parties. The plaintiffs were landlords of the land covered by the decree. The land was a non-transferable holding: and they brought a suit to prevent the defendant from taking possession of the holding, covered by the defendant's decree. The plaintiffs never recognised the defendant as a tenant: *Held* that the enforced recognition of the transferability of a holding is an 'irreparable injury' and an injunction can be granted: *Held* also, that if the injunction was not granted, the plaintiffs will be compelled to bring a suit to eject the defendant, and that will result in a multiplicity of proceedings. The foundation of the court's jurisdiction to grant an injunction rests on the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of a multiplicity of suits. The courts may grant an injunction in all cases of trespass according to their discretion, such discretion being exercised according to the principles of the Specific Relief Act and the circumstances of the particular case (4). Where it is alleged by the plaintiffs that the defendants are in physical possession of certain lands as their tenants and the defendants deny the tenancy, a mere suit for declaration of the plaintiffs' right as landlords, without a prayer for possession is not maintainable. An injunction is an equitable relief and cannot be granted unless common law remedies failed (5). Injunction is a proper remedy to enforce a landlord's lien upon property found upon the rented premises, as against execution-creditors of the tenant, who are endeavouring to sell it to satisfy their debts; also to prevent the fraudulent assignment of a lease by a tenant where the effect would be to defeat the landlord's claim for rent (6).

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(1) *Ram Baksh* v. *Ram Sarup*, 8 Ind. Cas. 151.

(2) Transfer of Property Act, s. 108 (*i*).

(3) *Muhammad Inam Ullah Khan* v. *Narain Das*, 13 A. L. J. 565=37 A. 423=29 Ind. Cas. 601.

(4) *Karnadhor Haldar* v. *Hari Prosad*, 3 Ind. Cas. 338.

(5) *Mir Hussin Bux Khan* v. *Kando*, 9 S. L. R. 174.=32 Ind. Cas. 689.

(6) Spelling on Injunctions and other Extraordinary Remedies § 550 citing

Lessee's right against third party.—A covenant, running with land, which gives a right of passage may be injunctively enjoined by the lessee of the covenantee (1). A court of equity will interfere by injunction at the suit of a lessee who claims an exclusive contract right to carry on a particular business on the leased premises, to prevent another lessee, having notice of that right, from violating it, the jurisdiction in such a case being analogous to the remedy by specific performance, and founded also on the necessity of preventing a constantly recurring grievance, for which there can be no adequate compensation in damages (2). The tenant of one story of a building used for manufacturing purposes may enjoin the tenant of the story above, in the floor of which there are holes for the passage of belting which runs the machinery of both tenants, from allowing sands and acids used in his business and the fumes of the acids, to come through the holes in the floor and injure his goods and machinery (3). The lessee of a dwelling house is entitled to an injunction and to compensation where a plaining mill near by is so managed that the house at times is enveloped in smoke, and dust and soot are deposited on the windows and upon washed clothing hung in the yard to dry (4). It is not necessary to adduce proof of damages to maintain an action for obtaining an injunction to restrain defendant without any title from collecting rent over and above the full rent from the plaintiff's estate (5).

Lessor and lessee as partners.—One partner may obtain an injunction in equity to restrain his co-partner from violating his rights under the contract of partnership, even when the dissolution of partnership is not asked. A contract between the lessor and lessee of a theatre, in effect, made them partners in the theatre business ; the lessee, however, to have sole management thereof, and the lessor to have no control, authority or voice therein. It was held that it was no breach of the contract, jusitfying a re-entry by the lessor, that the lessee did not personally attend to the management of the theatre building, but was looking after the business elsewhere ; aud that the lessee was entitled to a mandatory injunction restoring him to the possession of the theatre from which the lessor had ousted him (6). In delivering the judgment in the above case *Caldwell J.* said : "The contract between the parties, in legal effect, is a contract of partnership. By its terms one party contributes to the business of the partnership the use of the theatre building, and is to pay certain expenses incident to the use thereof, and the other party contributes his time and skill in the management and conduct of the business, and is to pay a fixed sum per month for lighting

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Click v. *Stewart*, 36 Tex 280 ; *Lewis* v. *Wilson* (Sup) 17 N. Y. p. 128.

(1) *Avery* v. *New York Central & H. L. R. Co.*, 106 N. Y. 142, 155 ; H. C. Joyce on Injunction § 487.

(2) H. C. Joyce on Injunction § 437 ; *Clay* v. *Powell*, 85 Ala. 538.

(3) H. C. Joyce on Injunction § 1051 citing *Boston Ferrule Co.* v. *Hills*, 159 Mass. 147 ; see also *Crump* v. *Lambert*, L. R. 3 Eq. 409 ; *Cooke* v. *Forbes*, L. R. 5 Eq. 166 ; *Rex* v. *White*, 1 Burr. 333.

(4) *Beir* v. *Cooke*, 37 Hun (N. Y.) 38.

(5) *Nadir Jumma* v. *Ram Chander*, W. R. (1864) 362.

(6) *Leavitt* v. *Windsor Land Co.*, 54 Fed. 439 ; H. C. Joyce on Injunction § 956.

and heating the building, and in addition thereto a fixed sum for rent, and the lessor is to receive, 'as additional rent, one half of the net annual profits accruing from the business of the theatre', and each party is to pay one half of the losses of the business. This constitutes them partners. If the agreement between the parties was a lease, simply, the cause would not, upon the allegations of the original bill, be one of equitable cognizance ; for, divested of the element of a partnership, it would have been a bill for a summary proceeding in the nature of forcible entry and detainer, or an action of ejectment, and must have been dismissed upon the ground that the complainant had a plain, speedy and adequate remedy at law. But, in view of the partnership relation created by this contract, the jurisdiction of equity to entertain the original bill seems to be clear. The case of *Marble Co.* v. *Ripy* (1) is an authority directly in point. That case shows that the contract in the case at bar is, in the language of *Mr. Justice Strong*, 'in a very practical sense, a contract of partnership'. The case is also an authority for the rule that equity will interfere by injunction to restrain one partner from violating the rights of his co-partner, even when the dissolution of the partnership is not contemplated. The reason for this rule is thus stated by *Vice-Chancellor Wigram* the *Fairthone* v. *Weston* (2) 'If that were the rule of the court, if a bill would in no case lie to compel a man to observe the covenants of partnership deed unless the bill seeks a dissolution of the partnership, it is obvious that a person fraudulently inclined might, of his own mere will and pleasure, compel his co-partner to submit to the alternative of dissolving a partership, or ruin him by a continued violation of the partnership contract.' "

Third party's Injunction against lessee.—The tenant of a vendee may be enjoined from the breach of the vendee's covenant which runs with the land (3).

Other cases of Injunctions.—The plaintiff purchased two *jamas*. The defendant-landlord brought a suit against the plaintiff in respect of one *jama* and obtained a decree ; subsequently he brought another suit in respect of the second *jama* against the old tenant, the vendor of the plaintiff and obtained a decree. The plaintiff brought a suit for injunction to restrain the defendant from executing his fraudulent decree : *Held* that the decree obtained by the defendant-landlord against the old tenants is fraudulent and cannot be allowed to be executed against the *jama* in the hands of the plaintiff (4).

When Injunction was not granted.—A preliminary injunction will not be granted to compel the lessees of an opera house to allow the complainants to use the house in accordance with a contract therefor, where such injunction would compel the lessee to break a similar contract made by them with an innocent third party and the complainants cannot use the house with profit to

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(1) 10 Wall, 339, 350.
(2) 3 Hare 387.
(3) *Sutton* v. *Head*, 86 Ky. 156 ; H. C. Joyce § 440.
(4) *Shib Chandra* v. *Krishna Chandra*, 9 Ind, Cas. 576.

themselves (1). The possession which a Zemindar could obtain after a decree for resumption of lands possessed by a defendant Taluqdar is a constructive one derived from rent having been received. The digging of tanks by the taluqdars is no act of waste requiring a perpetual injunction (2). In March 1870, the defendant obtained, in the settlement court, against the plaintiff, a decree for under proprietory rights in certain plots of land. In 1889, the defendant brought some of those plots under cultivation. The plaintiffs sued for an injunction restraining the defendant from cultivating the land, and in the alternative he asked to have rent fixed thereon. *Held* that under the settlement decree, the defendant had acquired proprietary rights though in subordination to the plaintiff, and that he could not be restrained from cultivating the land (3).

Injunction against sub-lessees.—A sub-lessee will be enjoined from carrying on an auction business in breach of a covenant in the original lease, a knowledge of which he could easily have obtained by inquiry (4).

CHAPTER XIII.

Joint Possession and Injunction.

Joint ownership in India.—"In England" says Mr. Mayne "ownership as a rule, is single, independent, and unrestricted. It may be joint, but the presumption will be to the contrary. It may be restricted, but only in special instances, and under special provisions. In India, on the contrary, joint ownership is the rule, and will be presumed to exist in each individual case until the contrary is proved. If an individual holds property in severalty, it will, in the next generation, relapse into a state of joint tenancy. Absolute unrestricted ownership, such as enables the owner to do anything he likes with his property, is the exception. The father is restrained by his sons, the brother by his brothers, the woman by his successors. If the property is free in the hands of its acquirer, it will resume its fetters in the hands of its heirs. Individual property is the rule in West. Corporate property is the rule in the East"(5). So in India even to-day joint-family plays a very important part on the property rights of individuals.

Co-sharers-Different kinds of.—Co-sharers may be classified under three different heads, namely co-parceners, joint-tenants and tenants in common.

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(1) H. C. Joyce on Injunction § 19; *Foster* v. *Ballenburgh* (1890) 43 Fed. 821.

(2) *Mungeeram* v. *Baboo Ganesh*, W. R. (1864) 275.

(3) *Rambal Singh* v, *Dalthaman Singh*, 2 O. C. 35.

(4) *Parker* v. *Whyte*, 32 L. J. Ch. 520. See also; *Wilkinson* v. *Rogers*, 12 W. R. 284, where a covenant running with the land was held to be binding on an assignee of the lease and his sub-tenant. Also, *Clements* v. *Welles*, L. R. 1 Eq. 200.

(5) Mayne's Hindu Law 7th Ed. p. 293.

When two or more persons together form an heir, they are called in law, *co-parceners*, or more shortly *parceners* (1). In England co-parceners were the only kind of joint owners to whom the ancient common law granted the power of severing their estates without mutual consent ; as the estate in co-parcenary was cast on them by the act of the law, and not by their own agreement, it was thought right that the perverseness of one should not prevent the others from obtaining a more beneficial method of enjoying the property (2). The law of partition is the out-growth of the ownership of land by co-parceners. "Parceners," or "co-parceners" are so called because the lands of which they are parceners may be partitioned or divided among them (3).

Two or more persons to whom are granted lands or tenements, to hold in fee simple, fee tail, for life, for years or at will, are joint-tenants according to the Law of England, and the estate which they thus hold is called an estate in joint-tenancy. The tenants thereof must have one and the same interest, arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession. The principal incident to this estate is the right to survivorship, by which, upon the death of one joint-tenant, the entire tenancy remains to the surviving co-tenant, and not to the heirs or other representatives of the deceased, the last survivor taking the whole estate. It is an estate that can only be created by the acts of parties, and never by operation law (4).

According to English law, the tenants in common are such as hold by several and distinct titles, but by unity of possession, "because none knoweth his own severalty, and therefore they all occupy promiscuously" (5). The shares in which tenants in common hold are by no means necessarily equal. Thus, one tenant in common may be entitled to one-third, or one-fifth, or any other proportion of the profits of the land, and the other tenant or tenants in common to the residue. So, one tenant in common may have but a life or other limited interest in his share, another may be seized in fee of his, and the owners of another individual share may be joint tenants as between themselves, whilst as to the others they are tenants in common. Between a joint tenancy and tenancy in common, the only similarity that exists is therefore the unity of possession. A tenant in common is, as to his own undivided share, precisely in the same position as the owner of an entire and separate estate (6).

Co-parceners under the Mitakshara.—Those who follow the authority of the *Mitakshara*, consider that no parceners had any such ascertained share in the joint property before partition as admits of being dealt with by himself, apart from his fellow sharers. They look upon every co-sharer as having a proprietary right in the whole estate, subject to a similar right on the part of all the others (7). All the members of a joint Hindu family are entitled to joint possession of the family property. The proceeds of such property must be brought into

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(1) Williams on Real Property p. 232. citing Brac. Abr. til Co-parceners.
(2) Williams on Real Property p. 232.
(3) Knapp on Partition p. 4.
(4) Knapp on Partition p. 18.
(5) 2 Black 192.
(6) Williams on Real Property p. 141.
(7) Mayne's Hindu Law 7th Ed. p. 330.

the common stock (1). A Hindu co-parcener who is excluded from the possession of joint property can claim to be placed in joint possession along with the remaining co-parceners or strangers claiming under them. He cannot on any account be compelled to bring a suit for portion of the joint property (2). No separate possession of any particular portion of undivided family estate can be successfully claimed except in a suit for partition. But though the separate possession claimed cannot be given without partition, in such cases a co-parcener, joint-tenant or tenant in common may obtain possession in common with a purchaser who has obtained separate possession without partition of specific individual property in which such co-parcener has an undivided unascertained share. Though a joint tenant or a tenant in common of joint family property cannot obtain exclusive possession of any specified parcel of undivided property no outsider purchasing from one of the co-perceners is entitled to such exclusive possession as against the other co-owners of any specified parcel of such property. And the purchaser therefore cannot by obtaining a possession to which he was entitled without partition, force on anothor co-parcener the necessity of bringing a suit for partition. If such co-owner is content with joint enjoyment, the purchaser must either submit to it or himself obtain by partition the specific share which he desires to enjoy separately. Where the plaintiff asks in his plaint for exclusive possession only, he may nevertheless be allowed possession in common (3). The members of a *Mitakshara* family are all joint tenants of the undivided property, in which no member has any defined share, and the property passess on the death of any member to the survivors (4). Uuder the Hindu law the exclusive possession of a plot of a common dwelling house, which one member of a joint family obtains very commonly without actual partition, must be referred to the continuing consent of his co-sharers. But as long as this peculiar state of exclusive possession is allowed to remain, it must be taken to involve a concession of all such reasonable rights of user as are necessary for the ordinary purposes of residence, having regard to the circumstances of Hindu life. One of the several co-sharers of joint property is not entitled to erect a building on land forming a portion of such property so as to materially alter the condition thereof, without his co-sharers' consent (5).

Rights of Co-parcener according to Jimutabahana.—*Jimutabahana* differed from the earlier writers as to the nature of the interest which each person, who was admitted to be a co-sharer had in the joint property. According to him the right to every co-parcener, is to a definite share, though to an unascertained portion of the whole property. He denies the existence of any general right, like the *Mitakshara*, in the co-parceners, and says that their property consists in unascertained portions of the aggregate (6).

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(1) *Partab Singh* v. *Girdhar Singh*, 5 C. P. L. R. 1.

(2) *Naran bhai* v. *Ranchhod*, 3 Bom. L. R. 598=26 B. 141.

(3) *Bhiku* v. *Putta*, 8 Bom L. R. 8.

(4) *Gopal Lall* v. *Mahadeo Prosad*, 6 C. W. N. 651.

(5) *Sheoprosad Singh* v. *Leela Singh*, 12 B. L. R. 188=20 W. R. 160.

(6) Mayne's Hindu Law pp. 330, 493.

Possession of joint property.—Property does not cease to be joint merely because it is used so as to produce more profit to one of the several co-owners, who has incurred expenditure or risk for that purpose, than to others, where the latter are not excluded. As long as joint property is used consistently with the continuance of joint ownership and possession, without exclusion of the joint owners, who do not join in the work, there is no encroachment on the right of any of them, as regards common enjoyment, so as to give ground for a suit (1). In *Mohesh Narain* v. *Nowbat Pathak*, (2), *Mr. Justice Mookerjee* said: "It is perfectly true that in the case of immoveable property jointly owned, each co-owner is in theory interested in every infinitesimal portion of the subject matter, and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property jointly with the other, or in the language of *Lord Coke* 'their occupation is undivided, and neither of them knowth his part in several' (Co-Litt. sect. 292). But it does not follow that every use of joint property by one co owner renders him liable to an action for account to the other, even though the use is perfectly legitimate and does not constitute an invasion of the rights of the co-sharers. If there is no assertion of hostile title, no exclusion or ouster, obviously an action of ejectment cannot lie. If there is no destruction of the property, no conversion, an action of trover is not, the appropriate means of redress; nor does an action of account lie, unless it is alleged and proved that the co tenant has received more than his just proportion. In the case of mining properties, the only mode in which they may be profitably used is to take from them valuable ores, and, if this is done properly by one co-tenant, so as not to interfere with the exercise in a similar manner of the equal right of the other co-tenant, I do not see upon what ground a liability may be imposed upon the one tenant to account to the other. Indeed if the contrary view prevailed there would be no mutuality, and enjoyment of joint property would be impracticable; one co-owner might by expenditure of capital and labour reap advantages, which he would be obliged to share with the other, but if he incurred any loss, he would not be entitled to throw the burden upon his co-sharer (3)." In *Henderson* v *Eason* (4), *Mr. Baron Parke* after pointing out that if there are tenants in-common, and one tenant alone possesses the property, he is under the Statute of Anne, answerable as bailiff to his co-tenant in an action of account, if he receives more than what comes to his just share but not otherwise, observed as follows: "There are many cases where profits are made and are actually taken by one co-tenant, yet it is impossible to say that he has received more than comes to his just share. For instance, if one tenant employs his capital and industry in cultivating the whole of the piece of the land, the subject of the tenancy, in a mode in which the money and labour

(1) *Lachmeswar* v. *Monowar*, 19C. 253=19 I. A. 48 P. C.
(2) 32C. 837=1 C. L. J. 437.
(3) See also *Henderson* v. *Eason*, 17 Q. B. 701 reversing *Eason* v. *Henderson*, 12 Q. B. 986; *Jacobs* v. *Seward*, L. R. 5 H. L. 464.
(4) 17 Q. B. 701.

expended greatly exceeds the value of the rent or compensation for the mere occupation of the land,—in raising hops, for example, which is a very hazardous adventure,—and he takes the whole of crops, is he to be accountable for any of the profits in such a case, where it is clear, if the speculation had been a losing one altogether, he could not have called for a moiety of the loss, as he would have been entitled to do, had it been so cultivated by the mutual agreement of the co-tenants ? In taking all the produce, he cannot be said to receive more than his just share and proportion to which he is entitled as tenant-in-common, as he receives in truth the remuneration for his own labour and capital, to which a tenant has no right (1)". "As each co-tenant has at all times the right to enter upon and enjoy every part of the common estate, this right can not be impaired by the fact that another of the co-tenants absents himself, or does not choose to claim his right to an equal and common enjoyment, it would be inequitable to compel a co-tenant in possession to account for the profits realized out of his skill, labour and business enterprise, when he has no right to call upon his co-tenant to contribute anything towards the production of their profits, nor to bear his proportion, when through bad years, failure of crops, or other unavoidable misfortunes the use made of the estate resulted in a loss, instead of a profit, to be one in possession (2)."

"Upon a review of these authorities, I think the following propositions are deducible ;—

"(i) A tenant in common cannot be held liable to his co-tenant for damages for use and occupation of the joint property, unless there has been waste or an ouster of his co-tenants.

"(ii) When a tenant in possession has prevented his co tenants from obtaining from the premises such profits as they were capable of yielding, or has taken possession of the whole and used them as his own, and, thereby made a profit, he must account, either for the fair rental value or the profits, or be liable for mesne profits, for one tenant is bound to account to another only as his bailiff, under contract express or implied.

"(iii) Where one tenant in-common occupies the joint property, without any assertion of hostile or exclusive title on his part, and without claim on the part of his co-tenants to be admitted into possession, he is under no obligation to account, for he has a right to such occupancy (3)".

If a defendant who is interested in all the lands of the estate is in possession of the joint lands in excess of the share under a private arrangement with his co-sharers, he is not liable to account to the other co-sharers out of possession

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(1) See also *Mc Mahon* v. *Burchell*, 2 P.H. 127, 134 ; *Kennedy* v. *De Trafford*, (1897) A.C. 180 (190) ; *Fennings* v. *Lord Granville*, 1 Taunt 241.

(2) Freeman on Co-tenancy p. 258 ; see also *Mc Cord* v. *Oakland Quick silver Mining Co*, 64 Cal. 134=49 Am. Rep. 686 ; *Irwin* v. *Covode*, 24 Penn. 162 ; *Le Barron* v. *Babcock*, 122 N. Y. 153.

(3) *Per Mookerjee J.* in *Mahesh Narain* v. *Nowbat Pathak*, 32 C. 837=1 C. L. J, 437. See also *Dwijendra* v. *Purnendu*, 11 C. L. J. 189 ; *Ananda Chandra* v. *Parbati*, 4 C. L. J. 198 ; *Israil* v. *Shamsar*, 18 C. W. N. 176 ; *Lokenath* v. *Dhakesar*, 21 C. L. J. 253=20 C. W. N. 51.

and his possession cannot be disturbed by the other except by seeking a partition of all the lands comprised in the state (1).

In the absence of any ouster, the possession of one co-sharer must be deemed to be the possession of all (2). Where possession in fact is undetermined, possession in law follows the right to possess, in other words possession follows title. Where, as between two claimants to the same property A and B, it was found that though A was in possession of a larger portion, there was yet no ouster of B or adverse possession or assertion of hostile title on the part of A, *held* that each of them must be deemed to have been in possession to the extent of his title, A having been found to be entitled to four annas and B to twelve annas share of the land (3). A co-sharer coming into exclusive possession of property belonging to himself and his co-sharer will be presumed to have done so not merely for himself but for his co-sharer as well, until there is ouster (4). If a co-sharer in an estate brings about the sale of the estate by not paying his own proportion of Government revenue and purchases the estate himself in the ensuing sale, he is under a duty to hold it in trust for the benefit of his co-sharer and reconvey his share to him (5). Although as a general rule one co-sharer has no right to take exclusive possession of a joint property, the question whether such exclusive possession amounts to ouster or not depends on the circumstances of each particular case and in a case where it cannot be held that there has been ouster, the exclusive possession of a co-sharer should not be disturbed at the instance of another who is similarly in possession of another portion of the joint property. In such a case the fact that one person constructs buildings upon lands is not such an injury as cannot be remedied in a partition suit (6). A co-proprietor is entitled until partition to appropriate to his exclusive use a part of the village common land which is in his exclusive possession for a number of years and his possession cannot be disturbed by any of the co-proprietors unless his appropriation of part of the common land has caused such material and substantial injury to the others as could not be remedied on partition. The remedy of the other co-sharers in such cases is not to apply for ejectment of the co-sharer in possession of his transferee but to sue for partition (7). In a suit for partition among co-tenants the court can adjust the equities as between the parties (8).

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(1) *Biswanath Missir* v. *Ram Prosad*, 10 Pat. 572=133 Ind. Cas. 673=A. I. R. 1931 Pat. 389.

(2) *Raghunandan* v. *Sheoprosad* 9 O. W. N. 1008; *Raghubans* v. *Khub lal*, 35 C. W. N. 949 P. C.=61 M. L. J. 186 (P. C.); *Subjan* v. *Asamulla*, 31 C. W. N. 405=54 C. 524; *Ram Manorath* v. *Sant*, 95 Ind. Cas, 985; *Sheo Ratan* v. *Lallu*, 95 Ind. Cas. 845; *Gajraj* v. *Ram Arjon*, 87 Ind. Cas. 59; *Ahmed* v. *Ram Lall*, 13 A. L. J. 204=26 Ind. Cas. 922=37 A. 203.

(3) *Galstaun* v. *Profulla*, 36 C. W. N. 583=A. I. R. 32 Cal. 634.

(4) *Swarnamoyee* v. *Probodh Chandra* 35 C. W. N. 758=55 C. L. J. 420,

(5) *Akshoy Kumar* v. *Ahmed Ali*, 59 C. 180=56 C. L. J. 311=A. I. R. 1032 Cal. 434; *Eradut* v. *Abu*, A. I. R. 1929 Cal. 558.

(6) *Yara* v. *Jalal*, 32 P. L. R. 653=A. I. R. 1931 Lah. 631.

(7) *Dunna Singh* v. *Ram Singh*, A. I. R. 1930 Lah. 1061=130 Ind. Cas. 56.

(8) *Poovanalingam* v. *Veeravi*, 54 Mad. 821.=61 M. L. J. 399.

A suit to recover possession is not maintainable against one's co-sharer in respect of property still joint and undivided, nor can rent be legally claimed from him except on the ground of some agreement or undertaking, express or implied. The best remedy for the plaintiff under the circumstances would be to bring a suit for partition and an account (1). But in a proper case a decree for joint possession and injunction can be granted by the court (2). A claim for joint possession of common property by one co-sharer against other co-sharers ought to be put forward without delay (3). Where one co-sharer is in possession of the common land, whether or not the portion he is occupying is in excess of the area, that would fall to him upon partition, without obligation from or ouster or exclusion of the other co-sharers, he is under no obligation either to account for or to pay compensation to such co-sharers in respect of the profits which have accrued to him by reason of the skill or industry which he has employed in making good use of the property which he was in possession. On the orher hand, if a co-sharer notwithstanding an objection from the other co-sharers claim an exclusive right to occupy a portion of the land of which they have a common right to possession or excludes or ousts from possession the other co-sharers then he will have to pay compensation to the other co-sharers for any profits that they may be held to have lost by reason of his exclusive occupation of the common land. To exclude is to keep out and to oust is to put out of possession. But ouster and exclusion may be actual or constructive (4). If co-owners of the *abadi* land under some arrangement remain in separate possession of a certain site, this does not give the other co-owners a right to sue. But if the co-owners in possession construct a building on the site the other co-owners may sue for the demolition of the building and for joint possession, provided that they do so within a reasonable time. "The right of co-owners to sole possession is a right which continues only so long as they possess themselves and such a right is consistent with the other co-sharers' title. If however the co-sharers transfer to a stranger this amounts to a denial of the title of their co-owners and is inconsistent with that title. Such a transfer gives the co-owner a right to sue for a declaration that the transfer is invalid against them. It also gives them a right to sue for joint possession with the transferors and ejectment of

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(1) *Gobind Chandra* v. *Ram Coomar* 24 W. R.. 393 ; *Ambicka* v. *Ram*, 1924 All. 923. Where a lessee from a co-owner erects buildings over the entire property though another co-sharer objected to it, the remedy of the latter is to file a suit for partition. *Haribhusan* v. *Sheikh Abdul*, 97 Ind. Cas. 441=A. I. R. 1927 Cal 54. Where co-sharers cannot agree how to enjoy the lands held in common, the remedy of any co-sharer who objects to the exclusive use of the land by another co-sharer is to obtain partition of the lands and not to sue for actual joint possession. *Kesho* v. *Gaya*, 94 Ind. Cas. 921.

(2) *Lloyd* v. *Bibu Sogra*, 25 W. R. 313 (315) ; *Mahabir* v. *Baijnath* 117 Ind. Cas. 339.

(3) *Bholaram* v. *Rajaram*, 27 N. L. R. 262=A. I. R. 1931 Nag. 120.

(4) *Chandra Kishore* v. *Bireswar*, 55C. 396=32 C. W. N. 291.

the transferee ; for the transferee gets no title to possession by the transfer (1). Where lands in India are held in common by co-sharers each co-sharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay compensation in respect of such exclusive use of the lands. Such case of exclusive use of land held in common by a co-sharer is not an ouster of his co-sharer from their proprietary rights as co sharers in lands (2). When one tenant in common occupies part of the joint property without assertion of hostile or exclusive title and without claim by his co-tenant to be admitted into possession he is under no obligation even to account (3). In the absence of proof of actual ouster or destruction of property one co-sharer cannot demand accounts from another co-sharer for mineral taken by him out of the joint-property unless it is shown that he had worked more than his fair share (4).

In *Sreemuty Basanta Kumari Dassya* v. *Mohesh Chandra Shaha* (5), the Plaintiffs and Defendant were co-sharers in a mehal. Each co-sharer was in sole occupation of some lands appertaining to the mehal as *khamar* lands and the defendant was in such possession of some lands. On the defendant commencing some building on portions of the land the plaintiffs brought a suit for recovery of joint possession of the land in dispute on declaration of their proprietary right to their share in it, for demolition of the building raised, and for an injunction restraining the defendant from building on the land. The defendant did not claim any exclusive title to the land and the plaintiffs did not allege that they had sustained or were likely to sustain any substantial injury by reason of the sole occupation of the land or building thereon by the defendant. The Court in refusing joint possession observed : "We do not think that the mere fact of sole occupation by one co-sharer necessarily constitutes an ouster of the other co-sharers, nor does it entitle the latter to a decree for joint possession. We need not discuss the various cases cited in argument on both sides, and need only refer to the case of *Watson* v. *Ramchand* (6), *Dwijendra Narain* v. *Purnendu Narain* (7) and *Ananda Chandra* v. *Parbati Nath* (8). The first case dealt with the rights of co-sharers in respect of agricultural lands and the last two related to joint lands on which permanent structures had been raised by one co-owner. Most of the authorities relied upon on behalf of the respondents, were considered in the last two cases. When a co-sharer is in sole occupation of a portion of the joint property, for instance, by building, or by carrying on cultivation on it, the other co-sharers

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(1) *Mahomed Sher Khan* v. *Bharat Indu*, 25 A. L. J. 983.

(2) *Midnapore Zamindary Co* v. *Kumar Naresh Narain Roy* 51 C. 631 = 80 Ind. Cas. 827 = 29 C. W. N. 34 = 51 I. A. 293.

(3) *Debendra Narayan Singh* v. *Narendra Narayana*, 23 C. W. N. 900 = 29 C. L. J. 504 = 51 Ind. Cas 976, see also *Sat Narayan* v. *Anant Prosad*, 51 Ind. Cas. 31.

(4) *Elias Myer* v. *Manoranjan Bagchi*, 22 C. W. N. 441 = 44 Ind. Cas. 297.

(5) 18 C. W. N. 328.

(6) 17 I. A. 110 = 18 C. 10.

(7) 11 C. L. J. 189.

(8) 4 C. L. J. 198.

are to that extent excluded from making any use of that particular portion as it was difficult to see how two different co-sharers can at the same time build upon or carry on cultivation, on one and the same piece of land. If the sole occupation of one co owner in this manner constitutes ouster of the other co-owners, then in every case the occupation by the co-owners of the lands in their respective possession would constitute an ouster of each other, and this certainly cannot be held. 'Ouster' must, therefore, mean dispossession of one co-sharer by another where a hostitle title is set up by the latter ; and where the occupation of the latter is not consistent with joint ownership. This being so, and there being no assertion of hostitle title in the present case, there was no ouster of the Plaintiffs by the Defendant No. 1. The distinction between a common law action for ejectment and an equity suit for injunction, as was pointed out in the case of *Dwijendra Narain* v. *Purnendu Narain* (1) should

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(1) 11 C. L. J. 189 : 'In support of the first contention, it has been argued that whatever equitable considerations may be applicable, if one co-tenant asks for an injunction against another, there is no room for the application of such principles to an action in ejectment. In view of his argument, the learned vakil for the appellant has intimated to the Court that he does not desire to press the claim for injunction. In essence, therefore the appellant invites us to recognize as applicable to the Courts of this country, the distinction between a common law action of ejectment and a equity suit for an injunction. This position is sought to be supported by the decision in *Doe* v. *Horn* (3 M & W. 333 at p. 338) in which *Baron Parke* followed the rule laid by *Littleton* (section 322) "that if a tenant in common occupy the whole and put the other out of possession and occupation, he who is put out of occupation shall have against the other a writ of *ejectione firmae* of the moiety." Reliance is also placed upon the commentary of Lord Coke on this passage to the effect that 'if he drive out of the land any of the cattle of the other tenants in common, or do not suffer them to enter or occupy the land, this is an ejectment or expulsion, wherefore he may have an ejectment for the moiety." After a careful consideration of the argument which has been addressed to us, we are unable to hold that we ought to rcognize in this country the distinction between a common law action of ejectment and an equity suit for an injunction. The history of the litigation to which reference has just been made illustrates the dangers likely to result from the recognition of such a distinction. In that case, a Railway company obtained a lease of five-sixth share of a certain property from some of the joint-owners. The other joint owner who owned the remainder brought an action of ejectment to recover possession, but was defeated by an outstanding term set up by the company. In this preliminary stage, the case is reported as *Doe* v. *Horn* (3 M & W. 333). The joint owner thus defeated brought a fresh ejectment suit having first determined by a notice to quit the outstanding tenancy. He was successful and got a decree for possession. In this second stage, the case is reported as *Doe* v. *Horn* (5 M & W. 564). The Railway company now filed a bill in chancery and prayed for an injunction to restrain the defendant from executing the writ of possession issued at his instance. An *ad interim* injunction was issued, but it was ultimately dissolved on the ground that the company had acted in defiance of the legal rights of the owner, and their conduct was such as disentitles them to any relief in a Court of Equity. In this final stage, the case is reported as *Durham and Cumberland Railway Co.* v. *Wann* (3 Beav. 119=4 Jur. 764). If there had been no distinction between a Court of Common Law and a Court of Equity, it is manifest that the matter in controversy between the parties might have been finally decided in the earlier litigation. The Courts of this country are in all matters for which no specific rule may exist, directed to act according to justice, equity and good conscience (Reg. III of 1793, section 21, subsequently repealed but substantially re-enacted in Act VI of 1871, section 24 and Act XII of 1887, section 37). There is no reason therefore, why the Courts should allow a litigant in the position of the plaintiff to obtain a decree for ejectment as a matter

not be introduced in this country. The distinction has been uniformly ignored in numerous cases, and the same equitable doctrine has been applied to cases of ejectment by one co-owner against another as well as to cases of injunction between such co-owners." One joint owner can maintain a suit against another in respect of a passage jointly owned by him if that other has interfered with it by building a balcony projecting over a considerable width of it. One joint owner of private property has no right

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of right and drive the defendants to obtain an injunction granted on equitable considerations. It is worthy of note that the distinction which we have been pressed to recognize has been uniformly ignored in numerous judicial decisions on the subject to be found in our Reports. For instance in the cases of *Gokool Kishen* v. *Issar Chunder*, (18 W. R 12), *Mohima Chunder* v. *Madhub Chunder* (24 W. R. 80), *Madan Mohan* v. *Rajab Ali* (28C. 223), *Syed Ali* v. *Najab Ali* (11 C. W. N. 143), *Ananda Chandra* v. *Parbati Nath* (4 C. L. J. 198), *Sankar* v. *Jnanada Sundari* (5 C. L. J. 267), *Amba Debiya* v. *Jnanoda Sundari* (4 C. L. J. 254), *Gobinda Chunder* v. *Ram Coomar* (24 W. R. 393), *Lloyd* v. *Bibee Sogra* (25 W. R 313) which were all suits for ejectment by one joint owner against another, the same equitable doctrines were applied as in the cases of *Bissumber* v. *Rajaram* (3 B. L. R. App. 67=13 W. R. 337 N), *L. J. Crowdy* v. *Inder Roy* (18 W. R. 408), *Nacory Lal* v. *Brindaban* (8C. 708), *Joy Chunder* v. *Bippen Charan* (14 C. 236), *Shamnugger* v. *Ram Narain*, (14 C. 189) *Fazilatunnessa* v. *Ijaz Hassan* (30 C. 901) ; *Atarjan* v. *Ashak* (4 C. W. N. 788), *Anantrama* v. *Gopal* (19B. 269), *Mohanchand* v. *Ishakbai* (25 B. 248) ; *Paras Ram* v. *Sherjil* (9A. 661), and *Shadi* v. *Anup Singh*, (12A. 436) which were all cases in which one co-sharer sought either a permanent injunction to restrain another co-sharer from dealing with the joint property in a particular manner or a mandatory injunction to compel him to demolish buildings erected by him or to restore the land from its altered to its original condition. It may further be observed that the case of *Watson* v. *Ram Chand Dutt* (L. R. 17 I. A. 110=18 C. 10) was one for injunction as well as joint possession, whereas the case of *Lachmeswar Singh* v. *Manowar Hossain* (L. R. 19 I. A. 48=19C. 253) was by one co-sharer against another for account of the profits of joint property. In both cases, however, the same test was applied to determine the rights of the joint owners ; that test is, whether the defendant has made use of the joint property in a way consistent with the continuance of the joint ownership and possession.....The proposition that the sole occupation of a portion of joint property by one co-owner necessarily constitutes an ouster of the other co-tenant, is neither well founded in principle nor sustained by the authorities. Joint-property in order that it may be jointly enjoyed must be used simultaneonsly in different parts by different co-owners or successively in time in its entirety by the various owners. It is inconceivable that the same piece of land can be simultaneously occupied and enjoyed in its entirety by two persons. The so called joint user of property necessarily implies a division in space or a succession in time or an employment of a common agent. From this point of view sole occupation of a part of the common estate by one co-owner does not inevitably imply an ouster of the other co-owner. This view is supported by the cases of *Watson* v. *Ramchand* (supra), *Mohesh Narain* v. *Nowbut Pathak* (1 C. L. J. 437=32C. 837) and *Ananda Chandra* v. *Parbati Nath*, (4 C. L. J. 198.) In the last of these cases, it was ruled that although in the case of immoveable property jointly owned, each co-owner is in theory interested in every infinitesimal portion of the subject-matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property jointly with the others, yet it does not follow that one joint owner is entitled to maintain an action in ejectment against a co-owner merely on the ground that the latter is in sole occupation of a portion of the joint property. Such sole occupation may under certain circumstances be perfectly legitimate and may not constitute an invasion of the rights of the co-sharer .....In Freeman on co-tenancy section 240, it is pointed out that the erection of a permanent structure cannot be invariably treated as conclusive evidence of ouster. This latter view was adopted by this Court in *Ananda Chandra* v. *Parbati Nath* (4 C. L. J. 198) in which it was ruled that sole occupation by one co-owner of a part of the joint land to his

to do anything which will make the joint property more exclusively his (1). Where a co-owner in a piece of land begins to build upon it a house to the prejudice of the other co-owner's right and the latter sues for his only remedy —partition, a temporary injunction should be granted, if there is a substantial question in issue, to maintain the *status quo* to the necessary extent (2). An injunction cannot be granted to a co-owner to prevent the carrying on of a necessary work by another co-owner upon common property (3).

Co-sharers and injunction.—In case of abuse of joint property by one co-sharer, by excluding the other or others, three remedies are open to the latter namely, a decree for joint possession, a decree for damage or a decree for perpetual injunction (4). But the Court should be very cautious of interfering with the enjoyment of joint estates as between co-owners, though they will do so in a proper case (5). In *Watson Co.*, v. *Ram Chand Dutt* (6) a suit was brought by two brothers Ganga Ram and Ram Chand Dutt on 29th February 1884, for recovery of possession of a 14 annas share of Khas lands by virtue of ijmali title, together with damages and for a permanent injunction restraining the defendants, Messers Watson & Co, from cultivating indigo. Of the lands to which this suit related, part of an extensive zemindari named *Silda*, in the Midnapore district, the plaintiffs had as to a portion become patnidars in 1869 ; and they held another portion as mokarraridars, under a maurasi grant made in 1879. Watson and company having obtained leases from the plaintiffs, which ended in 1883, as well as transfers from others owning interests, had reclaimed part of the land, settling cultivators, and themselves cultivated indigo on the Khas or untenanted part. In August 1883 the plaintiff Ramchand Dutt gave notice of the approaching end of the lease on the 14th September following, and demanded joint possession of 14 annas of *Silda*, inclusive of the 4, 128 bighas on which Watson and company were growing indigo. Their lordships of the Privy Council in reversing the judg-

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own use by the erection of a permanent structure is not necessarily evidence of an ouster. It may well be that the lands cannot be enjoyed as each of the joint owners is entitled to enjoy it without making extensive and permanent improvements. The test to be applied is, whether the plaintiff who complains of the act of his co-owner has sustained some substantial injury by reason of the act of which he complains. Precisely the same view was adopted in the case of *Cubitt* v. *Porter* (8 B&C. 257=32 R. R. 374), which was treated as authoritative by Jessel M. R. in *Standard Bank* v. *Stokes* (9 Ch. D. 68) and by *Jenkins C. J.* in *Mohan Chand* v. *Isak bai* (25 B. 248). See also *Rajendra* v. *Shama*, 5 C. 188.

(1) *Sibba Mal* v. *Naurang Mal* 15 A. L. J. 293=39 Ind. Cas. 739 ; *Ghasitu* v. *Sodhan*, 32 Ind. Cas. 690.

(2) *Hemanta Kumar* v. *Baranagar Jute Mill*, 24 Ind. Cas. 313=20 C. L. J. 441.

(3) *Kuttayan* v. *Manimanna*, 35 M. 681.

(4) *Watson & Co.* v. *Ramchand Dutt*, 18 C. 10=17 I. A. 110 ; *Lachmiswar Singh* v. *Manowar Hossain*. 19 A 253. (P. C.)

(5) *Lachmeswar Singh* v. *Manowar Hossain*, 19 A. 253 (P.C.)

(6) 18 C. 19=17 I. A. 110. "The rights of owners of lands held jointly has been practically settled by the Privy Council in the case of *Watson & Co.* v. *Ramchandra Dutt*. 18 C. 10 P. C., and the subsequent case of *Lachmeswr Singh* v. *Manowar Hossain* 19 A. 253 (P. C.) and what ever rights they possess according to law of course they can claim." *Rohini* v. *Hodding*, 21 C. p. p. 343-344

ments of both the lower Courts observed : "It seems to their Lordships that if there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession. Their lordships are further of opinion that the decree of the District Judge, so far as it orders an injunction to be issued, ought to be reversed. It appears to their Lordships that, in a case like the present, an injunction is not the proper remedy. In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one share-holder can restrain another from cultivating a portion of the estate in a proper and husband-like manner, the whole estate may, by means of cross-injunctions, have to remain altogether without cultivation until all the share-holders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the courts of justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one share holder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other share holder to appropriate to himself the fruits of the other's labour or capital."

"Though of, course, the principles on which English courts administer the remedy by injunction must be taken to be those which the Legislature meant to affirm in the Specific Relief Act, still the circumstances of this country are very different from those of England, and it would be a dangerous thing to assume that because the courts in England have very rarely found it necessary to grant an injunction as between co sharers in order to prevent multiplicity of suits, or upon any other grounds, the courts in this country may not properly be somewhat less rigid in doing so. The circumstances of the country are different ; the positions of co-sharers and persons with personal interests in land are very different from those in England ; and the interests of part-owners may here require protection by injunction in classes of cases in which it is not necessary to grant it in England. There is a large number of cases which go to show that the remedy by injunction may in this country be given in cases between co-sharers, when the circumstances of

the cases are such as to render it necessary in order to secure those objects which, according to the law, should be secured by injunction. Particularly, since the passing of the Specific Relief Act, an injunction may properly be granted if, on a consideration of the facts of the case, the Courts think that remedy is necessary in order to prevent repitition of injury and multiplicity of suits. (1)" In *Shamnagar Jute Factory* v. *Ramnarain* (2) the Court lucidly laid down the law on the subject thus : "English Courts have certainly not shown any special facility in granting injunctions between co-tenants ; such injunctions, are of very rare occurrence. In this country, as might be expected questions of this nature arise much more frequently between co-owners than in England, and the decided cases are numerous. We do not think it necessary to examine the whole series of cases in detail. It is enough to say that there are many cases in which an injunction has been granted ; and in some cases very general language has been used as to the right of a part owner to restrain his co owner. It is enough to refer to *Jankee Singh* v. *Bukhoree Singh* (3) ; *Inder Narain Singh* v. *Toolsee Narain Singh* (4) ; *Gurudas Dhur* v. *Bijoy Gobind Bural* (5), *Holloway* v. *Mahommed Ali* (6) ; *Stalkart* v. *Gopal Panday* (7). But we are not aware of any decision which establishes the broad proposition contended by the plaintiffs, that one co-owner is entitled to an injunction restraining another co-owner from exceeding his right, absolutely, and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction. On the other hand, a rule in conformity with the English decisions has been acted upon in a number of cases—*Lala Bishambar Lal* v. *Rajanarain* (8) ; *Dwarkanath Bhooya* v. *Gopeenath Bhooyea* (9) ; *Sree Chand* v. *Nimchund Sahoo* (10) ; *Crowdy* v. *Inder Roy* (11) : *Massin Mollah* v. *Panjoo Ghoramee* (12) ; *Nicholl* v. *Tarinee Charan Bose* (13) ; *Mohima Chunder Ghosh* v. *Madhub Chunder Nag* (14) ; *Rajendra Lall Gossami* v. *Shama Charan Lahiri* (15) ; *Nocury Lall Chakerbutty* v. *Brindaban Chunder Chakerbutty* (16). We think that the granting of an injunction is a matter in the judicial discretion of the Court." In *Anant Ram Rao* v. *Gopal Balwant* (17), *Sargent C. J.*, said. "The exercise of the Court's jurisdiction to grant relief by injunction must, it is plain, in disputes between members of a Hindu family, be attended from their very nature with great difficulty. However, we do not think that there would be any practical objection to the Court interfering by injunction in those

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(1) *Ramchand Dutt* v. *Watson & Co*, 15 C. 214 reversed on appeal 18 C. 10= 17 I. A. 110.
(2) 14 C. 189 (200, 201)
(3) S. D. A. 1856 p. 761
(4) S. D. A. 1857 p. 765
(5) 1 B. L. R. A. C. 108=10 W. R. 171
(6) 12 B. L. R. 191 (note)=16 W. R. 140.
(7) 12 B L. R. 197.
(8) 3 B. L. R. App. 67=13 W. R. 337 note.
(9) 12 B. L. R. 189 note
(10) 5 B. L. R. App. 25=13 W. R. 337
(11) 18 W. R. 408
(12) 21 W. R. 373
(13) 23 W. R. 298
(14) 24 W. R, 80
(15) 5 C. 188
(16) 8 C. 708
(17) 19 B. 269 (270).

particular cases in which, as between tenants-in-common, the Courts grant that form of relief. Following the practice of a Court of Equity in England, that would be confined to acts of waste, illegitimate use of the family property, or acts amounting to ouster. See *Bapaji* v. *Mansukhram* (1). This would appear to have been the opinion of *Phear J.* as regards illegitimate use of the property. See *Seo Persad* v. *Lala Singh* (2)".

In granting or refusing injunction as amongst the co-sharers, it should be borne in mind that "each co-owner is in theory interested in every infinitesimal portion of the subject-matter and each has the right irrespective of the quantity of his interest, to be in possession of every part and parcel of the property jointly with the others (3)." So "every co-tenant has the right to enter into and occupy the common property and every part thereof provided that in doing so he does not exclude his fellow tenants or otherwise deny to them, some right to which they are entitled as co tenants (4)". But "if a co-owner, with the tacit consent of his co-sharer, is in sole occupation of a portion of joint property, he is not entitled to change the nature of that possession or to use the property in a mode different from that in which it had previously been used (5)."

In England "as between co-parceners, joint tenants, or tenants in common, the Court will not interfere to restrain waste (6), unless the wrong-doer is insolvent, or incapable of paying to the other the excess of the value beyond his own share (7) or is occupying tenant to the other (8) or unless the waste amounts to destructive waste or spoliation (9)" (10). "Although Courts of equity will not interfere by injunction to prevent waste in cases of tenants in common or joint tenants, because they have a right to enjoy the estate as they please, yet they will interfere in special cases, as where the party committing the waste is insolvent, or where the waste is destructive of the estate; and not with the legitimate exercise of the right of enjoyment of the estate (11)." In *Twort* v. *Twort* (12) an injunction was granted against waste between tenants in common, on the ground that one was occupying tenant to the other but otherwise there is no injunction between tenants in common, except as to positive and actual destruction (13). And in *Smallman* v. *Onions* (14) an injunction to stay waste was refused where the plaintiff and defendant in possession were tenants in common, but granted on an affidavit of the defendant's

(1) P. J. 1893 p. 552.
(2) 20 W. R. 160,
(3) *Dwijendra Narain* v. *Purnendu Narain*, 11 C. L. J. 189; *Ananda* v. *Pabitra* 4 C. L. J. 198.
(4) *Lokenath* v. *Dhakeswar*, 21 C. L. J. 253.
(5) 41 C. 436 (442)=18 C. W. N. 176.
(6) *Kingham* v. *Lee*, 15 Sim. 396=74 R. R. 103; *Blagrave* v. *Blagrave*, 1 De G & S. 253=75 R. R. 99.
(7) *Smallman* v. *Onions*, 3 Bro. C C. 620.
(8) *Twort* v. *Twort*, 16 Ves. 128.
(9) *Durham* v. *Vawn*, 3 Beav. 119; *Arthur* v. *Lambe*, 2 Dr & Sm. 428; *Bailey* v. *Hobson*, 5 Ch. 180; *Job* v. *Patton*, 20 Eq. 84; *Glyn* v. *Howell*, (1909) 1 Ch. 677=78 L. J. Ch. 391.
(10) Kerr on Injunction p. 63.
(11) Story's Com. § 916; H. C. Joyce on Injunction § 1178; *Stolkart* v. *Gopal*, 20 W. R. 168.
(12) 16 Ves. 128.
(13) *Hole* v. *Thomas* 7 Ves. 589;: Joyce on Injuuction § 159.
(14) 3 Bro. C. C. 620.

insolvency and that he was unable to pay his co-tenants their shares of the money produced by the sale of the timber cut. But the Court will not grant an injunction between tenants in common against pure equitable waste (1).

Plaintiffs, one a Hindu and the other a Mahomedan, jointly purchased the building in suit and they were obstructed in the attempt to open a door in the eastern wall of the building which would lead to a court-yard common to them and defendants-respondents. They therefore prayed for an injunction restraining the respondent from interfering with their rights. *Held* if the injunction is withheld it would be tantamount to depriving the appellants of the user of the property which they own for it is not to be expected that a Hindu and a Mahomedan family could occupy one room jointly. The house can be brought into use only by means of a partition wall, and to make both the apartments habitable the door proposed to be opened by the appellants was indispensable, and therefore the injunction ought to be granted (2). Plaintiffs and defendants were members of a joint Hindu family. In a former suit for partition by the present plaintiff there was a decree on arbitration and award that the plaintiffs should have possession of all the family properties for 6 years from July 1904 and that at the end of the period defendants should be entitled to recover their half share either amicably or through Court. On plaintiffs' failure to give possession at the end of the period fixed defendants attempted to take possession. There was a possession suit and the plaintiffs afterwards brought the present suit for an injunction to restrain defendants from interfering with their possession. *Held* that plaintiffs were not entitled to the injunction asked for (3). In a case where the act of the defendants amounts to an ouster of the plaintiff from his possession of joint property, pecuniary compensation not being an adequate relief, an injunction would be proper remedy (4). In dispute between members of a joint Hindu family with respect to joint property, the exercise of the Court's jurisdiction to grant relief by injunction should be confined to acts of waste, illegitimate use of family property or acts amounting to ouster (5). Where a co-owner makes an unauthorized use of property, the other co-owners may sue for injunction although no damage is caused to them by such use (6). Injunction is also a proper remedy in case of complete deprival of the use of joint property by one of the co-owners (7).

Cultivation by one co-tenant and injunction. In a suit by a 4 anna share-holder for an injunction to restrain the 12 anna share-holder from carrying on without plaintiff's permission the cultivation of indigo in the joint estate of which he defendant claimed exclusive possession, *held* that

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(1) *Hole* v. *Thomas*, 7 Ves. 589.

(2) *Azizulla* v. *Gulam Hassain*, 80 Ind. Cas. 994=17 S. L. R. 63.

(3) *Srinivasa Aiyangar* v. *Svaraja Aiyangar*, 56 Ind. Cas. 608=11 L. W. 606 =(1920) M. W N. 364.

(4) *Soshibhusan* v. *Gonesh Chandra*, 29 C. 500.

(5) *Anant ramrao* v. *Gopal Balvant*, 19 B. 269; see also *Israil* v. *Samser*, 41 C. 436; *Dwijendra* v. *Purnendu*, 11 C. L. J. 189

(6) *Venkata rama* v. *Venkata ramasayya*, A. I. R. 1929 Mad. 25; *Watson* v. *Gray*, 14 Ch. D. 192.

(7) *Azizulla* v. *Ghulam Hussain*, 17 S. L. R. 63=80 Ind. Cas. 994.

the plaintiff was entitled to a perpetual injunction directed particularly to defendant's trespass, and that defendant ought to be restrained from excluding plaintiff from joint possession and from taking, retaining or giving exclusive possession of the land (1). In delivering the judgment *Phear J.* said: "The defendant, however, has personally taken exclusive occupation of certain portion of the soil, and maintains that he has a right to enjoy that exclusive occupation whether the plaintiff accords him his permission or not. This appears to me to be a complete disclaimer of the plaintiff's right as 4 anna share-holder, and to the extent to which the defendant has acted up to his assertion he has ousted the 4 anna share holder from his rights in the land. In a case in England, wherein three persons, tenants in common of certain lands to the extent of five-sixth of it, leased the land to a Railway Company who made a railway upon it, this was held to be such an obstruction to his right of entrance upon the land, as to amount to ejectment. [See *Durham and Sunder land Railway* v. *Watson* (2)]. So here the one share-holder, the defendant has taken exclusive possession of the soil, not as in the case cited, through a tenant, but by his own hand.....It seems to me that the plaintiff has established his rights to the declaration as against the defendant of his being 4 anna share-holder in the land which is the subject of suit jointly with the defendant, and of his being entitled as such share-holder to joint possession of the land together with the defendant. And he has further, I think, made that a good claim to such remedy as the Civil Court, considered as a Court of Equity, can give him against repetition of the trespass complained of. In ordinary cases of trespass, no doubt, where the trespasser is a mere stranger, a judgment which authoritatively declares the plaintiff's right and awards him damages affords sufficient relief. But in the present case, the defendant himself is entitled to possession as well as the plaintiff, and his wrongful act has been committed under claim of right. Under the circumstances such as these, it appears to me that a Court of Equity is justified in protecting the plaintiff's interest by a perpetual injunction if it sees fit on all the facts to do so. "In *Mr. L, G. Crowdy* v. *Bhikdha'e* (3) the plaintiff sues to restrain the defendant from growing indigo on lands which are the *khood-khast* lands of the plaintiff and on lands which are the *ijmalee ryotee* lands of all the joint proprietors in the village, which the plaintiff alleges, defendant had attempted to cultivate by force. The Plaintiff states his share to be 2 annas 15 gandas in the whole village. The defendant holds a lease of in all a little more than 5 annas. In granting injunction *Ainslie J.* observed: "Here it is quite clear that the use which the defendant proposes to make of the joint property is one which entirely alters its condition as regards the other co-sharers, and he has no right to make that alteration. In respect of the *Khood khast*

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(1) *John Stalkart* v. *Gopal Panday*, 20 W. R. 168; but see *Watson & Co* v. *Ramchand Dutta*, 18 C. 10 (P. C.) by which this case seems to have been overruled. Vide p. 310 supra.

(2) 3 Beav. 119=5 M & W. 564.

(3) 16 W. R. 41.

lands, it is perfectly clear that the defendant can have no possible right..... We think that the order in this case must be that the defendant be restrained from growing or causing to be grown indigo on the *ijmalee* lands of the joint proprietors, or without the consent of the ryots who hold tenures in the *ijmalee* lands ; and that, in respect of the *Khood khast* land of the plaintiff, he is restricted from growing or causing to be grown indigo without the consent of the plaintiff (1)."

An undivided share holder is not prevented by law from granting a lease of his share to a third person. All that the other co-proprietor can insist upon is, that the lessee should be prevented from dealing with the subject of the lease in any way different from that in which the lessor, his co-proprietor, could deal with it. A joint share-holder or any lessee of a joint share holder is at liberty to contract with the ryots of the zemindaree for any lawful purpose, even without the consent of the other co-proprietors (2). In case of ouster of the plaintiff by the defendant claiming as a lessee of the co-sharer of the plaintiff the plaintiff in order to get relief by injunction, must state in the plaint, that "we wish to till and cultivate the land jointly with our co-proprietors, or with our co-proprietor's assignee and we complain that in the matter of sowing the new crop (indigo) we have not been consulted ; we have good reasons as joint cultivators to object to its being grown for us jointly with others on these lands, and on that ground we ask to have the defendant restrained from growing it." If they simply say "we were joint proprietors of this *Mouzah*, and we do not wish that the new crop (indigo) should be grown, not on our behalf, but be grown by or for any one within the *mouza*, therefore we ask for this injunction," in that case they have no right to the injunction on that footing (3). "It is impossible to contend with any semblance of reason or justice, that any one co sharer in an undivided property has a right to possess himself of any portion of it to the exclusion and without the authority of his co sharers, and to deal with it and cultivate it as he wills, without their sanction. We take it to be perfectly clear that every co-owner of such property is entitled to take a part in determining how it shall be used, unless restrained by local custom or special agreement (4)". In the above case where the plaintiff was ousted from the land by the defendant an indigo grower and objected to the plaintiff's prayer for perpetual injunction on the ground of delay, the same learned judge said : "The defendant has no right to complain of any delay which has occurred, in as much as that delay operated rather as an advantage than a disadvantage to himself ; and it would obviously be an ineffectual mode of enforcing the plaintiff's rights to leave her as Mr. Woodroffe suggested, to bring her action for damages from time to time against the defendant for excluding her from possession of the joint property. The case which we have

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(1) *Crowdy* v. *Bhickdari Singh*, 16 W. R. 41.

(2) *Macdonald* v. *Shib Dyal Singh*, 21 W. R. 17.

(3) *Nundun Lal* v. *Lloyd*, 22 W. R. 74.

(4) *Per Garth C. J. in Lloyd* v. *Bibi Sogra*, 25 W. R. 313.

already referred (1) decided by *Phear* and *Ainsle JJ.* in 20 Weekly Reports page 168, is a clear authority, if it were needed that in a case of this kind, an injunction is the proper remedy (2)."

Construction of buildings by one co-sharer—The mere circumstance that one co-sharer has taken possession of a portion of joint property does not entitle the other co-sharers to claim joint possession : in other words, sole occupation by one co-sharer does not necessarily constitute ouster of other co-owners. At the same time it does not follow that because a co-owner is, with the tacit or express consent of his co sharer, in sole occupation of a portion of a joint property he is entitled to change the nature of that possession or to use the property in a mode different from that in which it had previously been used (3). In a suit to obtain an order for the demolition of a house erected on land, the joint property of plaintiff and defendant, even though in strictness, defendant had no right to erect the house withont the consent of his co-owner, the court ought to inquire whether, under all the circumstances, the ends of justice can not be satisfied by some other remedy (4). Under the Hindu law, the exclusive possession of a plot of a common dwelling house, which one member of a joint family obtains, very commonly without actual partition, must be referred to the continuing consent of his co-sharers. But as long as this state of exclusive possession is allowed to remain, it must be taken to involve a concession of all such reasonable rights of user as are necessary for the ordinary purposes of residence, having regard to the circumstances of Hindoo life (5). In *Dwarkanath Bhoolah* v. *Gopeenath Bhorea* (6), *Mitter J.* said : "Even if the land be found to be *ijmalee* the defendant was clearly entitled as a co-parcener to use every inch of that land ; and if, by erecting the building in question, he has taken possession of more land than he would be entitled to on a partition, the proper course for the plaintiff to adopt would be to sue for a division of the lands, and not to ask the court for the demolition of the building. But a co sharer in landed property has no right to do anything (*e. g.* commence a building) which alters the condition of the joint property without the consent of his co sharers. If he thinks his interest in the property might be improved by works of a particular character,

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(1) *Stalkart* v. *Gopal Panday*, 20 W. R. 168.

(2) In all cases of this nature the following observations of the Privy Council should be borne in mind : "In India a large proportion of the lands, including many very large estates is held in undivided shares and if one share-holder can restrain another from cultivating a portion of the estate in a proper husband like manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation till all the share-holders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons." *Watson & Co*, v. *Ramchand Dutt*, 18 C. 10 (22) P. C.

(3) *Israil* v. *Samser*, 18 C. W. N. 176 ; *Dwijendra* v. *Purnendu*. 11 C. L. J. 189.

(4) *Massim Mollah* v. *Panjoo Ghorami*, 21 W. R. 373 ; *Lalla Bisambur* v. *Rajaram* 3 B. L R. App. 67.

(5) *Sheo Pershad* v. *Leelah Singh*, 20 W. R. 160.

(6) 16 W. R. 10.

he can effect a partition and improve his particular share (1). In *Jugut Chander* v. *Eshan chander* (2), one of the co-sharers converted the joint agriculturing land into a site for building and excavated tanks and erected buildings on it without the consent of his co-sharer. In that case *Jackson J.* in remanding the case to the lower court for further evidence observed: "As far, therefore, as the evidence given in this case goes, it appears to us that the plaintiff had made out his right to prohibit the building of this house without his consent. Then, as the plaintiff had such strict right, the question of course, arises whether he was in a position to enforce that right, and whether he was entitled to ask the assistance of the civil court to enforce it. In order to determine this question, it is necessary to determine the facts before the principles can be applied" In a case like this the court should take into consideration the conduct of the plaintiff at the time when the house was erected as well as to the possibility of affording the plaintiff relief of other kinds by the dividing of his undisputed share of this land or otherwise and consider whether under the circumstances of the case, the ends of justice require that the house should be pulled down (3). So the mere fact of a building being erected by a joint owner of land without the permission of his co-owners and even without protest, is not sufficient to entitle co-owners to obtain the demolition of such building, unless they can show that the building has caused such material and substantial injury as could not be remedied in a suit for partition of the joint property (4).

In *Nocurry Lall Chackerbutty* v. *Brindaban Chandra Chackerbutty* (5). *Field J.* in delivering the judgment of the court said: There is a considerable difference between a case in which the other co-sharers, acting with diligent watchfulness of their rights, seek by injunction to prevent the erection of a permanent building (6) and a case in which after a permanent building has been erected at considerable expense he seeks to have the building removed. In a case such as that last mentioned, the principle which seems to have been settled by the decisions of this court is this, that though the court has a discretion to interfere and direct the removal of the building, this is not a discretion which must necessarily be exercised in every case; and as a rule, it will not be exercised. Unless the plaintiff is able to show that injury has accrued to him by reason of the erection of the building, and perhaps further that he took reasonable steps in time to prevent the erection (7)". This question was considered by a Division Bench of the Calcutta High Court in *Joy chander Rakhit* v. *Bipped Surn Rukhit* (8), where the learned Judges, after considering the earlier

(1) *Guru Das Dhar* v. *Bijoya Gobinda*, 1 B. L. R. A. C. 108=10 W. R. 171.

(2) 24 W. R. 220.

(3) *Massim Mollah* v. *Panjo Ghorame* 21 W. R. 373; *Jugat chander* v. *Eshan Chander*, 24 W. R. 220 (222).

(4) *Paras Ram* v. *Sherjet*, 9 A. 661; see also *Lala Biswambhar* v. *Raja Ram*. 3 B. L. R. App. 67; *Nocury* v. *Bindabon*, 8 C. 708; *Girdhari* v. *Vilayat Ali*, A. W. N. 1885, p. 277.

(5) 8 C. 708.

(6) Vide *Sadi* v. *Anup*, 12 A. 436 (F. B.); *Nazukhan* v. *Imteazuddin*, 18 A. 115.

(7) See also *Girdhari Lal* v. *Vilayot* A. W. N. 1885, 277; *Wahid Ali* v. *Ghansham Narain*, A. W. N. 1887, 116.

(8) 14 C. 236.

rulings of their court, held that even in cases where joint land has been dealt with in an exclusive manner by one joint owner inspite of the protest of his co-owners, before a court will make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of the others should be restored to its former condition (as, for instance, where a tank has been excavated), a plaintiff must show that he has sustained by the act he complains of same injury which materially affects his position (1).

Where in a suit by certain co-owners to restrain the remaining co-owners from building on land of which the latter only were in occupation with the consent of their co-owners, the court upon an application for a temporary injunction found that the plaintiff had come before the court in proper time and that the defendants had raised the greater portion of the building since the institution of the suit and with full knowledge of the proceedings : *Held* that it was not only a proper case for granting an *ad interim* injunction restraining the defendants from proceeding further with the building, but the court might, if so desired, order the removal of the building already erected (2). In delivering the judgment the court observed : "In the case before us, therefore, *prima facie*, the defendants should not be allowed to proceed to complete the building which they have erected. But the case for the plaintiff is materially strengthened when we bear in mind the conduct of the defendants. The court of first instance found that there was good reason to hold that a substantial portion of the building had been erected after the defendants had become aware of the institution of this suit and of the application for temporary injunction. In a case of this description, the court could if necessary, proceed not only to grant a temporary injunction restraining the further erection of the building but also to direct that the building already erected might be taken down (3). In *Krehl* v. *Burrel* (4). *Jessel M. R.* said : "If with the notice of the right belonging to the plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich defendant is to be entitled to build up a house of enormous proportions at an enormous expense, and then to say in effect to the court, you will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right, that simply means that the court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would the be real result of such

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(1) In a suit for injunction against a co-owner relating to the erection of structures on the joint property, if the property is not partible, there is no occasion for the plaintiff to show any special damage. It is sufficient for him to show that he has been deprived of the uses of the property as it stood originally. *Yusaf Ali* v. *Mohomed Din*, 104 Ind. Cas. 563=28 P. L.R. 590=A. I. R. 1927 Lah. 718.

(2) *Israil* v. *Sameswar*, 18 C. W. N. 176.

(3) See also *Daniel* v *Ferguson*, (1891) 2 Ch. 27 ; *Von Jaol* v, *Hornby*, (1895) 2 Ch. 774 ; *Aynesley* v. *Glover*, L. R. 18 Eq. 544 ; but see *Curriers' Company* v. *Corbett*, 4 D. J & S. 764=2 Dr. & Sm. 355, 360 ; *Newson* v. *Pender* L. R. 27 Ch. D. 43.

(4) 7 Ch. D. 551 (554).

a decision. If I accede to this view I should add more to the number of instances which we have from the days in which the Bible was written until the present moment in which the man of large possessions has endeavoured to deprive his neighbour, the man of small possessions, of his property, with or without adequate compensation (1)."

When one of the co-owners of a *Kucha* sought to put up a *Chabutra* which would have the effect of excluding the others from using it the latter having sued for an injunction the other party denied their title, *held* that it was a proper case in which an injunction should be granted (2). But there is no such broad proposition that one co-owner is entitled to an injunction restraining another from exceeding his rights absolutely and without reference to the amount of damage to be sustained by one side or the other from granting or withholding the injunction. In a matter of injunction there is a considerable difference between a case in which the other co-owners acting with diligent watchfulness of their rights seek by an injunction to prevent the erection of a permanent building and a case where after a building has been erected at a considerable expense they seek to have it removed. Even if a case falls under the former category an injunction should not be granted unless there is ouster or other substantial injury (3). Where the parties are not divided but are only tenants in common in a house and for the sake of convenience each is in possession of some particular portion, the principles governing the court in respect of grant of injunction at the instance of one tenant in common as against the other are essentially different from those governing the courts in respect of a grant of injunction between neighbouring owners of land or houses. Where there are no materials on record from which the court can come to a conclusion whether a proper case has been made out for the grant of injunction as between tenants in common, no injunction can be granted (4). Where a co sharer is rebuilding his side of a party wall which belonged jointly to the parties encroaching upon the land of the other co-sharer to the extent of $2\frac{1}{2}$ inches in width and the suit is not one for mere mandatory injunction but for possession, the court is bound to grant a decree for possession to the extent of the co sharer's land which has been encroached upon (5).

Though an injunction against a joint owner to demolish structures built without permission on a joint land can be obtained, the granting of such injunction is discretionary. Where the applicant brings a suit after an unreasonable delay, which is deliberate and for improper motive, his conduct is

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(1) *Hemanta Kumar* v. *Barranagar*, 19 C. W. N. 442 ; *Benode* v. *Soudaminy*, 16 C. 252 ; *Dhunji bhoy* v. *Lisboa*, 13B. 253.

(2) *Alijan* v. *Mahomed Ismail*, 32 P. L. R. 694=133 Ind. Cas. 872

(3) *Akshay Kumar* v. *Bhaja Gobind*, 57 C. 665 ; *Kazim Hussain* v. *Ram Sarup*, A. I. R. 1929 A. 877 ; *Macneil & Co*, v. *Debendra Nath*, A. I. R. 1928 Cal. 293.

(4) *Visvanadham* v. *Mangamma*, 120 Ind. Cas. 737=A. I. R. 1930 Mad. 236.

(5) *Ramsarup* v. *Shambhu*, 52 A. 755 =A. I R. 1930 All. 396 ; see also *Mughli* v. *Hanwant*, 125 Ind. Cas. 57=11 Lah. L. J. 481=A. I. R. 1930 Lah. 201 ; *Amar Singh* v. *Jatmal*, 27 P. L. R. 565=99 Ind. Cas. 999=A I. R. 1926 Lah. 506 ; *Daudkhan* v. *Chandu*, 1923 B. 370.

such as to disentitle him to the assistance of the court. Injunction should be refused as it is an equitable remedy and plaintiff does not come into court with clean hands (1). If a construction made by one co-sharer over joint property is calculated to make the joint property more exclusively his, the other co-sharer can have the construction removed through court (2). Where one of the co-sharers erects substantial structures on the joint property against the wishes of the others the normal remedy of the other co-sharers is to obtain a partition but there may be circumstances in which the court would permit the demolition of the structure (3). Where a co-owner of joint land sues to have a permanent building erected on the land by another co-owner removed ; the court should weigh the amount of substantial mischief done to the plaintiff, and compare it with that which would be inflicted upon the defendant and if the balance of the convenience is in favour of the plaintiff it should insist upon the removal of the building. If however the balance of the convenience lay on the side of the defendant the court should leave the plaintiff to his remedy by partition. Where therefore a person erects, at the instance of a co-sharer, a building on joint land which is likely to cause serious inconvenience to another co-sharer as far as his enjoyment of the plot on which the construction is put up, is concerned, and the inconvenience cannot be remedied by partition, that other co sharer is entitled to a decree for demolition of the building (4).

A co-sharer has a right in every portion of the land and the other co-sharers are not entitled to build on the common land without the consent of the former. Where a co-sharer brings a suit for restraining the defendant by an injunction from building on the common land and the suit is dismissed and the defendant without waiting for the result of any appeal that might be preferred by the plaintiff built on the land ; *held* that if the plaintiff succeeded on appeal he was entitled to an injunction for demolishing the structure erected by the defendant. The defendant could not resist the claim by asking the plaintiff to sue for a partition (5). A proprietor may be restrained by his co-sharers from appropriating a vacant site to his own exclusive use by erecting a building thereon. It is not necessary for the other co sharers to prove special damage (6). Whatever the powers of the court may be in adjudicating on the rights of parties in passing injunction (or conditional injunctions) in consequence of such adjudications it is a different matter to say that where a party admittedly owns a piece of property the court has any authority to create and

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(1) *Kazim Hussain* v. *Ram Sarup*, A. I. R. 1929 A. 877.

(2) *Mukund Lal* v. *Mohan Lal*, 101 Ind. Cas 744=A. I. R. 1927 All. 518.

(3) *Gaya Prasad Singh* v. *Someswar*, 8 L. R. 13 Rev.

(4) *Parmai* v. *Mohan*, 3 O. W. N. 564=A. I. R. 1926 Oudh. 412 ; *Attar Singh* v. *Kirpa Singh*, 92 Ind. Cas. 297= A. I. R. 1926 Lah. 175 ; *Gaya Prasad* v. *Sameshwar*. 3 O. W. N. (Sup) 230,

(5) *Hayat Ali* v. *Mt. Taj-ul Nissa*. 71 Ind. Cas. 557=1923 Lah. 205.

(6) *Rustom Khan* v. *Rahman*, 1923 Lah. 289=71 Ind. Cas. 47 ; but see *Kala* v. *Kahna*, 60 Ind. Cas. 531 ; *Sheoram* v. *Mussamat Dhapan*, 2 Lah. L. J. 635= 56 Ind. Cas. 454 ; *Majju* v. *Tija Singh*, 29 P. R. 1918=44 Ind. Cas. 841.

impose conditions as to the enjoyment of the same, neither breach of contract nor the infringement of any right being alleged to have taken place. Consequently a co-sharer who had rebuilt at his expense a common wall belonging to him and the defendant, another co-sharer, cannot obtain an injunction restraining the latter from treating the half belonging to him as his property until he had paid his portion of the cost of re-building the wall (1).

Where two co-owners jointly owned a lane 10ft. in breadth and one of them put two pials and steps thereby encroaching upon the common lane and making it less convenient for the other to pass through: Held that the aggrieved co-owner is entitled to a mandatory injunction directing the removal of the obstruction (2). Plaintiff owned certain land jointly with defendant for the purpose of access of the sweeper to the privies in the house belonging exclusively to him. Defendant built a wall across the joint land so as to put an end to the uses of the plaintiff. *Held* that the defendant was not entitled to obstruct the uses of the plaintiff, and the plaintiff was entitled to an injunction directing the defendant to remove the obstruction (3). But where a co-sharer had taken possession of a small plot of unoccupied land and had erected a tin-shed thereon and it was found that by such exclusive possession his other co-sharers had not suffered any substantial injury: *Held* that no mandatory injunction should be issued requiring him to restore the land to its original condition (4).

One of several co-sharers in a *mahal* having begun to erect certain *kachcha* building upon the common land, another co-sharer, three or four days after the building had commenced, brought a suit for an injunction to restrain the continuance thereof, on the ground that the defendant was ousting the plaintiff as a co-sharer from a portion of the common land. It was found that the defendant was building upon land which was in excess of the share which would come to him on partition, and that on partition the plaintiff could not be adequately compensated. *Held* by the Full Bench that the plaintiff was entitled to a perpetual injunction restraining the defendant from proceeding further with the building and directing that the building so far as it had proceeded be pulled down, and prohibiting the defendant from building on the land as exclusive owner at any future time (5). In the above case *Edge C. J.* in delivering his judgment said: "The law provides the means by which common lands may be lawfully partitioned in a proceeding in which all the co-sharers will get their fair *quantum* of the common land, having regard to possession, quality and the amount of their shares. In this case the defendant without having recourse to the courts to give him lawful partition, proceeded to appropriate to himself lands in which each of his co-sharers had an interest, and thus he proposed to exclude his co-sharers from all use and enjoyment of a

(1) *Talib Hussain* v. *Mahomed Hussain*, 69 Ind. Cas. 526.

(2) *Varnasi Subbaya* v. *Varnasi Samaligam*, 38 M. L. J. 491=55 Ind. Cas. 643.

(3). *Debendra* v. *Surendra*, 59 Ind. Cas. 175.

(4) *Brahmomoyi* v. *Gopi Mohan*, 15 C, W. N. 188.

(5) *Shadi* v. *Anup*, 12 A. 436 (FB).

portion of common land. We need not in this case consider what a Civil Court should do if the defendant had erected at great expense buildings which a court of equity might hesitate to order him to pull down. All we have got to consider is that almost instantly on the unlawful attempt of the defendant to appropriate, and, in fact, to make partition on his own behalf, one of the co-sharers invoked the assistance of the Civil Court to prevent the defendant from interfering with his rights as a co-sharer." Mr. Justices *Straight*, *Brodhurst*, *Tyrrell* and *Mahmood* concurred with him. So one of several joint owners of land is not entitled to erect a building upon the joint property without the consent of the other co-owners, notwithstanding that the erection of such building may cause no direct loss to the other joint owners (1). The plaintiff and defendant Municipality were in joint possession of a certain piece of land. Inspite of the protests of the plaintiff the Municipality proceeded to construct on a portion of the land some houses and latrines for the use of sweepers and methars The houses and latrines were constructed during the pendency of the suit. The plaintiff's title as also possession was found but an injunction was granted limited to the removal of the latrines only. *Held* that one co-sharer has no justification to change without the consent of co-tenants the state of the possession as enjoyed by the co tenants and that the court below was wrong in thinking that the plaintiff was seeking an injunction on the ground of actionable nuisance whereas in fact the case was based on the ground of infringement of the rights of a co sharer by another co owner, and the plaintiff's remedy should not have been limited but should have been included in the whole subject matter of the suit (2).

The plaintiff, desirous of reconstructing a wall which belonged to him and to the defendant in common, approached the defendant for his consent both informally and subsequently sent him registered notice. The defendant showed hostility and did not reply to the notice. In a suit brought by the plaintiff for a declaration of his right and an injunction to restrain the defendant from obstructing the plaintiff building the wall, an objection was taken as to the maintainability of the suit; it was held that the only inference from the attitude of the defendant was that he was unwilling to give his consent, that no more evidence of open rupture or quarrel was necessary to entitle the plaintiff to maintain the suit and that an injunction ought to be granted to avoid future litigation (3). It is settled law that one co-sharer of a party wall is not entitled to raise its height without the consent or acquiescence of the others and if he does so he makes himself liable for an action for injunction or damages (4). But if a co-owner of a party wall stands

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(1) *Najju Khan* v. *Imtiaz-ud-din*, 18 A. 115.

(2) *Ashutosh Roy* v. *Rampur Boalia Municipality*, 29 C. W. N. 643.

(3) *Dodda Bachiah* v. *Bapiah*, 9 Mys L. J. 49,

(4) *Basant Singh* v. *Shiba Mal*, 107 Ind. Cas. 481=10 Lah. L. J. 7; *Shivaputrapha* v. *Shivru drappa*, 28 Bom. L. R. 708=96 Ind. Cas, 432=A. I. R. 192=6 Bom. 387; *Kanakayya* v. *Narasimpulu*, 19 M. 38.

by and suffers the building to proceed to a considerable extent, his acquiescence in the erection will be implied therefrom and in each case it is a matter for consideration whether a mandatory injunction for the demolition of the structure should be granted (1). One of two tenants in common of a party wall raised the height of the wall with a view to building a superstructure on his own tenement. The other tenant in common, who had not consented to the alteration in the wall, but had suffered no inconvenience therefrom, now sued to enforce the removal of the newly erected portion: *Held* that the plaintiff was entitled to the relief sought (2).

Altering the condition of land by a co-sharer.—Before a Court will, in case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of the other should be restored to its former condition (as, for instance, where a tank has been excavated) a plaintiff must show that he has sustained, by the act he complained of, some injury which materially affects his position (3). In delivering the judgment in the above case the Court observed: "It has been contended before us, as it has been found by the lower Courts, that the conduct of the defendant in proceeding to excavate the tank in spite of the protest in itself justifies the order passed The learned pleaders who have argued this case with great care have cited a number of cases bearing on the subject commencing from *Gurudas Dhar* v. *Bijoy Gobind Boral*, (4) and *Lala Biswambhar Lal* v. *Rajaram* (5) down to that of *Nocury Lall Chakerbutty* v. *Brindaban Chunder Chackerbutty* (6). We are also referred to a case recently decided by *Wilson* and *Porter JJ.* (Second Appeal 1164 of 1885) on the 20th of April last, *Shamnagar Jute Factory Co*, v. *Ram Narain Chatterjee* (7) in which the cases cited before us were also considered. We fully adopt the opinion expressed by the learned Judges in that case. The result of the cases cited before us seems to be in accordance with the principle laid down by *Sir Barnes Peacock* in the case of *Lala Biswambhar Lal* v. *Rajaram* (5) which is to the effect that before the Court will proceed in the manner asked by the plaintiff in this case he must show that he has sustained some injury by the act complained of. We understand the term 'injury' to mean something substantial, something that materially affects the position of the parties". "The fact that a portion of the land on which the tank was excavated was fit for cultivation does not, in our opinion, properly describe any injury of a substantial nature to the plaintiff, such as would justify the order of the lower Courts, in putting the defendant to the expense of re-filling the tank (3)" Where the injury is

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(1) *Basant Singh* v. *Shiba Mal*, 107 Ind. Cas. 481 = 10 Lah. L. J. 7.

(2) *Kanakayya* v. *Narasimpulu* 19 M. 38; *Watson* v. *Gray*, L. R, 14 Ch. D. 192; followed in *Vankatarama* v. *Vankatanarasayya*, A. I. R. 1929 Mad. 25.

(3) *Joy Chunder Rakhit* v. *Biprochurn*, 14 C. 236.

(4) 1 B. L. R. A.C. 108 = 10 W.R. 171.

(5) 3 B. L. R. Ap. 67.

(6) 8 C. 708.

(7) 14 C. 189.

remediable by partition of the joint land, the Court should not grant mandatory injunction (1). In a suit to recover possession of a share of a *talook*, on the ground that a co-sharer had dispossessed plaintiff by digging a tank, building a school-room, and manufacturing bricks for his own use, the Lower Court refused to compel the defendant to restore lands to its former state. As plaintiff had suffered no injury by what defendant had done, the High Court refused to interfere (2). In the above case *Markby J.* said: "On the other land, it has been laid down by a late Chief Justice of this Court (*Sir Barnes Peacock*) in a decision (3) which has since been repeatedly followed and adopted, that when a party asks the Court to interfere in this way between co-sharers, the Court ought not to look only at the strict legal rights of the parties, but is (as we understand the judgment) to see what is fair and reasonable between them, and if what has been done is neither unfair nor unreasonable, then whether it be in accordance with the strict rights of the parties or not, the Court has a discretion to leave the plaintiff to this strict remedy by partition or any other remedy he can maintain. In the case before us, the Courts below have decided that they will not interfere, but will leave the plaintiff to assert his rights by partition and to any other remedy which he may have.

"We think that, under the circumstances of this case, the Courts below were justified in taking this view As regards the use of the soil for brick making, the complaint of the plaintiff seems to us to be altogether frivolous. The bricks were made upon a piece of chur land near the river, and no injury to the plaintiff whatsoever is shown to have occurred thereby. It is not even alleged that the plaintiff wished to apply the land to any other purpose; or that its value is lessened by what has been done; it is only said that the appearance of the land is changed. As to the school house, that also is not said to be in any way injurious to the plaintiff, or that he requires the land occupied by it to be put to any other use, The school appears to have been built for the benefit of the neighbour-hood, and it seems very unreasonable for the plaintiff, unless he requires the land for some useful purpose, to insist on its being pulled down. We do not feel called upon to assist him in doing so.

"With regard to the tank and garden, the case of the plaintiff is perhaps of a somewhat more substantial character; the extent of ground which these cover is probably not altogether inconsiderable, and there has been something like a permanent appropriation of the property to the defendant's own purposes. Still the plaintiff does not allege that he has been excluded from this part of the land, or that he desires to appropriate it to any other purpose, and that he has been prevented from doing so. In fact, after all, this plot of land is only a very small portion of the *talook* and it is close to the defendant's house, the tank being in the outer compound of his *bari*. The plaintiff was also certainly slow

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(1) *Paras Ram* v. *Sherjit*, 9A. 661; *Chunder*, 24 W R. 80. *Joychunder* v. *Bipro Churn*, supra.

(2) *Mohima Chunder Ghose* v. *Madhub*

(3) *Lala Biswamber* v. *Rajaram*, 3 B. L. R. App. 67 (80) *per Peacock C. J.*

in asserting his rights, for he admits that he was aware of these excavations being made in 1276, whereas this suit was not brought until 1280. Under all the circumstances we are not prepared to say that the Courts below did not do right in refusing to compel the defendant to do that which the plaintiff asks in his plaint, namely to restore the land to its former state by fiilling up the tank and excavations at the defendant's expenses. We do not see that the plaintiff has suffered any injury by what has been done, and we are strongly inclined to think that his conduct is in reality, merely vexatious."

So where in an ijmali land one co-sharer excavates a tank and there is no proof of any injury caused thereby to the property, the other co-sharer has no right to have the tank filled up or the land restored to its former condition, but he is entitled to a declaration of title to the extent of his share (1). Where one of two co-owners of a lane constructs a drain in it no injunction can be issued restraining him from doing so at the instance of the other, unless the latter proves the construction of the drain to be a nuisance to him (2).

A, B and C are members of an individual Hindu family. A cuts timber growing on the family property and threatens to destroy part of the family house and to sell some of the family utensils. B and C may sue for an injunction to restrain him (3).

Delay—In a suit for perpetual injunction directing defendants to remove an encroachment made on common land, it is for the plaintiff to prove that the encroachment was made within six years before suit and a mere surmise by the court that the encroachment is recent is insufficient for holding that it took place within six years (4). Where plaintiff co-sharer sought demolition of structure over a party wall, the relief was refused at the suit brought eight years after the structure was built (5). No individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers at the time of partition. To restrain a co-sharer from appropriating a portion of the common land, it is not necessary to give proof of special damage, but the suit must be brought without delay and before the defendant has erected substantial buildings on the land (6).

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(1) *Atarjan* v. *Shaikh Ashak*, 4 C. W. N. 788.

(2) *Logambal* v. *Vaithinatha*, 30 Ind. Cas. 768.

(3) Section 54 of the Specific Relief Act, illustration (*n*)

(4) *Chanddu* v. *Gajju*, 26 P. L. R. 283=7 Lah. L. J. 228=88 Ind. Cas. 176.

(5) *Ata Mahomed* v. *Nur Ahmed*, 89 Ind. Cas. 746=A. I. R. 1925 Lah. 642.

(6) *Manji* v. *Ghulam*, 1 Lah 249=57 Ind. Cas. 207.

CHAPTER XIV.

Injunction to prevent the violation of contracts.

Law of contracts.—The Indian Contract Act does not profess to be a complete code dealing with the law relating to contracts (1). It purports to do no more than to define and amend certain parts of the law (2). Originally it consisted of eleven chapters only which dealt with the following subjects, namely, (*i*) contract in general under several heads ; (*ii*) the contract of the sale of goods ; (*iii*) the contract of Indemnity and Guarantee ; (*iv*) the contract of Bailment ; (*v*) the Contract of Agency ; and (*vi*) the Contract of Partnership (3). Now the Chapters dealing with sale of goods and contract of Partnership have been repealed by the Indian Sale of Goods Act (4) and the Indian Partnership Act (5). "These contracts were chosen from the subject of the Act, because they are of the commonest occurrence. If an attempt had been made to include within this Act provisions as to every kind of contract on which legal decisions have been given, the Act would have been of the most unwieldy dimensions, and would have contained a good deal of matter which would probably have been of very little practical use to Judges and suitors. The framers of the Indian Contract Act carefully considered the provisions of the Draft New York Civil Code (on the subject of obligation) and adopted several of its provisions, but they have also omitted several principal matters contained in that Code. The principal matters omitted are :—Shipping Contracts, Trusteeship ; Insurance ; Contracts by Carriers ; Mortgage ; Bills of Exchange and the whole subject of Relief. (6)" So "the Act only lays down certain general rules, which in the absence of any special contract, or usage to the contrary, are binding on contracting parties. But it could never have been intended to restrain free liberty of contract as between man and man, or to invalidate usages or custom which may prevail in any particular trade or business" (7). More over other Acts contain many provisions of the law of contract in British India. The chief among them is the Transfer of Property Act (IV of 1882) which deals with 'the rules relating to the assignment by operation of law of obligations on the transfer of land, to sale, mortgage and lease of immoveables : to exchange and gift of every kind of property and to the assignment of contractual rights not comprised in the Negotiable Instruments Act (XXVI of 1881) " (8). The second in importance is the Negotiable

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(1) Codification in British India p. 238.
(2) Preamble to the Indian Contract Act.
(3) Codification in British India p. 238.
(4) III of 1930.
(5) IX of 1932.
(6) Codification in British India p. 239
(7) *Per. Sir Richard Garth C. J.* in *Moothora* v. *I. G. S. N. Co.* 10 C. 166 (185). See also *The Irrawaddy Flotilla Co.* v. *Bhugwan das*, 18 C. 620 ; *Kanhaya-Lal* v. *Chunder*, 7A. 313 ; *Kuverji* v. *G. P. Roy*, 3 B 113.
(8) Codification in British India p. 242

Instruments Act (XXVI of 1881) which "codifies the rules relating to the assignment of contractual rules relating to the assignment of contractual rights, not comprised in the Transfer of Property Act (1)." These Acts are to be supplemented by the various Acts relating to trusts, contracts with carriers, contracts between master and servant, contracts for professional services and contracts relating to Insurances, etc. The Indian Contract Act was mainly based upon English Common Law and equity doctrine as understood sixty years ago. The framers of the Act in elaborating the original draft also borrowed from the New York draft Civil Code (2). The chapters and sections of the Transfer of Property Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872 (3). The Law of contracts specially affecting land-sales, mortgages, leases and other forms of alienation of immoveable property—is dealt with in the Transfer of Property Act (IV of 1882) without however any modification of the general principles laid down in the Indian Contract Act (4).

Agreement must be a valid contract.—Nothing in the Specific Relief Act, shall be deemed to give any right to relief in respect of agreement which is not a contract (5). Every promise and every act of promises, forming the consideration for each other, is an agreement (6). An agreement which is enforceable by law is a contract (7). All agreements are contracts if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void by the Indian Contract Act (8). An agreement not enforceable by law is said to be void (9). An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract (10). The same reasons exist for not granting a perpetual injunction, or, if temporary injunction has already been granted, for dissolving it, where upon the pleadings or upon evidence introduced at the hearing there remain substantial doubts as to what are the terms of the contract the violation of which it is sought to enjoin, as when the validity of the contract is doubtful (11). It is a well settled principle governing the remedy by injunction that it will not ordinarily be granted to restrain violation of contracts concerning the legal validity of the terms of which there is a dispute, and concerning which upon the bill and the answer there are serious doubts (12). Accordingly an agreement not to enter into a certain business will not be enforced by preliminary injunction, at the suit of the assignee of the covenantee, where the defendants are abbundantly solvent, and there is doubt whether the agreement, being in general restraint of trade, is valid whether it is supported by an adequate

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(1) Codification in British India p. 242
(2) Sir Frederick Pollock's Contract Act, 1st Ed. Preface.
(3) Vide s. 4 of T. P. Act. (IV of 1882)
(4) Cunningham and Shephard's Indian Contract Act Preface.
(5) Specific Relief Act s. 4.
(6) The Contract Act, s. 2 (e).
(7) Ibid s. 2 (h).
(8) Ibid s. 10.
(9) Ibid s. 2 (g).
(10) Ibid s. 2 (i).
(11) Spelling on Injunctions etc. § 482.
(12) *Morris* v. *Society*, 6 N. Y. S. 474.

consideration ; and whether it is assignable (1). So also it was held that an agreement to "never tow vessels in competition" with complainants or either of them, was too uncertain and indefinite to be enforced by injunction, since every case of alleged violation would involve the consideration of the questions of fact, depending on peculiar circumstances of each case, whether there was in fact any competition, whether complainants at the time were furnishing sufficient facilities, and what ought to be considered sufficient facilities (2). An injunction was refused where it appeared that there was not in fact the contract alleged, but only an agreement to negotiate for a contract (3). "If the bill or other pleading of the applicant discloses a contract void for illegality or other reason, the invalidity need not be shown by answer, and can be reached by demurrer. It is however, well to note that courts are peculiarly reluctant to enforce contracts affecting real estate which are either tainted with fraud, or inequitable for any reason. A Court of equity will not specifically enforce hard and unconscionable bargains, or cases where fraud or mistake is established, or in any case where a decree for specific performance would in its operation be inequitable in all the circumstances (4)"

Void agreement.—Where both the parties to an agreement are under a mistake as to matter of fact essential to the agreement, the agreement is void. An erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact (5). But "the courts' said *Chancellor Kent* "do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind (6)." Every agreement of which the object or consideration is unlawful is void. In each of the following cases, the consideration or object of an agreement is said to be unlawful, namely (i) where it is forbidden by law; or (ii) where it is of such a nature that, if permitted, it would defeat the provision of any law ; or (iii) where it is fraudulent ; or (iv) where it involves or implies injury to the person or property of another ; or (v) where the court regards it as immoral, or opposed to public policy (7). An agreement made without consideration is also generally void (8). But there are three exceptions to this rule :—

(i) When the agreement is one made between near relations out of natural love and affection, and is in writing and registered ;

(*ii*) When the agreement is to compensate a person who has already done something voluntarily for the person making the promise, or something which the person making the promise was legally compellable to do ;

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(1) *American Preservers Co.* v. *Norris*, 43 F. 711.

(2) *Caswell* v. *Gibbs*, 32 Mich. 331.

(3) *Metropolitan Exhibition Co*, v. *Ewing*. 42 F. 198.

(4) Lewis & Spelling on Injunction § 131.

(5) The Indian Contract Act s. 20

(6) Cited in Story's Eq. Jur. note to § 126 ; cited in Cunningham & Shephard's Contract Act p. 98 ; see also *Vishnu* v. *Kashinath*, 11 B. 174 ; Section 21 of the Indian Contract Act.

(7) Indian Contract Act s. 23.

(8) Ibid s. 25.

(*iii*) When the agreement is to pay a debt barred by limitation, but otherwise enforceable, and is made in writing and signed by the party to be charged or his agent (1).

Every agreement in restraint of the marriage of any person, other than a minor is void (2). Subject to certain exceptions mentioned in s. 27 of the Indian Contract Act, every agreement by which one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void (3). So also, subject to two exceptions mentioned in section 28 of the Indian Contract Act, agreements in restraint of legal proceedings are also void (4). Agreements, the meaning of which is not certain, or capable of being made certain, are void (5). Subject to an exception an agreement by way of wager is also void (6).

Voidable Contract—The expression "voidable" is like the expression 'void' used with reference to cases in which the contract is defective in its origin as well as those in which owing to some subsequent circumstance it ceases to be enforceable by one party (7). When consent to an agreement is caused by coercion, undue influence, fraud or mis-representation, the agreement is a contract voidable at the option of the party whose consent was so caused (8). Where a party to a contract has refused to perform or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct his acquiescence in its continuance (9). When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented (10). Where a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract (11). In order to resist an action for specific performance it is not necessary for the defendant to make out that the agreement is void. It is quite enough for his purpose that the agreement is voidable, that is, enforceable at his and not at the plaintiff's option (12). The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. It must be, in general, mutual in its obligation and in its remedy (13). It may be said as a general proposition, that where a contract was intended to bind both the parties, and for any reason one of them is not bound, he cannot compel performance by the other (14). So a contract which

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(1) Indian Contract Act s. 25.
(2) Ibid s. 26.
(3) Ibid s, 27.
(4) Ibid s. 28.
(5) Ibid s. 29.
(6) Ibid s. 30
(7) Cunningham and Shephard's Contract Act p. 19.
(8) Indian Contract Act s 19.
(9) Ibid s. 39,
(10) Ibid s, 53.
(11) Ibid s. 55.
(12) Banerjee's T. L. L. for 1906 p. 211.
(13) *Bromly* v. *Jeffries*, 2 Vern. 415.
(14) Pomeroy's Equity Jurisprudence § 1405.

is voidable cannot be specifically performed (1). On the other hand, if the party at 'whose instance a contract is voidable, elects to stand by the contract, he has the same rights on the contract, as he would have if it were not voidable and if the contract is voidable on the ground of fraud, he may also be entitled to damages for the fraud (2). A transaction voidable on the ground of undue influence may be confirmed and rendered unimpeachable by acts of confirmation or acquies.ence on the part of the person who could have avoided it (3). Fraud is said to be waived by a person who, after discovery of it, insists on performance of the contract, or performs his part of it, or takes any benefit under it, or generally acts as if it were still a subsisting and a valid contract (4). In *Flight* v. *Bolland* (5) it was held that an infant could not maintain a suit for specific performance of a contract, the remedy not being mutual, and it being a general principle of Courts of Equity to interfere only where the remedy is mutual: "The principle would seem to be an illustration of the judicial discretion to which the remedies of a Court of equity are subject. viz., that a defendant ought not to be harassed with litigation founded on agreement which he could not enforce against the plaintiff" (6).

Breaches of contract and Remedies.—The remedy for a breach of contract at common law is personal only; the sole redress which it affords to a disappointed party is damages. Consequently, as far as the common law remedy is concerned, it is open to a contracting party either to perform the contract or to pay the damages, and to choose between these two courses at his pleasure. Equity, on the other hand, has regarded such a remedy as in many case inadequate; and deeming a contracting party bound in conscience to do exactly what he has agreed to do, has exercised its authority to compel specific performance of such agreements (7). A court of equity also grants ancillary and provisional remedies by interpleader and receivers. It also relieves the party by the establishment or protection of their interests; estates and primary rights It accomplishes this object indirectly by reformation or re execution of instruments (8), and recession (9), cancellation (10), surrender-up, or discharge of instruments (11). A court of equity also grants preventive remedies. "Preventive remedies, are those by which a violation of a primary right is prevented before the threatened injury is done, or by which the further violation is prevented after the injury has been partially effected, so that some other relief for the wrong actually accomplished can be granted. The ordinary injunction, whether final or preliminary, is a familiar example of this class; the mandatory injunction is essentially a restorative remedy" (12).

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(1) *Jogulkishore* v. *Anundalal*, 22 C. 545 (550)

(2) Cunningham and Shephard's Contract Act p. 91.

(3) Ibid p. 94.

(4) Cunningham and Shephard's Contract Act p. 93; See also *Campbell* v. *Flemming*, 1 A & E. 40; *Brigg's Case*, L. R. 1 Eq. 483.

(5) 4 Russ. 298.

(6) 2 Dart V & P. 1064 cited in T. L. L. for 1906 p. 350.

(7) Smith's Principles of Equity p. 668.

(8) Act I of 1877, Ch. III.

(9) Ibid Ch. IV.

(10) Ibid Ch. V.

(11) Pomeroy's Eq. Jur. § 1425.

(12) Pomeroy's Equity Jur. § 1424.

Injunction to prevent the violation of contracts—An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules (1); and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit (2). Where the agreement stipulates that certain acts shall not be done, an injunction preventing the commission of those acts is evidently the only mode of enforcement; but the remedy of injunction is not confined to contracts whose stipulations are negative (3); it often extends to those which are affirmative in their provisions, where the affirmative stipulation implies a negative. The universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs (4).

Controlling principles—The injunction is here used indirectly as a means to an affirmative end though the judicial edict is negative, or rather prohibitive in form. The real basis of the jurisdiction in most cases under this head was the fact that there were many contracts for the violation of which a court of law would have furnished, is some cases a nominal, and in still a larger number of cases a wholly inadequate remedy. More formally stated, the injunctive remedy to prevent breach of contract is a specific enforcement of it, negatively, the test of the jurisdiction being whether or not the legal remedy for damages is adequate. The broad rule and its limitation is thus admirably stated: "The universal test of the jurisdiction of a court of equity to restrain the breach of a contract is the inadequacy of the legal remedy for damages. An injunction to prevent the breach of a contract is a negative enforcement of that contract; and the jurisdiction of equity to grant such an injunction is substantially coincident with its jurisdiction to compel a specific performance of an affirmative decree. In either case, a court of equity cannot exercise jurisdiction unless the injury apprehended from a violation of the contract is of such a nature as not to be susceptible of adequate damages at law (5)." The corollary to the broad principle as thus stated is that where there is an adequate remedy at law for the breach of a contract, a court of equity will not, with rare exceptions, lend its aid by injunction to restrain a breach. Another cardinal rule on the subject is that the applicant for equitable aid to prevent a breach

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(1) "When such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II of this Act" Vide s. 54 of the Specific Relief Act.

(2) "Injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced." Vide s. 56 (f) of the Specific Relief Act.

(3) *Montague* v. *Flockton*, L. R. 16 Eq. 189; *Manchester Canal* v. *Manchester Race Course Co.*, (1901) 2 Ch. 37.

(4) Pom. Eq. Jur. §§ 1331, 1691.

(5) Per Andrews C. J. in *Dills* v. *Doefler*, 62 Conn. 366.

of contract by the other party thereto must have performed his part of the contract so far as possible. This is but an application of the well understood "clean hands" rule (1). Equitable jurisdiction to restrain the violation of contracts is usually based upon the necessity of protecting legal rights, and preventing fraudulent abuse of the rights of parties, and preventing irreparable injury. Super-added to one or more of these will often be found the prevention of a multiplicity of actions, as an additional ground for injunction. But equity will not, as a rule restrain the prosecution of suits at law merely to prevent multiplicity of suits, without regard to other considerations. Injunction will only be granted where the terms of the contract are free from doubt or are not disputed, and a violation cannot be compensated for by damages in law. Nor can the remedy be perverted so as to compel specific performance of positive stipulations. In other words, injunction will not be granted to restrain defendant from refusing to perform a contract (2). The remedy by way of specific relief, for affirmative covenants are enforced by specific performance (3).

Temporary Injunction a d breaches of contract.—In any suit for restraining the defendant from committing a breach of contract or other injury of *any kind*, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right (4). Temporary injunction to restrain the breach of a contract are regulated by Order 39, rule 2 of the Civil Procedure Code. Perpetual injunctions to prevent the breach of a contract are regulated by the Specific Relief Act, 1877, ss. 54, 56 (f) and 57. Section 56 (f) of the Specific Relief Act lays down that a perpetual injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. A contract for the non-performance of which compensation in money is an adequate relief cannot be specifically enforced (5). So a perpetual injunction in not obtainable where damages are proper remedy (6). Generally speaking temporary and perpetual injunctions are governed by the same principles (7). In issuing temporary injunctions the court should be guided by the rules laid in Chapter III (8). "If a suit is brought for specific performance of a contract and for an injunction to restrain the defendant from committing a breach of the contract and the plaintiff applies for a temporary injunction to prevent the breach of the contract until the suit is disposed of,

(1) Lewis and Spelling on Injunctions § 127.

(2) Spelling on Injunctions and other Extra-ordinary Remedies § 468.

(3) Woodroffe's Injunction p. 214.

(4) C. P. Code Order 39 rule 2 (i). By this new rule the ruling in *Dorab Kuar* v. *Gounti Kuar*, 22 A. 449 has been made obsolete.

(5) S. R. Act s. 21 (a).

(6) *London and Blackwell Ry* v. *Cross*, 31 Ch. D. 354 vide p. 143 Supra.

(7) *Nusserwanji* v. *Gordon*, 6 B. 266 ; *Bishnu* v. *Sashi*, 73 Ind. Cas. 294=2 Pat. L. R. 17 ; but see *Suba* v. *Haji* 26 M. 168.

(8) Vide pp. 65 130.

the court will decline to grant a temporary injunction if the plaint and the affidavit filed by the parties show on the *face of them* that the case is not one for a perpetual injunction or for specific performance (1)". The defendant entered into an agreement with the plaintiff in England, to exclusively serve their company in India for a period of four years, binding himself under a penalty in money, for the due performance of the agreement. Plaintiffs alleged that the defendant had absented himself and that in violation of the terms of the agreement, he was doing work for some third person in Madras. They instituted a suit for an injunction against the defendant and for damages for breach of his agreement and sought an *interim* injunction against the defendant's serving elsewhere, pending the disposal of the suit. The defendant was not justified in rescinding the contract under s. 39 of the Contract Act, on the ground of unfair treatment by the superior. Plaintiffs were entitled to the injunction sought for by them. The company could not be adequately compensated by means of pecuniary damages for the defendant's breach of contract. Though the contract may not be capable of specific performance by reason of section 21, cl (g) of the Specific Relief Act, as one extending over more than three years, that could not prevent its being the subject of an injunction. Section 57 of the Act provides that in the case of an affirmative agreement coupled with a negative agreement express or implied, an injunction may be granted though the specific performance could not be. Nor was the provision, in the agreement itself, for a penalty for its non-performance, a bar to the grant of relief by way of injunction, the principle in section 20 of the Specific Relief Act being applicable to the case of injunction as well. The case was regarded as one fit for the interference of the court by way of *interim* injunction; restraining the defendant from serving any person other than the plaintiffs, which was granted on condition that the latter should take him back into their service and continue to retain him, pending the disposal of their suit (2). Where the consequence of the violation of a contract upon showing made by the bill would if permitted be serious and irreparable, a temporary injunction will usually be granted in the first instance, pending a determination of the controverted issues made by the answer (3). An order for temporary injunction under Order 39, rule 2 of the Code of Civil Procedure Code can be sought only in aid of the prospective order for a perpetual injunction. If therefore in the event of the plaintiff's success, he cannot obtain a decree for perpetual injunction, it is not competent for him to ask for temporary injunction during the pendency of the suit. In granting a temporary injunction, the Court acts in aid of the legal right, so that the property may be preserved in *statu quo* (4). It is open to a

(1) Mulla's C. P Code notes under Order XXXIX, rule 2 ; see also *Bhikaji* v. *Bapu Saju*, 1 B. 550 ; *Haji Abdul* v. *Haji Abdul*, 6 B. 5 ; *Nusserwanji* v. *Gardon*, 6 B 266. *Assur* v. *Ratnabai*, 13 B. 56 ; *Ganput* v. *Rajon Koar*, 1 C. 74.

(2) *Madras Ry. Co.* v. *Rust*, 14 M. 18 ; see also *Burma Oil* v. *Sampson*. 64 Ind. Cas. 534=13 Bur. L. T. 227.

(3) Spelling on Injunctions § 485.

(4) *Jit Lal Singh* v, *Raja Kamaleswari Prosad*, 16 C. L. J. 555=15 Ind. Cas. 614 ; *Promotho* v. *Jagannath*. 17 C. L. J. 427.

Court acting under this rule to issue temporary injunctions in a mandatory form pending the disposal of a suit (1). Where one party to a contract alleges a breach and refers the matter to arbitration and the other party brings a suit for a declaration that he is not liable upon the contract, then if the existence of the contract itself is denied, no temporary injunction should be granted restraining the arbitration proceedings but if the contract is impeached on the grounds of equity such as fraud or misrepresentation, a temporary injunction should ordinarily be granted (2). The Court refused an injunction restraining the defendant from proceeding to arbitration where an action had been brought impeaching the instrument containing the agreement for reference, on the ground that the contracts were wagering contracts (3). In dealing with an interlocutory application for an injunction the Court must be governed by considerations as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction, and the burden lies on the plaintiffs as the persons applying for the injunction, of showing that their inconvenience exceeds that of the defendants. The plaintiff must be able to show that an injunction until the hearing is necessary to protect him against irreparable injury and by the term "irreparable injury" is meant, substantial injury which could never be adequately remedied or attenuated for by damages (4). Plaintiffs advanced money to the defendants for the purpose of carrying on work in certain mica mines, in pursuance of an agreement by which defendants undertook, in consideration of the advance, to send all the mica produced from the mines to plaintiffs and bound themselves not to send any of it to any firm other than the plaintiff's or to keep it in stock. Plaintiffs now complained that defendants had, in breach of their agreement, arranged to consign, and had already made consignments of mica to another firm and were keeping mica in stock. Plaintiff filed a suit for specific performance and for an injunction restraining defendants from acting in violation of the terms of the agreement ; a temporary injunction was subsequently applied for and obtained. Upon an appeal being preferred by defendants against the order granting the temporary injunction : *Held* that the injunction was rightly granted (5). A temporary injunction *pendent lite* will not be granted unless the plaintiffs have a good *prima facie* case and unless there is a risk of irreparable injury being caused if the injunction is not granted (6).

In granting or refusing to grant a temporary injunction a Court has a wide discretion under Order 39 rule 2. The exercise of that discretion should be

(1) *Kandaswami* v. *Subramania*, 6 L. W. 140=(1917) M. W. N. 501=33 M. L. J. 448 ; see also 41 C. 436 ; 16 Bom. L. R. 556.

(2) *Firm of Sohanlal* v. *Jai Narain*, 54 Ind. Cas. 546 ; see also *Sardarmull* v. *Agar Chand*, 52 Ind. Cas. 588=23 C. W N. 811 ; *Gojanand* v. *Jalal*, 22 C. W. N. 545=46 Ind. Cas. 988 ; *Manohar* v. *Jai Narain*, 2 Lah. L. J. 283=55 Ind. Cas, 403.

(3) *Firm of Kirpaldas* v. *Firm of Gajan mal*, 15 S, L. R. 5=70 Ind Cas, 864.

(4) Ibid.

(5) *Subba Naidu* v. *Haji Badsha*, 26 M. 168.

(6) *Board of Trustees* v. *Ahmed Nabi*, A. I. R. 1933 Lah. 621.

in a judicial manner ; depending upon the circumstances of each case **If a** Court grants or refuses to grant a temporary injunction on the ground of balance of convenience, it is not correct to say that the discretion has been exercised otherwise than judicially only because the Court of revision thinks that it would have passed a different order in the circumstances of the case (1). Where the breach of contract has already taken place and there is no prayer in the suit to restrain the defendant from committing any other injury but the suit is one for specific performance of the alleged contract, order under s. 151 can be passed. The Court has inherent power to act *ex debito justitae* even in cases not covered by the provisions of the Code (2). Where there is no danger of any irreparable injury and the plaintiff can be easily compensated by the award of damages a Court has no power to grant any injunction in the exercise of inherent jurisdiction. The fact that the defendants had disobeyed the temporary injunction issued at the commencement of the suit is no justification for the grant of the injunctions (3).

Perpetual Injunction in cases of breaches of contract—Under Chapter X of the Specific Relief Act, perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of the Specific Relief Act, which deals with Specific Performance of Contract (4). The Court may grant perpetual injunction where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion (5), or where the invasion is such that pecuniary compensation would not afford adequate relief (6) or where it is probable that pecuniary compensation cannot be got for the invasion (7). In such cases a perpetual injunction may be granted by the Court subject to the rules laid down in Chapter IV (8). But an injunction cannot be granted to prevent the breach of a contract ; the performance of which can not be specifically enforced (9).

Cases in which specific performance is enforceable—"Except as otherwise provided in Chapter II of the Specific Relief Act, the specific performance of any contract (10) may in the discre-

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(1) *District Board of Farukhabad* v. *Ikhlaque Husain*, A I. R. 1933 All. 86.

(2) *New Delhi Theatres* v. *Kailash Chand*, A. I. R. 1933 Lah. 73=140 Ind. Cas. 843=A. I. R. 1933 Lah. 73 ; see also A. I. R. 1920 Lah. 436 ; A. I. R. 1926 Lah. 144 ; A. I. R. 1927 Lah. 833.

(3) *New Delhi* v. *Kailash Chandra*, *supra*

(4) Specific Relief Act s. 54.

(5) Vide p. 142 supra.

(6) Vide p. 143 supra.

(7) Section 54 of the Specific Relief Act and p. 143 supra.

(8) Vide p. 131 supra.

(9) Specific Relief Act s. 56 (f)

(10) A Court will not enforce a contract, which is uncertain or vague (*Hyam* v. *Gubboy*, 20 C. W. 66 ; *Kemble* v. *Keen*, 6 Sim. 337 ; *Low* v. *Innes*, 4 De G J & S. 288 ; *Davies* v. *Davies*, 36 Ch. D. 359 ; *Murray* v. *Dunn*, (1907) A. C. 289 ; *Douglas* v. *Baynes*, (1908) A. C. 477 ; Here the word contract means completed contract (*Koylash* v. *Tariney*, 10 C. 588 ; *Hyam* v. *Gubboy*, 20 C. W. N. 66 ; *Hartzfildt* v. *Alexander*, (1912) 1 Ch. 284 ; *Ridgway* v. *Wharton*, 6 H. L. C. 268 ;

tion (1) of the Court be enforced—

(*a*) When the act agreed to be done is in the performance, wholly or partly, of a trust (2) ;

Ressiter v. *Miller*, L. R. 3 App. Cas. 1124. "The contract to be specifically enforced must as a general rule, be mutual,—that is to say, such that it might at the time it was entered into, have been enforced by either of the parties against the other". Fry on Specific Performance, 3rd. Ed. 215 ; Pomeroy's Eq. Jur. § 2191 ; see also *Wylson* v. *Dunn*, 34 Ch. D. 569 (576). "Whenever the contract was intended to bind both the parties, and for any reason one of them is not bound, he cannot compel performance by the other". Pomeroy's Specific Relief s. 240 ; *Measure Brothers* v. *Measure Brothers*, (1910) 2 Ch. 240 ; Banerjee's T. L. L. p. 350. According to Dr. Banerjee the want of mutuality to be fatal must exist at the time the act is brought and not at the time it is executed. Banerjee's T. L. L. for 1906 p 351 ; *Hawkes* v. *Eastern Counties Ry Co*, 1 De G M & G. 735, 755. (1855) 5 H. L. C. 331, 365. The doctrine of mutuality is not inapplicable in this country. *Abdul Haque* v. *Yehiakhan*, A. I. R. 1924 Pat. 82 (84) ; *Sarwarjan* v. *Fakuruddin*, 39 C. 233 (P. C). But the doctrine of mutuality is open to so many exceptions that it is of little value as a rule (Pomeroy's Eq. Jur. § 1405 note 3). The contract must be upon a valuable consideration. Moreover the contract must be free from any fraud, mis-representation even though not fraudulent, mistake or illegality (Pom, Eq. Jur. § 1405) It must not be against public policy [*Woodward* v. *Battersea Corporation*, (1911) 104 L. T. 51 ; *Neville* v. *Dominion of Canada News Co*, (1914) 31 T. L. R. 84, 542]. The elements which peculiarly affect the equitable character of the agreement and of the remedy are the following : The contract must be perfectly fair, equal, and just in its terms and in its circumstances. The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive. Pomeroy's Equity Jur. § 1405). A minor cannot contract (*Mohori* v. *Dharmo*, 30 C. 539 P. C=7 C. W. N. 441). He cannot enforce specific performance of a contract on attaining majority. *Sarwarjan* v. *Fakuruddin*, 39 C. 232 ; see also *Narayana* v. *Muthia chetti*, 47 M. 692 ; *Molla* v. *Sharif*, A. I. R. 1927 Lah. 355 ; *Srinath* v. *Jatindra*, 30 C. W. N. 263.

(1) When the contract is otherwise enforceable, "the right to its specific performance is not absolute, like the right to recover a legal judgment. The granting the equitable remedy is, in the language ordinarily used, a matter of discretion, not of an arbitrary, capricious discretion, but of sound judicial discretion controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. This is the ordinary language of the judges and text-writers (*Radcliff* v. *Warrington*, 12 Ves. 326, 332 ; *Joynes* v. *Statham*, 3 Atk. 338 ; *Underwood* v. *Hitchcox*, 1 Ves. Sr. 279). The term 'discretionary' as thus used, is in my opinion, misleading and inaccurate. The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions, and incidents which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions and incidents exist, the remedial right is perfect in equity. So far as these essential elements and conditions do not relate to the existence of contracts binding in equity, they are nothing but expressions and applications of the fundamental principles, he who seeks equity, must do equity, and he who comes into equity must come with clean lands.' (Pomeroy's Eq. Jur. § 1404) ; see also *Guruswami* v. *Ganapati* 5 M. 337.

(2) "The remedies belonging to the class are suits to enforce express trusts, either private or charitable, suits to enforce resulting or constructive trusts by compelling a conveyance of the legal title ; suits against persons in fiduciary relations ; suits against administrators ; or suits against corporations and their managing officers." Pomeroy's Eq. Jur. § 1411. *Illustration* : A holds certain stock in trust for B. A wrongfully disposes of the stock. The law creates an obligation on A to restore the same quantity of stock to B and B may enforce

(b) When there exists no standard for ascertaining the actual damage caused by non-performance of the act agreed to be done (1).

(c) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief (2); or

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specific performance of this obligation. [Vide s. 12, Illustration to clause (a)].

(1) "Where, however particular chattels have some special value to the owner over and above any pecuniary estimate,—the *pretium affectionis*—and where they are unique, rare, and incapable of being reproduced by money damages equity will decree a specific delivery of them to their owner and the specific performance of contracts concerning them." Pomeroy's Eq. Jur. § 1401. "This class includes (*i*) Articles of special value to their owner, but of no general pecuniary value; and (*ii*) Articles of such great rarity and value that they cannot be replaced by money,—paintings, statutes, etc. The jurisdiction will be exercised to compel their delivery by one who wrongfully detains them, or to compel the specific execution of a contract for their sale or delivery." *Ibid note.* As illustration, see illustration to clause (b). A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare china vases. A may compel B specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance. See also *Pusey* v. *Pusey*, 1 Vern 273 (an ancient horn); *Duke of Somerset* v. *Cookson* 3 P. Wms. 389 (an antique silver patera), *Fells* v. *Read*. 3 Ves 70; *Lloyd* v. *Loaring* 6 Ves. 773; *Nut brown* v. *Thornton*, 10 Ves. 159, 161, 163; *Wallwyn* v. *Lee*, 9 Ves. 24, 33; *Saville* v. *Tankered*, 1 Ves. Sr. 101; *Wood* v. *Rowcliffe*, 3 Hare 304; *Lady Arundell* v *Phips*, 10 Ves. 139; *Lowther* v. *Lord Lowther*, 13 Ves. 95; *Pearne* v. *Lisle*. Amb 75, 77; *Falcke* v. *Gray*, 4 Drew. 65, (rare works of art). Analogous to this jurisdiction and for the same reasons, equity will decree the delivery up to the lawful owner of deeds and other written muniments of title. *Brown*. v. *Brown* 1 Dick. 62; *Tanner* v. *Wise*, 3 P. Wms. 294, 296; *Duncombe* v. *Mayer*, 8 Ves. 320; *Freeman* v. *Fairlie*, 3 Mer. 29. 30; *Reece* v. *Trye*, 1 De. Gex. & J 273; *Lady Bresford* v. *Driver*, 14 Beav. 387; 16 Beav. 134; *Turner* v. *Letts*, 20 Beav. 121; Pomeroy's Eq. Jur. 1402.

(2) When: in regard to a breach of contract the Court finds that a compensation in money afford adequate relief, it cannot, having regard to the provisions of sections 12 (*c*) and 21 (*a*) of Specific Relief Act decree specific performance. *Ramji Patel* v. *Rao kishore Singh*, 33 C. W. N. 893 P. C. *Illustrations*: (*i*) A contracts with B to sell him a house for Rs. 1,000. B is entitled to a decree directing A to convey the house to him, he paying the purchase money. (*Adderly* v. *Dixon*, 1 Sm. & St. 607).

(ii) In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway company contracts with Z to make an archway through their railway to connect lands of Z severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf, as specified in the contract. Z is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money; and the court may appoint a proper person to superintend the construction of the archway, road, siding and wharf. (*Storer* v *G. IV. Ry. Co.* (1842) 2 Y & C. Ch. 18, 53).

(iii) A contracts to sell and B contracts to buy, a certain number of railway shares of a particular description. A refuses to complete the sale. B may compel A specifically to perform this agreement, for the shares are limited in number and not always to be had in the market; and their possession carries with it the status of a share holder, which cannot otherwise be procured. (*Doloret* v. *Rothschild*, 1 Sim & Stu. 500.) It appears to have become settled doctrine in England that specific performance of a contract to convey shares in a railway or other private corporation will be decreed, upon the ground that such shares are of uncertain value, and not always to be had in the market. *Duncuft* v. *Albrecht* 12 Sim. 189; *Shaw* v. *Fisher*, 5 De G. M. &. G. 596; *Cheale* v. *Kenward*, 3 De G & J 27; Story's Eq. Jur. § 994;

(iv) A contracts with B to paint a picture for B who agrees to pay therefor Rs. 1,000. The picture is painted. B is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

(d) When it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done (1).

Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved (2)."

Contract of which the subject has partially ceased to exist— "Notwithstanding anything contained in section 56 of the Indian Contract Act (3), a contract is not wholly impossible of performance because a portion of its subject matter, existing at its date, has ceased to exist at the time of the performance" (4). This section must be read as a proviso to section 56 of the Indian Contract Act and may perhaps be paraphrased as : "A contract to do an act which, after the contract is made, becomes only partially impossible by reason of the loss or destruction of a portion of its subject matter, does not become void when the act so becomes partially impossible, but may, in the discretion of the court, be specifically enforced so far as it is still capable of

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(1) Illustration : "A transfers without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent, and C is appointed his assignee. B may compel C to endorse the note, for C succeeded to A's liabilities, and a decree for pecuniary compensation for not endorsing the note would be fruitless."

(2) Section 12 of the Specific Relief Act, (I of 1877) ; *Adderly* v. *Dixon*, 1 Sim. & St. 607 : 'Courts of equity decree the specific performance of contracts not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value." *Cud* v *Rutter*, 1 P. Wms. 570. 'One parcel of land may vary from, and be more commodious, pleasant, or convenient than another parcel of land." "Where land or any estate therein, is the subject-matter of the agreement, the inadequacy of the legal remedy is well-settled, and the equitable jurisdiction is firmly established. Whenever a contract concerning real property is in its nature and incidents entirely un-objectionable,—when it possesses none of those features which, in ordinary language, influence the discretion of the court,—it is as much a matter of course for a court of equity to decree its specific performance as it is for a court of law to give damages for its breach. Among other contracts thus enforced are agreements to give or renew a lease (*Furnival* v. *Crew*, 3 Atk. 83, 87) contracts for mortgages (*Ashton* v. *Corrigan*, L. R, 13 Eq. 76 ; *Hermann* v. *Hodges*, L. R, 16 Eq. 18), family settlements, bonds to convey land, judicial sales, and other contracts concerning land." Pomesoy's Eq. Jur. § 2167 ; see also *Maung Pe* v. *Kin Kauk*, U. B. R. (1897—1901) Vol. II, 539.

(3) Section 56 of the Contract Act : "An agreement to do an act impossible in itself is void. A contract to do an act which after the contract is made, becomes impossible or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains though the non-performance of the promise."

(4) *Illustrations :* "(a) A contracts to sell a house to B for a lakh of rupees. The day after the contract is made the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase money."

'(b) In consideration of a sum of money payable by B, A contracts to grant an annuity to B for life. The day after the contract has been made, B is thrown from his horse and killed. B's representative may be compelled to pay the purchase-money."

performance (1)." This section is to be read along with ss. 14 and 15 of the Specific Relief Act. It may appear that illustration (a) which is based on *Paine* v. *Miller* (2) is not in consonance with the Indian law as embodied in s. 54 of the Transfer of Property Act. Here by a mere contract of sale, the vendee does not become the equitable owner of the property as in England (3). The title to a property does not pass to the vendee until the execution and if the property is valued at Rs. 100 or more registration is completed by the vendor. In the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of property (4). The buyer is bound, where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller (5). So it seems to many that the principle enunciated in section 13 of the Specific Relief Act is not consistent with rule laid down in section 54 of the Transfer of Property Act. But Dr. Banerjee in his admirable book on the Specific Relief reconciles them thus : "Illustration (a) is framed upon the English case of *Paine* v. *Meller* (2) and illustration (b) upon that of *Mortimer* v. *Copper* (6). But where the words of the enactment are clear, illustrations cannot be held to restrict or alter them ; it is the section which governs and not the illustrations (7). The illustrations to section 13 do not seem to me to be in harmony with the section. In both cases, it appears that, at the time of the performance, the entire subject matter of the contract, viz. the house in illustration (a) and the life in illustration (b) had ceased to exist ; the contract therefore became wholly impossible of performance. However this may be, it is clear, that when illustration (a) was framed there was an idea that the doctrine of *Paine* v. *Meller* (2) and *Hughes Morris* (8) was not inapplicable to India. Since then, the Transfer of Property Act (9) has been enacted, and I apprehend that no section of, or illustration in the Specific Relief Act should now be so interpreted as to be out of harmony with the remainder of the Indian Statute book. As I have already said before, there is no ground for limiting specific relief to executory contracts. A frequent case in practice is where a conveyance relating to immoveable property has been properly executed and registered, but possession has not yet been delivered, or the purchase money in whole or in part has yet to

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(1) Banerjee's T. L. L, for 1906 p. 47.

(2) (1801) 6 Ves. 349.

(3) "The effect of an executory contract for sale of land, in working an equitable conversion, and in clothing a purchaser with an equitable estate in the land and the vendor with the equitable ownership of the purchase price, has already been described (§§ 382, 372, 1161). As soon as the contract is finally concluded, although it is wholly executory in form, these rights and estates become fixed and vested. It follows therefore, that the purchaser being the equitable owner, is entitled to all the benefits and assume all the risk of ownership." Pomeroy's Eq. Jur. § 1406.

(4) T. P. Act s. 54.

(5) *Ibid* s. 55 (5) (c).

(6 1 Bro. C. C. 156.

(7) *Nanak* v. *Mehm*, 1 A. 487, 495 ; *Koylish* v. *Sonatun*, 7 C. 132 ; *Govinda* v. *Thayammal*, 28 M. 57, 61.

(8) 2 De G. M & G. 349, 355.

(9) Act IV of 1882.

be paid. In such a case, if after the execution of the deed, the premises sold were devastated by fire, tempest, earth-quake or flood, the contract could not be avoided. That is how I would apply illustration (a) to section 13 of the Specific Relief Act (1)"

Specific performance of part of contract where part unperformed is small—Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation for the deficiency (2). The ordinary rule is that the court cannot specifically perform the contract piecemeal, but it must be performed in its entirety, if performed at all (3). "It is the essence of specific performance that, except under special circumstances, part only of an agreement ought not to be deemed to be performed (4)." "Sections 14 to 17 inclusive, of the Specific Relief Act, 1877, are both positive and negative in form. Taken together they constitute a complete code, within the term of which relief of the character in question must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the sections must ultimately prevail. When the whole contract is enforced in one way or another, as to the greater part by the remedy of specific performance and as to small residue by compensation, it is not necessarily making a new contract to select from among the remedies, which the court can grant, one for the major and another for the minor part of the contract (5)." "In exercising its jurisdiction" said *Lord Haldane* (6) "the court of Equity looks at the substance and not merely

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(1) Bannerjee's T. L. L. pro. 1906 p. 283.

(2) Specific Relief Act s. 14. *Illustrations* : (a) "A contracts to sell B, a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belong to A ; and the two remaining bighas to a stranger, who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important for such use or enjoyment that the loss of them may not be made good in money. A may be directed at the suit of B to convey to B the 98 bighas and to make compensation to him for not conveying the two remaining bighas ; or B may be directed, at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase money less a sum awarded as compensation for the deficiency." (*M' Queen* v. *Farquhar*, 11 Ves. 467. (b) 'In a contract for the sale and purchase of a house and lands for two lakhs of rupees it is agreed that part of the furniture should be taken at a valuation. The court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house."

(3) Per *Lord Romilly* in *Merchants Trading* v. *Banner*, 12 Eq. 18, 23 ; see also *Goring* v. *Nash*, 3 Atk. 186, 190.

(4) Per *Pontifix J.* in *Cutts* v. *Brown*, 6 C. 328 at p. 336.

(5) *Per Lord Summer* in *William Graham* v. *Krishna Chandra Dey* 29 C. W N. 919 at p. 921, 922.=52 I. A. 90=52 C. 335 (P. C.)

(6) *Rutherford* v. *Acton Adams*, 32 Ind. Cas. 47=84 L. J. P C. 238 ; see also U. *Pan* v *Mang Pa*, A. I R. 1927 R. 90.

at the letter of the contract If a vendor sues, and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by mis-representation or otherwise disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and the court refuses it, unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the court holds him to have an even larger right. Subject to considerations of hardship, he may elect to take all that he can get, and have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject matter described in the contract. It does not apply to a claim to make good representation about that subject matter, made not in the contract, but co-laterally to it. In the latter case the remedy is recession, or a claim for damages for deceit, where there has been fraud, or for a breach of a collateral contract if there has been such a contract." Under this section, performance of a contract may be enforced by either the promisor or promisee, provided (*i*) the part which cannot be performed (a) is inconsiderable and (b) may be compensated for in money, and (*ii*) provided that such compensation is made (1).

Specific performance of part of contract, where part unperformed is large.—Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant (2). This rule applies where a member of an undivided Hindu family agrees to sell part of the joint property

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(1) *Krishna Chandra De* v. *W. Graham*, 27 C. W. N. 693. (697).

(2) Section 15 of the Specific Relief Act. *Illustrations* :—(a) "A contract to sell to B a piece of land consisting of 100 bighas. It turns that 50 bighas of the land belong to A. and the other 50 bighas to a stranger, who refuses to part with them. A, cannot obtain a decree against B for the specific performance of the contract ; but if B, is willing to pay the price agreed upon, and to take the 50 bighas which belong to A, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey those 50 bighas to him on payment of the purchase-money." (*Durham* v. *Legard*, 34 Beav. 611) (b) "A contracts to sell to B, an estate with a house and garden for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that A, is unable to convey the garden. A cannot obtain a decree against B for the specific performance of the contract, but if B is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey the house to him on payment of the purchase-money.

in which he has only a share. Where the managing member of a Hindu family agrees to sell the family property and the other co-parceners are not parties to the agreement, and it is found that the agreement is not binding on the latter, specific performance of the contract cannot be enforced (1). "Whenever the seller is unable to carry all that he agreed to, the buyer is entitled, as a matter of right, in all cases, if he will pay the full contract price, to specific performance of whatever interest the seller has, and this irrespective of any question as to the state of his knowledge regarding the nature of the seller's title at the time of the bargain (2)." Where a person is jointly interested in an estate with another person, and purports to deal with the entity, specific performance will not be granted against him as to his share. But this only if the contract is indivisible and the question whether the contract was divisible or not is essentialy one of fact. Where an agent without authority contracted to sell to the plaintiff the shares of five co-sharers, three of whom ratified the contract and the others refused and it was clear that each party treated his share as separate and distinct, there is no impediment in law to a decree being granted to the plaintiff in respect of the shares of such of the co-shares who ratified the agent's contract (3). Where one member of a joint Hindu family purports to sell not only his but his co-parcener's shares and the vendor is not able to give a good title to any thing more than his own individual share in the property, if the purchaser desire to have a remedy by way of specific performance he cannot claim more than the share of the actual contracting member of the joint family and he can only obtain even that share by being prepared to pay not merely a proportionate part of the purchase money but the whole of the sum originally agreed upon as consideration for the sale of the entire property (4). In *Baluswami Aiyar* v. *Laksh-mana Aiyar* (5), *Mr. Justice Kumara swami Shastri* said ; "The English decisions on the subject of specific performance where a party is only entitled to a share are not uniform and the latter part of section 15 of the Specific Relief Act is a clear departure from the English rule as to abatement or compensation when specific performance of part of a contract is decreed." Under s. 15 the party in default may claim specific performances without compensation, where the part left unperformed is small in value and it admits of compensation, but he can not have specific performance where such part is considerable and does not admit of compensation ; the party not in default, however, may have specific performance with compensation in the first case, but specific performance without compensation in the second case (6).

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(1) *Juturi* v. *Ariparala*, 15 Ind. Cas. 623.

(2) Banerjees' T. L. L. for 1906 p. 182

(3) *Harendra Chandra* v. *Nandalal*, 36 C. W. N. 1002. Sections 14 to 17 of the Specific Relief Act constitute a complete code so far as specific performance of part of a contract is concerned. *Ibid.*

(4) *Panchananda* v. *Rajani*, 35 C. W. N. 40.

(5) 44 M. 605 (F. B.)

(6) *Krishna Chandra* v. *W Graham*, 27 C. W. N. 693 (697).

Specific performance of independent part of contract—When a part of a contract which taken by itself, can and ought to be specifically performed stands on a separate and independent footing from another part of the same contract which cannot and ought not to be specifically performed, the court may direct specific performance of the former part (1). To make this section applicable it has to be shown that there was a part of the contract, which (a) "taken by itself could and ought to be specifically performed," and (b) "stood on a separate and independent footing," from the other part of the contract, which could not be performed and before a court can apply the section it should have some material to establish these propositions, and cannot apply the section on a mere surmise that if opportunity were given for further enquiry, such material might be forthcoming, and possibly might be found to be sufficient (2). So under this section where a contract consists of several parts, which are separate from, and independent of, one another, and some of which cannot and ought not to be performed, such part or parts as can and ought to be performed, may alone be specifically enforced. This is on principle that such a contract, though nominally one, is actually divisible, and when the court enforces what is apparently a part of the contract it enforces one entire and complete contract. The question, therefore, whether a contract is divisible or indivisible is one of construction, depending upon the nature and circumstances of each individual contract (3). This section embodies the third exception to the rule, that the court will not as a general rule, compel specific performance of a contract unless it can execute the whole contract (4). The court shall not direct the specific performance of a part of a contract, except in cases coming under one or other of the three last preceding sections, namely sections 14, 15, and 16 of the Specific Relief Act (5).

Power to award compensation in certain cases.—Any person suing for specific performance of a contract may also ask for a compensation for its breach, either in addition to, or in substitution for such performance. If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly. If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section (6).

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(1) Section 16 of the Specific Relief Act.

(2) *Graham* v. *Krishna Chandra*, 29 C. W. N. 919 (921)=52 I. A. 90=52 C. 335=86 Ind. Cas. 232

(3) *Krishna Chandra De* v. *W. Graham*, 27 C. W. N. 693 (697).

(4) *Abdul Huq* v. *Mahomed Yehia*, 2 Pat. L. R. 181.

(5) Specific Relief s. 17.

(6) Section 19 of the Specific Relief Act.

Liquidation of damages not a bar to specific performance.—A contract otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same (1). "If a man covenant to abstain from doing an act," says *Lord St. Leonards* (2), "and agree that if he do it, he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act ; and just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract. The question for the court to ascertain is, whether the party is restricted by the covenant from doing the particular act, although if he do it, a payment is reserved ; or whether according to the true construction of the contract its meaning is, that the one party shall have a right to do the act, on payment of what is agreed upon as an equivalent." So the general rule of equity is that if a thing be agreed upon to be done, though there is penalty annexed to secure performance, yet the very thing itself must be done (3). Where a person has agreed to do a certain act, or to refrain from doing a certain act, and has added a penalty for the purpose of securing a performance, a court of equity will, if the contract is otherwise one which calls for its interposition, compel the party to specifically perform or restrain him from committing the act, as the case may be, notwithstanding the penalty. If the sum stipulated to be paid is really a penalty the party will never be allowed to pay it, and then treat such payment as a sufficient ground for refusing to perform his undertaking (4). Where, however, the creditor party in such a contract has elected to proceed at law, and has recovered a judgment for damages, he cannot afterwards come into a court of equity and obtain a specific performance ; he cannot have the remedy given by both courts (5). Where, however, the parties to an agreement have added a provision for the payment, in case of a breach, of a certain sum which is truly liquidated damages, and not a penalty, in other words, where the contract stipulates for one of two things in the alternative, the doing of certain acts, or the payment

(1) Section 20 of the Specific Relief Act. *Illustration :* "A contracts to grant B an under-lease of property held by A under C and that he will apply to C for a licence necessary to the validity of the under-lease, and that, if the licence is not procured, A will pay B Rs. 10,000. A refuses to apply for the licence and offers to pay B the Rs. 10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the licence."

(2) *French* v. *Macale*, 2 Dru & War. 274.

(3) *Ibid.*

(4) *French* v. *Macale*, 2 Dru & War. 274 ; *Howard* v. *Hopkins*, 2 Atk. 371 ; *Chillmer* v. *Chiller*, 2 Ves. 528 ; *In re Dengemham Dock Co.*, L. R. 8 Ch 1022 ; *Hardy* v. *Martin*, 1 Cox. 26 ; *Logan* v. *Wienholt*, 1 Clark & F. 611 ; *Fox* v. *Scard*, 33 Beav. 327 ; *Hobson* v. *Trevor*, 2 P. Wms. 191 ; *Kennedy* v. *Lee*, 3 Mer. 441, 450 ; *Preble* v. *Boghurst*, 1 Swanst. 309 ; *Jones* v. *Havens*, L. R. 2 Ch. D. 120, 141. If a man, for instance, agrees to settle an estate, and execute his bond for six hundred pounds as a security for the performance of his contract he will not be allowed to pay the forfeit for his bond, and avoid his agreement but he will be compelled to settle the estate in specific performance of his agreement. *French* v. *Macale*, supra.

(5) Pomerory's Eq. Jur. § 446 citing *Fox* v. *Scard*, 33 Beav. 326, per S. J. Romilly M. R.

of a certain amount of money in lieu thereof,—equity will not interfere to decree a specific performance of the first alternative, but will leave the injured party to their remedy of damages at law (1). This is one reason among many why courts of equity incline strongly to construe such stipulations as providing for a penalty rather than for liquidated damages (2). "In English and American cases a distinction is made between a penalty and liquidated damages, but the Indian law does not recognise this distinction, and there is no reason to import any such distinction in the considertion of a case of specific performance. The distinction in India may be said to be between contracts containing any stipulation by way of penalty and those containing stipulations for liquidated satisfaction : In the former case, if damages are asked for in the event of breach, the court will award reasonable compensation not exceeding the amount named or penalty stipulated for. If on the other hand specific performance is asked for, such agreement may be deemed 'not to be the weaker, but the stronger for the penalty.' " (3).

Injunction refused where specific performance Impracticable.— Subject to the provision of s. 57 of the Specific Relief Act an injunction can not be granted to prevent the breach of a contract, the performance of which would not be specifically enforced (4). Where therefore generally speaking the enforcement of specific performance by the court is impracticable, injunction sought to enforce specific performance will not be granted ; for instance where a contract by its terms stipulates for a succession of acts where performance can not be consumated by one transaction, but will be continuous and require protracted supervision (5) So where a contract is one of a class which will be specifically enforced, a court of equity will enjoin its breach, if that is the only practicable mode of enforcement which its terms permit (6). An injunction was refused against the breach of a contract made with Associated press to give an exclusive right of publication of their despatches for an indefinite period to a publishing company, in return for the latter's services as their correspondent and agent because the contract could not be specifically enforced against the complainant (7). An injunction was held improper to restrain the

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(1) *French* v. *Macale*, 2 Dru & Wr. 269 ; *Coles* v. *Sims*, 5 De Gex 579 ; *Ramdhan* v. *Ram Mohan*, 1 A. L. J. 688.

(2) Pomeroy's Eq. Jur. 447.

(3) Banerjee's T. L. L. for 1906 p. 117.

(4) Specific Relief Act s. 56 (f). "In all cases where specific performance can be decreed, the jurisdiction by injunction will attach as a matter of course, *but it is not confined to such cases, but will be exercised in all cases where it can operate to bind men's conscience to true and literal performance of their agreements.* The court will not suffer men to depart from their agreement at their pleasure, leaving the party with whom they have contracted to the mere chance of damages which a jury might give." Kerr on Injunction p. 410 citing, *Lumley* v. *Wagner*, 1 De G. M. & G 619 ; *De Matto* v. *Gibson*. 4 De G. & J. 282 ; *Moore* v. *Ullcoats*, (1908) 1 Ch. 585 ; *Jones* v. *Tankerville*, (1909) 2 Ch. 440 ; *Lord Strathcona* v. *Dominion Coal*, (1926) A. C. 125.

(5) *Blackett* v. *Bates*, L. R 1 Ch. App. 117 ; *Powell—Duffyyn Coal Co* v. *Taffvale R. Co*, 9 Ch. App. 331 ; Lewis & Spelling on Injunction § 130.

(6) *South Chicago* v. *Calumet*, 49 N. E. 576 ; Spelling on Injunc. etc § 478.

(7) *Iron Age Pub. Co.* v. *Western Union Tel. Co.*, 23 N. Y. Supp. 360.

breach of a covenant to furnish water power to the complainant "for all time (1)". And it was held that a mandatory injunction would not lie to enforce a contract to lease floor space in a building being erected, where its enforcement would necessitate the exercise of skill and discretion in reconstruction of the building, it not being feasible for the court to supervise the work (2). And it was held no relief could be granted under a bill praying that the defendant be enjoined from passing resolutions depriving the complainant of his office as treasurer of the defendant company in alleged violation of a contract, since complainant could not be compelled to serve as treasurer, or render the service contemplated by the contract (3). Under sections 21 and 57 of the Specific Relief Act a limited liability company cannot be restrained by injunction from dispensing with the services of Managing Agents even when the contract of service provides that the Managing Agents are only to be removed in a specified manner and after a specific period (4). In delivering the judgment in the above case *Chitty J.* said : "It was perhaps necessary for counsel to frame his argument in some such way as this, because if the case be one of a contract for service, the plaintiffs are met by the combined effect of secs 21 and 56 of the Specific Relief Act. They could not enforce the contract of service against the company nor could they by injunction directly obtain the relief prescribed by sec. 21. I cannot accede to the argument of their counsel that sec. 57 would help them. If they could not enforce the positive contract of service, they clearly could not obtain an injunction to restrain the company from dispensing with their services, except in a given manner, or until after a stated period ; for the result of this would be to continue their services, and so in effect to specifically enforce the contract. It would be a very strong measure to restrain the body of share-holders from expressing their opinion at a meeting duly convened. It is the only way they have of interfering in the matters of the company. On this point the remarks of *Lord Justices* in *Isle of Wight Rail Co.* v. *Tahourdi* (5) are very pertinent though the question in that case was the removal of directors and not the dismissal of servants."

Principles regulating specific performance to apply.—An injunction is a form of specific relief ; it forbids a party to do what he has contracted not to do. "A prohibition" said *Lord St. Leonards* "preventing the commission of an act, may as effectually perform an agreement, as an order for the performance of the act agreed to be done" (6). Since restraining the breach of a contract by injunction is merely a mode of specifically enforcing the contract, it follows that the discretion of the court in awarding the injunction is guided by the same equitable principles and doctrines as those which regulate the

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(1) *York Haven W & P. Co* v. *York Haven Paper Co*, 201 Fed. 270.

(2) *Bromburg* v. *Eugenotto*, 158 Ala. 323.

(3) *Jackson* v. *Marshall*, 178 Ill. Ap. 27 ; Lewis & Spelling on Injunction § 130

(4) *N. C. Sarkar* v. *Baraboni Coal Concern Ltd.* 16 C. W. N. 289.

(5) 25 Ch. D. 320.

(6) *Lumley* v *Wagner*, 1 De G. M. & G. 604 ; Banerjees T, L. L. 1906 p. 614.

remedy of specific performance (1). Thus the breach of the following classes of contract will not be enjoined, namely :—

(*a*) a contract for the non-performance of which compensation in money is an adequate relief (2) ;

(*b*) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms ;

(*c*) a contract the terms of which the court cannot find with reasonable certainty ;

(*d*) a contract which is in its nature revocable ;

(*e*) a contract made by trustees either in excess of their powers or in breach of their trust ;

(*f*) a contract made by or on behalf of a corporation or public company created for special purposes or by the promoters of such company, which is in excess of its powers ;

(*g*) a contract, the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date ;

(*h*) a contract, of which a material part of the subject matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

And save as provided by the Code of Civil Procedure and the Indian Arbitration Act, 1899, no contract to refer present or future differences to arbitration shall be specifically enforced ; but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit (3).

Contract for non-Performance of which compensation in money is adequate relief.—Decrees for specific performance are usually made only in cases where it is supposed to be impossible to give satisfactory compensation by way of money damages (4). So specific performance was refused by the court where damages are proper remedy (5). In *Nand Kishore* v. *Mohon lal* (6), *Phear J.* said : "And finally there seems to be really no substantial reason for making a decree for specific performance at all, because plaintiff would, so far as we can judge on the facts of the case, be afforded ample remedy for a wrong which he has suffered, by a decree for money damages, if he had asked for it." The remedy of specific performance of contract is purely equitable, given as a substitute for the legal remedy of compensation,

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(1) Vide S. 54 of the Specific Relief Act ; Pomeroy's Equity Jur. 1692. An injunction cannot be granted to prevant the breach of contract, the performance of which cannot be specifically enforced. Vide s. 56 (f) of the Specific Relief Act ; see also *Bhikaji* v. *Bapu Suju*, 1 B. 550 ; *Nusserwanji* v. *Gordon*, 6 B. 226 ; *N. C. Sarkar* v. *Boraboni Coal*, 16 C. W. N. 289.

(2) *Naran Pershad* v. *Narain Singh*, 52 A. 1037=131 Ind. Cas. 599=A. I. R. 1931 A. 40=1930 A. L. J. 1577.

(3) Specific Relief Act, s. 21.

(4) *Ashruffoonnisa* v. *Stewart*, 7 W R. 303.

(5) *Balgobind* v. *Lutafat*, 7 W. R, 142 ; see also *Sheo Pergah* v. *Injore*, 21 W. R. 433.

(6) 22 W. R. 164 (165).

when the legal remedy is inadequate or impracticable (1). In the language of *Lord Selborne* : "The principle which is material to be considered is, that the court gives specific performance instead of damages only when it can by that means do more perfect and complete justice, (2)." The foundation and measure of the jurisdiction is the desire to do justice, which the legal remedy fails to give. This justice is primarily due to the plaintiff, but not exclusively, for the equities of the defendant are also protected. Specific performance is, therefore, a conscious attempt on the part of the court to do complete justice to both the parties with respect to all the judicial relations growing out of the contract between them (3). The jurisdiction depending upon this broad principle is exercised in two classes (i) where the subject matter of the contract is of such a special nature, or of such a peculiar value, that the damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representative of that subject matter in the hands of the party who is entitled to its benefit ; or in other words, where the damages are inadequate ; (ii) where, from some special and practical features or incidents of the contract inhering either in its subject-matter, in its terms, or in the relations of the parties, it is imposible to arrive at a legal measure, of damages at all, or at least with any sufficient degree of certainty, so that no real compensation can be obtained by means of an action at law ; or in other words, where damages are impracticable (4). So where for the non-performance of the contract, a sum of money would not be an adequate relief, the contract is proper to be specifically performed (5).

Extent of the Jurisdiction—Inadequacy of Damages.—"The object of the present discussion is to determine the general classes of contracts which come within the jurisdiction, and which may be specifically enforced. Whether any particular contract belonging to one of these classes will actually be thus enforced depends upon other equitable elements to be described hereafter. *Lands* : where land, or any estate therein, is the subject-matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established (6). *Chattles* : On the contrary, the doctrine is equally well settled that equity will not, in general, decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality (7)." A contracts to sell and B contracts to buy, a

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(1) Pomeroy's Eqr. Jur. § 1401.

(2) *Wilson* v. *Northamton* etc. *Ry* Co. L. R. 9 Ch. 279, 284.

(3) Pomeroy's Equity Jurisprudence § 1401 : see also *Buxton* v. *Lister*, 3 Atk 383 ; *Wright* v. *Bill*, 5 *Price*, 325, 328, 329 ; *Adderley* v. *Dixon*, 1 Sim & St. 607, 610 ; *Ord* v. *Jhonston*, 1 Jur. N. S. 1063, 1064.

(4) Pomeroy's Equity Jurisprudence § 1402.

(5) *B. Das* v. *E Vas*, 55 I. A. 58.= 55C. 238=32 C. W. N. 509 P. C. ; see also *Colins* v. *Plubub*, 16 Ves. 454 ; *Holmes* v. *Eastern Counties Ry*, 3 K. & J. 675 ; *Munroe* v. *Wivenhoe*, 4 Ch. 557 (658) ; *Frith* v. *Frith*, (1906) A. C. 254, 261 ; *Rayan* v. *Mutual Tontine*, (1893) 1 Ch. 116 ; *Maya Ram* v. *Prag Das*., 5 A. 44(51).

(6) *New Beerbhum Coal* v. *Bularam*, 5C. 932 P. C.= L. R. 7 I. A. 107.

(7) Pomeroy's Equity Jurisprudence § 1402.

lakh of rupees in the four percent loan of Government of India : The above contract cannot be specifically enforced for both A and B would be reimbursed by compensation in money (1). In consideration of a certain property having been transferred by A to B, B contracts to open a credit in A's favour to the extent of Rs 10,000, and to honour A's drafts to that amount. The above contract cannot be specifically enforced for A would be re-imbursed by compensation in money (2). *Exceptions* : Where, however, particular chattels have some special value to the owner and above any pecuniary estimate, the *pretium affectionis*,—and where they are unique, rare and incapable of being reproduced by money damages, equity will decree a specific delivery of them to their owner, and the specific performance of contracts concerning them (3). A contracts to sell and B contracts to buy 40 chests of indigo at Rs 1,000 per chest. This contract cannot be specifically enforced for A and B would be re-imbursed by compensation in money (4). In *Buxton* v. *Lister* (5), *Lord Hardwicke* said : "To be sure, in general, this court will not entertain a bill for specific performance of contracts of stock, corn, hops, etc., for as those are contracts which relate to merchandise, that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action, the party might not have been paid, perhaps, above a shilling in damage."

Contract with minute details, etc.—A contract which runs into such minute details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms, cannot be specifically enforced (6). A court of equity does not also deem it expedient to make a decree for specific performance of a contract which runs into minute details (7). A lets land to B and B contracts to cultivate it in a particular manner for three years next after the date of the lease. This contract cannot be specifically performed (8). So also where A and B contract that, in consideration of annual advances to be made by A, B will for three years next after the date of the contract grow particular crops on the land in his possession and deliver them to A, when cut and ready for delivery, the contract cannot be specifically enforced (9). "How can a master" asked *Lord Nottingham*, "judge of repairs in husbandry" (10). By a charter party entered into in Calcutta between A, the owner of a ship and B, the charterer, it is agreed that the ship shall proceed to Rangoon and there load a cargo of rice, and thence

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(1) S. 21 of the Specific Relief Act, illustration (*a*) based on *Cuddu* v. *Rutter*, 2 Wh. & T. 422.

(2) S. 21 of the Specific Relief Act illustration (*a*) which is based on *Larios* v. *Bonany* (1873) 5 P. C. 346.

(3) Pomeroy's Equity Jurisprudence § 1402.

(4) Vide s. 21 of the Specific Relief Act illustration (a)

(5) 3Atk. 383.

(6) Specific Relief Act s. 21 cl. (b).

(7) Banerjee's T. L. L. for 1906 p. 165.

(8) Specific Relief Act s. 21 illus (b).

(9) Ibid ; *Starens* v. *Newsome*, 1 Ten. Ch. 239.

(10) Banerjee's T. L. L. p. 165 citing *Rayner* v. *Stone*, 2 Edn. 128.

proceed to London, freight to be paid, one third on arrival at Rangoon and two thirds on delivery of the cargo in London (1). This contract cannot also be specifically enforced. "In such cases" says Dr. Banerjee "The court refuses to interfere, not because the court cannot formulate a decree which shall order everything necessary for a complete performance or which shall not be absolutely incapable of compulsory execution, but because (to quote Pomeroy) 'the enforcement of the decree would unnecessarily tax the time, attention, and resources of the court, and thereby interfere too much with its public duties to other suitors, and in the general administration of justice (2)".

"Although the contract is valid, and the defendant is able to do what he has undertaken to do, if through the want of appropriate means and instru mentalities, the court is unable, while pursuing its ordinary modes of administering justice, either to render a decree or to enforce the decree when made, then the remedy will be refused (3)". So a contract for sale at a price to be fixed by valuers cannot be enforced *in specie*. A contracts to buy B's business at the amount of a valuation to be made by two valuers, one to be named by A and the other by B. A and B each name a valuer, but before the valuation is made A instructs her valuer not to proceed. This contract cannot be specifically enforced (4). "An agreement to submit a matter to arbitration, or to sell at a price to be fixed by valuers, if the mode of fixing the price is an essential part of the contract, will not be specifically enforced, since it is beyond the power of the court to compel arbitrators to agree; nor will the court itself fix the price, since that would be to make a new agreement for the parties (5)."

A contracts with B to execute certain works which the court cannot superintend; this contract cannot be specifically enforced (6). So contracts whose performance would be continuous, and would require protracted supervision and direction, including, especially, contracts for building and construction, for working mines, for operating rail roads, and the like, cannot be specifically enforced (7). The general rule has long been settled, after a period of conflict and uncertainty in the early cases (8) that contracts for building and construction, and contracts to make repairs, will not be 'enforced' *in specie*, on account of the inconvenience of enforcing a decree by the process of attachment for contempt (9). Where numerous questions

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(1) S. R. Act s. 21 illustration to Cl. (b).

(2) Banerjee's T. L. L. for 1906 p. 166, citing Pomeroy's S. P. § 307 p. 393. A contract for the preparation of a set of account papers relating to the *darpatni mehal* is one of which the court cannot, from its very nature, enforce specific performance. *Najibulla Sardar* v. *Hari Mohan*, 59 C. 352=138 Ind. Cas. 640= A. I. R. 1930 Cal. 481.

(3) Pomeroy's Eq Jur. § 2179.

(4) S. R. Act, 21 illustration to clause (b).

(5) Pomeroy's Equity Jur. § 2180.

(6) S. R. Act s. 21 illustration to clause (b).

(7) Pomeroy's Equity Jur § 2179.

(8) In the eighteenth century, such contracts were enforced rather frequently vide *City of Landon* v. *Nash*, 3 Atk 512. *Lord Hardwicke* in that case made the distinction that a covenant to build could be enforced, "for to build is one entire single thing"; but not a covenant to repair. By the end of that century, however, this distinction was abandoned: *Lucas* v. *Comerford*. 1 Ves. Jr. 235.

(9) C. P. Code Order XXI rule 32.

must usually arise under the decree in such a case as to whether there has been substantial performance, whether defective performance may be excused, what compensation should be made for the deficiency and the like More over, if the building is to be done on the plaintiff's land the remedy at law is usually adequate, since he may do the work himself and sue at law for the cost. Several exceptions have been made to the rule by the English Courts (1). One of these exceptions has become firmly established "where there is a definite contract, by which a person, who has acquired land in consideration thereof, has agreed to erect on the land so acquired a building (or other structure) of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages..... specific performance ought to be recorded (2)". In *Beck* v.

(1) In general, the specific performance of these contracts will not be decreed, because the court cannot, by its ordinary means and instrumentalities, enforce its decree. *Errington* v. *Aynesly* 2 Brow. Ch. 341 : "There is no case for specific performance decreed of an agreement to build a house because if A will not do it, B may. A specific performance is only decreed where the party wants the thing *in specie* and it cannot have it in any other way." See also *Lucas* v. *Commerford*, 3 Brown. Ch. 166 ; *Paxton* v. *Newton*, 2 Sim & G. 437 ; *Mosely* v. *Virgin*, 3 Ves 184 ; *Flint* v. *Brandon*, 8 Ves. 159 ; *Southwales Ry* v. *Wythes*, 1 Kay & J. 186 ; *Kay* v. *Johnson* 2 H. & M. 118 ; but see 38 L. J. Ch. 143. The English Courts have established exceptions to this rule, and enforced contracts in four classes of cases : *viz* : (i) where the agreement to erect a building is defined and certain. *Mosely* v. *Virgin*, 3 Ves. 184, 185 ; *Fint* v. *Brandon*, 8 Ves. 159, 164 ; *Cubitt* v. *Smith*, 10 Jur. N. S. 1123 ; *Phillips* v. *Soule*, 9 Gray, 233 ; *Brace* v. *Wehnert* 25 Beav. 348. (ii) Where the defendant has contracted to construct some defined work on his own land, and the plaintiff has a material interest therein not susceptible of adequate compensation in damages. *Storer* v. *Great* W. Ry, 2 Young & C. Ch. 48, *Sanderson* v. *Cockermouths*, etc. Ry. 11 Beav. 497 ; *Franklin* v. *Tuton*, 5 Madd. 469 ; *Middlton* v. *Greenwood*, 2 De G. J. & S. 142 ; *Wilson* v. *West Hartte pool Ry*, 2 De G, J. & S. 475 ; *Wilson* v. *Northampton etc. Ry* L. R. 9 Ch. 279 ; *Att. Gen.* v. *Mid Kent Ry*. L. R. 3 Ch. 100. (iii) Where defendant has contracted to construct works on land acquired by conveyance from the plaintiff etc. *So. Wales Ry* v. *Wythes*, 1 Kay & J. 186, 200 ; *Price* v. *Corporation of Penzance*, 4 Hare, 506 *Wilson* v. *Furnez*. Ry L. R. 9 Eq. 28; *Hood* v. *North East* Ry. L. R. 5 Ch. 525. *Firth* v. *Midland Ry*, L. R. 20 Eq 100. (iv) Where there had been a part performance, so that the defendant is enjoying the benefits *in specie*. *Price* v. *Corporation of Penzance*, 4 Hare, 506 509. "I must confess that I cannot altogether understand the principle upon which courts of equity have acted in some times granting orders for specific performance in these cases and sometimes not.....In early times they seem to have granted decrees for specific performance in such cases. Then came period in which they would not undertake to supervise the performance of the contract. Later on they seem to have attached less importance to this consideration, and returned to some extent to the more ancient practice holding that they could order specific performance in certain cases in which the works were specified by the contract in a sufficiently definite manner." *Per Collins L. J.* in *Mayor etc of Wolverhapton* v. *Emmons*, (1901) 1 K. B. 515.

(2) *Per A. L. Smith M. R.* in *Mayor etc. of Wolverhampton* v. *Emmon*, (1901) 1 K. B. 515 ; *Ryan* v. *Mutual Tontine etc. Ass'h* (1893) 1 Ch. 116 128. See also *Stores* v. *Great Western Ry Co*, 2 Young & C. Ch., 48 ; *Wilson* v. *Farness Ry Co*, L. R. 9 Eq. 28, per *James V. C.* : "It would be monstrous if the company, having got the whole benefit of agreement, could turn round and say, 'This is a sort of thing which the court finds a difficulty in closing, and will not do ! Rather than allow such a gross piece of dishonesty to go unredressed the court would struggle with any amount of difficulties in order to perform the agreement,"

Allison (1) *Grover J.* said : The Court must first adjudge what repairs are to be made and the time within which they are to be done. When this is accomplished, more serious difficulties remain. The idea that the Court can appoint a Receiver to take possession of the property and cause the work to be done with money furnished by the defendant, would be in the language of *Lord Northington*, absurd. The mode, if undertaken must be for the Court first specifically to determine what shall be done, and when and how, and then to enforce performance by attachment as for contempt in case of alleged dis-obedience. Then will arise not only the question, whether there has been substantial performance, and if found not, whether the defendant had any such excuse therefor as will exonerate him from the contempt charged, and in case of performance, but not in as beneficial a manner as adjudged, the compensation that should be made for the deficiency. It is obvious that the execution of contracts of this description under the supervision and control of the Court, would be found very difficult if not impracticable, while the remedy at law would, in nearly, if not in all cases, afford full redress for the injury. (2)"

It is a familiar rule that contracts for personal services, where the full performance rests upon the personal will of the contracting party, will not be specially enforced against him (3). The relief is here refused on the ground that in this case the Court cannot enforce its decree. "The old adage that a "bird that can sing and will not sing, must be made to sing" (4) is answered by the other old adage that 'although you can lead a horse to the water you cannot make him drink' (5)" (6). As an almost universal rule, these contracts will not be directly enforced. So also where A contracts to employ B on personal service it also cannot be specifically enforced (7). In *Johnson* v. *Shrewsbury & Birmingham Ry Co.* (8), *Knight Bruce L. J.* said : "We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree, and good people do not always agree, enormous mischief may be done (9)". A an author, contracts with B a publisher to complete a literary work. B cannot enforce specific performance of this coutract (10). Similarly where A contracts with B that in consideration of Rs. 1,000 to be paid to him by B, be will paint a picture for B, that contract also cannot be specifically performed (10). Upon the volition of the parties also

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Lytton v. *Great Northern Ry Co*, 2 Kay & J 394 ; *Sanderson* v. *Cockermouth Ry Co.* 11 Beav. 497 ; *Molyneux* v. *Richard*, (1906) 1 Ch. 34 ; Pomeroy's Equity Jurisprudence § § 1402, 2182.

(1) 1 Ames 70 = 56 N. Y. 366.

(2) Banerjee's T. L. L. for 1906 p. 166, 167.

(3) Pomeroy's Equity Jur. § 2181.

(4) *De Rivafinoli* v. *Corsciti*, 4 Paige Ch. 264.

(5) 6 R. C. 166.

(6) Banerjee's T. L. L. for 1906 p. 161.

(7) S. R. Act s. 21, illustration to Cl. (*b*) ; *De Francisco*, v. *Barnum*, 45 Ch. D. 430

(8) 3 De G. M. & G. 914.

(9) See also *Rigby* v. *Connol*, 14 Ch. D. 482 ; *Nusserwanji* v. *Gordon*, 6 B. 266 (282, 283) ; *Mahant* v *Surendra*, 42 Ind. Cas. 521.

(10) S. R. Act s. 21 illustration to Cl. (b).

depends a contract for marriage and as such it cannot be enforced in specie (1). Similarly where A contracts to supply B wi h all the goods of a certain class which B may requ.re as well as where A contracts with B to take from B a lease of a certain house for a speci ied term, at a specified rent, "if the drawing room is handsomely decorated" cannot be specifically enforced because here the contract depends on the volition of the promisor (2). A power of appointment ordinarily carries with i a power of dismissal, unless there is anything special in the nature of the office, or the deed or statute under which a person is appoi ted shows the contrary. So a superintendent of an endowment so appointed could not sue in the Civil Court for an injunction to restrain the trustees from dismissing him, his only remedy if he was wrongfully dismissed being by an action for damages (3).

Cases where a Court cannot render a decree cannot also be specifically performed. The following s ecies of contracts will not be thus enforced: Agreements concerning the manufa ture and sale of secret medicines and other secret commodities, where the contract recognizes the secret as not to be disclosed (4); con racts for the sale or transfer of a good will, seperate from or unconnected with the business and premises of which it is an incident (5).

Completeness and certainty of the terms of the contract.—A contract the terms of which the Court cannot find with reasonable certainty cannot be specifically enforced (6). A contract that is incomplete, uncertain or inde nite in its material terms will not be speci cally enforced in equity. There is required a greater degree of certainty and definiteness for specific performance than to obtain damages at law For specific performance is demanded that degree of certainty and definiteness which leaves in the mind of the Chancellor or Court no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is to compel done ( ). " he element of completeness denotes that the contract embraces all the material terms; that of certainty denotes that each one of these terms is expressed in a sufficiently exact and definite manner. An incomplete contract, therefore is one from which one or more material terms have been entirely omitted. An uncertain contract is one which may indeed embrace all the material terms, but one or more of them is expressed in so inexact, indefinite, or obscure language, that the intent of the parties cannot be sufficiently

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(1) *Ibid*; see also *Re Gunpat Narain Singh*, 1 C. 74; *Jogeswar* v. *Panchkori*, 5 B. L. R. 395; *Nowbat* v. *Lad Koer*, 5 N. W. P. 102; *Ashgorali* v. *Mohabat*, 13 B. L R. App. 34.

(2) S. R. Act s. 21 clause (*b*). ill; Banerjee's T. L. L. for 1906 p. 163.

(3) *Ramchandra* v. *Rakhal Das*, 17 C W. N 1045=20 Ind. Cas 157.

(4) *Newbury* v. *James*, 2 Mer. 446; *Wi'l ims* v *Williams*, 3 Mer. 157.

(5) *Bozon* v *Farlow*, 1 Mer. 459; *Baxter* v. *Conolly*, 1 Jacob & W. 576; *Coslake* v. *Till*, 1 Russ. 376. But where the good-well is sold and transferred, together with the business and premises, the agreement may be directly enforced, or negatively enforced by injunction. *Darby* v. *Whitaker*, 4 Dr. 134, 139, 140; *Chissum* v. *Dewes*, 5 Russ, 29: *Whittaker* v. *Howe*, 3 Beav. 349; Pomeroy's Equity Jur. § 1405 note 10.

(6) Section 21 of the Specific Relief Act cl (*c*).

(7) Pomeroy s Equity Jur. § 2186.

ascertained to enable the Court to carry it into effect (1)" Where essential terms are wanting there is no complete contract capable of enforcement (2).

Where the contract rests in whole or in part on parol evidence, the elements of incompleteness, uncertainty, and indefiniteness may exist when the proof is insufficient, conflicting, and leaving room for doubt as to what the precise terms were, for the plaintiff is bound to establish clearly and satisfactorily the existence of the contract and its terms (3).

"Nothing is more established in this court" said *Lord Hardwicke*, "than that every agreement of this kind ought to be certain, fair. and just in all its parts. If any of those ingredients are wanting in the case, this court wi l not decree specific performance (4)." "I lay it down as a general proposition," said *Lord Rosslyn*, "to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined (5)."

However, it is not required that the written contract itself should furnish the sole evidence of certainty and definiteness where it is complete in its terms, and there is sufficient certainty and definiteness for the court to supply, either by proper reference to other documents or by properly admissible parol evidence as to extrinsic facts, the necessary degree of exactness. But parol evidence can never be given to supply an omitted term or make definite and certain that which the parties left indefinite and uncertain; in a word parol evidence cannot show the intent of the parties if it cannot be found in the contract (6). Parol evidence can only be used to "fit the description of the land." Under such circumstances, the maxim is applicable *certum est quod certum reddi potest*, "that is sufficiently certain which can be made certain." This principle has been repeatedly applied to cases of specific performance of contracts. To take one illustration, where an agreement in writing for the sale of a house did not describe the particular house but stated that the deeds were in the possession of A, the court held the agreements sufficiently certain, since the house might be easily ascertained by reference to the deeds (7). Again in *Monro* v. *Taylor* (8), where a contract was made to sell an estate with certain ascertained boundaries described as partly freehold and partly leasehold, it was deemed not void for uncertainty, because the purchaser was entitled to have it reduced to certainty by the boundary of the properties of different

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(1) Pom. Spec. Perf. § 145.

(2) *Sri Krishna* v. *Punjab N. Bank*, 149 P. L. R 1913.

(3) Pomeroy's Equity Jur. § 2187.

(4) *Buxton* v. *Lister*, 3 Atk 386.

(5) *Lord Walpole* v. *Lord Oxford* (1797) 3 Ves. 407, 409.

(6) Pomerory's Equity Jur. § 2188. This rule has been well stated in *Fry* v. *Platt*, 32 Kan 62=3 Pac 781, as follows: That in order to satisfy the requirements both of the statute of frauds and of certainty in the contract, "it is required that the whole contract with all its essentials be in writing that its terms be definite and certain or that they can be made definite and certain in reference to other instruments in writing, or by reference to extrinsic and existing facts which may be shown to the court"

(7) *Owen* v. *Thomas* 3 Myl. & K. 353; *Plant* v. *Bourne*, (1897) 2 Ch. 281.

(8) 8 Hare 51.

tenures being ascertained or shown to be capable of being so (1). The principle is that the description must be such as to enable the court to determine with certainty, with the aid of extrinsic evidence as is admissible under the rules of evidence, what property was intended by the parties to be covered thereby. The description need not be given with such particularity as to make a resort to extrinsic evidence unnecessary. Reasonable certainty is all that is required; and extrinsic proof is allowed in order to apply, not to alter or vary, the written agreement (2). But where A, the owner of a refreshment-room, contracts with B to give him accommodation there—for the sale of his goods and to furnish him with the necessary appliances and A refuses to perform his contract, the case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined (3).

The material terms, or the existence of the contract, may be uncertain or lacking, in reference to: (i) the parties contracting, or (ii) the price or some definite means of ascertaining it, (iii) the subject matter, (iv) conditions, etc. Thus, (i) the parties must be capable of being determined from written contract; (ii) there must be a price stated, or some means of ascertaining it with the power of equity to enforce; (iii) the land or the subject matter, must be described with sufficient definiteness to identify it, with the aid of such parol evidence as is properly admissible to apply the written description. Thus, a contract to convey "your lot," where the vendor owned three lots, is not enforceable, and parol evidence cannot be brought in to show the intent of the parties as to one particular lot. But to give the classic instance; a contract to convey "my mill" where vendor owned but one mill, is good. It is, as a general thing, not necessary to specify the town, county and state where the land is located, since the implication is that the location is that where the contract is made. Not only must the specific thing be identified, it must be defined. A contract to take a certain tract of land or any other piece of defendant's land, is too indefiinite. A contract to convey a certain quantity of land, merely, or a certain quantity out of a specified larger tract, is too uncertain to be specifically enforced; (iv) conditions, etc. The contract must be complete, definite and certain as to whatever conditions are annexed, terms of credit where given, place of performance, time of performance unless a reasonable time is inferred, and other terms that are made by the contract. Thus, a contract to furnish a city with light, allowing the substitution of electric light for gas, but leaving the number and price of the electric lights for later agreement is unenforceable for incompleteness in a material term. Similarly a contract to take milk from plaintiff is unenforceable where neither price, amount, time nor place of delivery was

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(1) *Wylson* v. *Dunn*, 34 Ch. D. 569.
(2) *Gaj Kumar* v. *Lachman Ram*, 14 C. L. J. 627 (632).
(3) Specific Relief Act s. 21 illustration to cl. (c).

named by the contract (1). If the essential terms of a contract are settled, the contract may well be regarded as complete and concluded and may be enforced or specifically performed, either as consisting of those terms only or together with such other terms and conditions as may be regarded as being usual in contracts of that description (2).

Revocable contract.—A contract which is in its nature revocable cannot be specifically enforced (3). The rule is that the contract must be such that its specific enforcement would not be nugatory (4). The court will not grant the remedy when by the terms of the contract itself the defendant would be entitled at any time to terminate the agreement and thus evade the decree (5). Accordingly, it is held that an agreement to enter into or carry on a partnership at will cannot be specifically enforced, for it might be terminated at any time (6). The doctrine is frequently stated more broadly to the effect that as a general rule the court will not decree specific performance of an agreement to perform and carry on a partnership (7). In the above case the court said: "It is an agreement to form a partnership, and if so, it is an agreement on which the plaintiff may maintain an action at law for damages, and that is an appropriate remedy." Equity may, however, secure to a partner the interests in property to which by the partnership agreement he is entitled (8). In *Hamfray* v. *Fothergill* (9), a provision in a partnership deed that the other partners should have the first opportunity to purchse the share of any partner desiring to sell was specifically enforced (10). And upon a similar principle *Grant M. R*, refused specific performance of a contract for a lease which was to contain a proviso for re-entry on breach of a covenant which the plaintiff had already broken (11).

Contract made by a trustee in excess of his powers.—A contract made by trustees either in excess of their powers or in breach of their trust cannot be specifically enforced (12). "The rule of equity," said *Lord Redesdale*, "is to require the plaintiff to show that, in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for if he does, a consequence is produced that quite passes by the object of the court in exercising the jurisdiction, which is to do more complete justice (13)" Before a decree for specific performance of the contract is made, the court must ascertain whether the contract is specifically enforceable and one of the elements to be taken into consideration is whether the specific

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(1) Pomeroy's Equity Jur. § 2189.
(2) *Sri Sri Gopal Sridhar* v. *Sashi Bhusan*, 36 C. W. N. 1108.
(3) Specific Relief Act s. 21 cl. (d)
(4) Pomerory's Eq. Jur. § 1405.
(5) Pomerory's Eq. Jur. Eq. 1405.
(6) *Hercy* v. *Birch*, 9 Ves. 357; *Scott* v. *Rayment*, (1869) 7 Eq. 112: S. R. A. s. 21 cl. (d) ill.
(7) *Scott* v. *Rayment*, L. R. 7. Eq. 112.
(8) Pomerory's Eq. Jur. § 2177.
(9) L. R. 1 Eq. 567.
(10) See also *England* v. *Curling*, 8 Beav. 129.
(11) Banerjee's T. L. L. for 1906 p. 170 citing *Jones* v. *Jones*, 12 Ves. 188; *Gregory* v. *Wilson*, 9 Ha. 683; *Lewis* v. *Bond*, 18 Beav. 85; 2 Scott. 29
(12) Specific Relief Act s.21.
(13) *Harnett* v. *Yielding*, (1805) 2 Sch. & Lef. 549, 553; Banerjee's T. L. L. for 1906 p. 208.

performance of the contract would involve a breach of trust (1). If the property intended to be let out, is trust property, and the proposed lease is beyond the authority of the trustee lessor, a court of equity will not grant specific performance of the contract (2). Thus A is a trustee of land with power to lease it for seven years. He enters into a contract with B to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced (3). So also where the directors of a company have power to sell the concern with the sanction of a general meeting of the share-holders, and they contract to sell it without any such sanction, this contract cannot be specifically enforced (4). Two trustees A and B, empowered to sell trust property worth a lakh of rupees, contract to sell it to C for Rs 30,000. The contract is so disadvantageous as to be a breach of trust. C cannot enforce its specific performance (5). The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property—and in fact agrees to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase money. This contract cannot be specifically performed (6). A promoter is in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make a full and fair disclosure of his interest and position with respect to that property. There is no difference in this respect between a promoter and a trustee, steward or agent (7).

A trustee or a person in a representative capacity cannot delegate his authority except where the employment of an agent is according to the usual course of business It is open to a trustee or a shebait to appoint a sub-agent, but such appointment must only be as means of carrying out his own duties himself and not for the purpose of delegating those duties by means of such appointment. So where the sanction of the trustee is necessary for a lease of the debutter properties, a contract to lease entered into by the agent of the trustee without reference to the trustee till after the contract was entered into is not binding and not specifically enforced (8).

Contracts made by corporation etc. in excess of their powers and specific performance.—A contract made by or on behalf of a corpo-

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(1) *Harnet* v. *Yielding*, supra ; *Byrne* v. *Acton*, 1 Bro. P. C. 186 ; *Motee Das* v. *Modhoosudan*, 1 W. R. 4 ; *Narain* v. *Akhoy*, 12 C. 152 ; *Surbesh* v. *Hari Doyal*, 11 C. L. J. 346=14 C. W. N. 451.

(2) *Mahomed Esmail Khan* v. *Nunda Dulal*, 16 Ind. Cas. 390.

(3) Specific Relief Act s. 21 (e) Illustration.

(4) Illustration to clause (e) of section 21 of the Specific Relief Act.

(5) *Ibid* ; see also *Mortlock* v. *Buller*, 10 Ves. 292.

(6) *Ibid* ; see also *Ema Silver Mining Co.* v. *Grant*, 11 Ch. D. 918.

(7) *New Sombrero* v. *Erlanger*, 5 Ch. D. 73 affirmed. 3 A. C. 1218.

(8) *Sri Sri Gopal Sridhar* v. *Sashi Bhusan Sarker*, 36 C. W. N. 1108.

ration or public company created for special purposes, or by the promoters of such company, which is in excess of its powers, cannot be specifically enforced (1). Thus where a company existing for the sole purpose of making and working a railway, contracts for the purpose of a piece of land for the purpose of erecting a cotton mill, thereon, this contract cannot be specifically enforced (2). All these contracts are *ultarvires* i.e. in excess of the powers of the corporation. An illegal contract is not enforced by a court. On the same principle where the defendant is a company or a corporation with limited powers, a defence that the transaction songht to be enforced is *ultra vires* is, if established, a bar to specific performance (3)". "The reasons why a corporation is not liable upon a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the Legislature, and varying from the objects of its creation as declared in the law of its organisation are, 1st, the interest of the public, that the corporation shall not transcend the powers granted, 2nd, the interest of the stock-holders, that the capital shall not be subjected to the risk of enterprise not contemplated by the charter, and therefore not authorised by the stock-holders in subscribing for the stock, 3rd, the obligation of every one entering into a contract with a corporation, to take notice of the legal limits of its powers (4)"

Contracts involing continuous duty.—A contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date cannot be specifically enforced (5). A contracts to let for twenty-one years to B the right to use such part of a certain railway made by A as was upon B's land and that B should have a right of running carriages over the whole line on certain terms, and might require A to supply the necessary engine power, and that A should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to B (6). "A court," said *Mellish L. J*, "can only order the doing of something which has to be done once for all, so that the court can see to its being done (7)." The defendant executed a registered agreement, in favour of plaintiff's father, providing *inter alia*, that the former would bring about co-habitation between his son and plaintiff, and would also treat her well, and promised, in case of failure to do so, to pay plaintiff a certain amount of maintenance and to give her a house to live in. Plaintiff sued, on the basis of this agreement, for arrears of mainteance and for one of defendant's houses, alleging that defendant did not bring about co habitation between herself and her husband, and that she was ill-treated and driven out of the defendant's house. *Held* that this was not a case in which specific perform-

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(1) Specific Relief Act s. 21 clause (*f*)
(2) *Ibid* Illustration.
(3) Halsbury's Laws of England Vol. 27 p. 36 ; see also *Imperial Ice Manufacturing* v. *Munchershaw*, 13 B. 415.
(4) Banerjee's T. L. L. for 1906 p. 206 citing *Day* v. *Spiral Spring Buggy*, 58 Am. Rep. 352, *per Gray J.*
(5) Specific Relief Act s. 21 clause (*g*)
(6) *Ibid* Illustration.
(7) *Powel* v. *Taff Vale*, 9 Ch. 331 cited in Banerjee's T. L. L. for 1906 p. 168.

ance could be decreed and a perpetual liability imposed on the defendant. Such a decree would be opposed to section 21, cl (g) of the Specific Relief Act (1). When a contract is for a period exceeding three years it cannot be split up and cannot be enforced even for a limited period (2). But there is a clear distinction between agreements which contemplate the continuous performance of specific acts for more than three years and contracts which contemplate forbearance from the performance of certain acts. While the former kind of contract can not be enforced under s. 21 (g) of the Specific Relief Act and therefore a mandatory injunction in respect thereof cannot be granted under s. 56. There is nothing in that section to prohibit the grant of preventive relief by way of an injunction in the latter kind of cases. This follows from the clear wording of section 57 which is an exception to section 56 of the Specific Relief Act. So an injunction restraining a person from letting his portion of the property to a stranger can be granted (3).

Contract under mistake.—A contract, of which a material part of the subject matter, supposed by both parties to exist, has before it has been made, ceased to exist, cannot be specifically enforced (4). A contracts to pay an annuity to B for the lives of C and D. It turns out, at the date of the contract, that C though supposed by A and B to be alive was dead. The contract cannot be specifically performed (5). "As a mistake is no defence in a court of law" says *Dr. Pomeroy* "to the obligation under his contract, one must look for relief, if at all in equity. For certain kinds of mistakes equity will give the affirmative relief of recission, or reformation with specific performance. For other kinds of mistakes only the negative relief is given of a refusal to decree specific performance against the defendant setting up the defence of mistake (6)." In the cases of mistake, as in other matters in equity, it is plain that a set of circumstances in sufficient to give a right to the radical step of recission, in which all the rights in law or equity are cancelled, may well be sufficient for equity, using its discretionary power, to refuse its aid to enforce contract against the party making the mistake, although it will not protect him from the consequences of his contract in law. Mutual mistake which gives a right of reformation or recission, would of course give a right to the lesser relief of refusal of specific performance if the affirmative relief were not insisted upon (7). If this mistake is material, that is, of the essence of the transaction, which without it would not probably have taken place, a Court of equity feels disposed to interfere (8). In granting a decree for specific performance *Justice Fry* said: "The mistake is not one which goes to the corpus with which the Court deals. It is not a mistake as to the essential part. A

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(1) *Daropti* v. *Jaspat Rai*, 28 P. L. R. 1905=49 P. R. 1905.

(2) *Emperor* v. *Mahomed*, 22 Ind. Cas. 742=96 P. L. R. 1914.

(3) *Nathu Lal* v. *Muni Lal*, 28 P. L. R. 655=103 Ind. Cas. 715=9 Lah. L. J. 311,

(4) Specific Relief Act s. 21, cl. (*h*).

(5) *Ibid*, Illustration.

(6) Pomeroy's Eq. Jur. § 2199.

(7) Pomeroy's Equitable Remedies § 778.

(8) Banerjee's T. L. L. for 1906, p. 323.

mere difference in quantity has never been held to be a bar to specific performance."

Contract for Arbitration.—And, save as provided by the Code of Civil Procedure (1), and the Indian Arbitration Act, 1899 (2), no contract to refer present or future difference to arbitration shall be specifically enforced ; but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted so to refer, the existence of such contract shall bar the suit (3). Section 21 of the Specific Relief Act applies to an agreement before suit, as well as to one made during pendency of a suit (4). Before section 21 of the Specific Relief Act could be pleaded as a bar to a suit for damages for breach of a contract according to whose terms the parties have agreed to refer any disputes between them to arbitration, it must be shown that the plaintiff had refused to refer to arbitration. The filing of the plaint is not such a refusal (5). "Under section 28 of the Contract Act, it was not ordinarily open to parties to ignore the courts of the country and to set up a Tribunal for deciding their disputes. One exception was recognised to the effect that if the parties had agreed to refer their disputes to arbitration, the existence of the argeement shall be a bar to seeking redress in the ordinary courts. The section also recognised the right of one of the parties to sue for specific performance of the agreement to refer. Then came the Specific Relief Act of 1877, which by section 21 took away (6) the right to sue for the specific enforcement of the contract, but preserved the right to the party, who was willing to abide by the argreement, to object to the trial of the suit filed by the other party. Lastly, we have section 22 of the second Schedule of the Code of Civil Procedure, which has repealed that portion of section 21 of the Specific Relief Act which enabled the defendant to plead the agreement to refer as a bar to the suit. The result of these various legislative provisions is to bring the Indian Law into conformity with the English Law on the subject. The provisions of the Indian Arbitration Act which apply to Presidency Towns and to Karachi are to the same effect. In our opinion the intent to be gathered from these Acts is that the rights of a party to seek the assistance of the properly constituted Courts of the Realm are unrestricted. The right inhering in a suit or to sue is preserved intact" (7). In *Mitchell* v. *Harris* (8) *Lord Loughborough, L. C.* repudiated the suggestion that an agreement to

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(1) Act V of 1908.

(2) Act IX of 1899.

(3) Specific Relief Act s. 21, proviso. The last thirty seven words do not apply to any submission or arbitration to which the provisions of the Indian Arbitration Act, 1899, for the time being apply, or to any agreement to refer to arbitration, or to any award to which Sch II of Act 5 of 1908 applies. (Para 22 of Schedule II of C. P. Code).

(4) *Sheodat* v. *Sheosankar*, 27 A 53 = 1 A. L. J. 398.

(5) *Koomud* v. *Chunder*, 5 C. 498 = 5 C. L. R. 284.

(6) This right is not taken away in the Scheduled Districts, where Act I of 1877 is not applicable.

(7) *Appavu* v. *Seeni Rowther*, 42 Ind. Cas. 514 = 41 M. 115 = 33 M. L. J. 117 ; *Dinabandhu* v, *Durga Prosad*, 23 C. W. N, 716 = 46 C. 1041 ; *Doleman & Sons* v. *Ossett Corporation* (1913) 3 K. B. 257.

(8) 2 Ves. 129, 137.

refer, where no reference had taken place, would stop a court of law, as also the idea of a bill to enjoin a party from proceeding at law under a notion of giving effect to such a covenant. Indeed, it appears to have been treated in later cases as settled law that an agreement to arbitrate did not oust the jurisdiction of the court and the pendency of an arbitration was a bad plea (1). In the case last mentioned, *Lord Denman C. J.* ruled that the pendency of an arbitration was no answer to an action for recovery of a debt and the plea as a plea in bar was clearly bad (2). In the above case the court further observed : "The result of this provision is that when the Court is apprised that the suit has been instituted in contravention of an arbitration agreement, the court has a descretion to stay the suit. Indeed, as *Lord Selborne* said in *Willesford* v. *Watson* (3), if parties chose to determine for themselves that they will have a domestic forum instead of resorting to ordinary courts, then since that Act of Parliament (*i. e.* the Common Law Procedure Act, 1854, sec. 11 of which corresponds to para 18 of the Civil Procedure Code) was passed, a *prima facie* duty is cast upon the courts to act upon such an agreement.' As *Sir George Jessel M. R.* put it in *Hodgson* v. *Railway Passengers Assurance Co.* (4) 'the plaintiffs are in the position of a party applying, and if there is any reason why the matter should not be referred to arbitration, it is their duty to bring it forward and present it to the Judge, and if they cannot do so, the Judge is quite justified in being satisfied that there is no reason' The burden therefore lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not on the defendant to show that no such reason exists ; it is the *prima facie* duty of the court to act upon the agreement between the parties.....(5). The substance thus is that for the determination of the controversy between the parties, there were two competent tribunals available, the court and the arbitrators. The plaintiff contracted to choose the latter ; he has in fact taken the former. His opponents are not allowed to enforce specific performance of the contract or to plead the contract as a conclusive bar to the suit ; but the law permits them to apply to the court to stay the suit in the exercise of its judicial discretion, so as to enable either of the parties to obtain a reference to the arbitrators." "The true position consequently is that as soon as the suit is instituted the arbitrators lose their authority. If the defendant still desires that the controversy should be decided by arbitration he must endeavour to obtain a stay of the suit by an appropriate application under para 18 of the schedule to the Civil Procedure Code. If the application is refused by the court in the exercise of its discretion, the remedy by arbitration ceases to be available (6)." If on the other hand, the arbitrators have made an award after the institution of the

(1) *Thompson* v. *Charnock*, 8 T. R. 139 ; *Harris* v. *Raynolds*, 7 Q. B. 71.

(2) *Dinabandhu* v. *Durga Prosad*, 23 C. W. N 716=46 C. 1041.

(3) L. R 8 Ch. 473, 479.

(4) 9 Q. B. D. 188.

(5) *Lyon* v *Johnson*, 40 Ch. D. 579 ; *Clegg* v. *Clegg*, 44 Ch. D. 200.

(6) *Sarat Chandra* v. *Rajkumar*, 26 C. W. N. 967 ; see also *Jokiram* v. *Ganeshyam*, 25 C. W. N. 62=47 C. 849.

suit, the award cannot be pleaded as an effective bar to the suit (1). Where an agreement of reference has been acted upon and terminated in an award, a suit for cancellation is not against the tenor of section 21 of the Specific Relief Act ; that section has no application except where a person, having made a contract to refer a controversy to arbitration, has refused to perform it and institutes a suit in respect of the subject matter in defiance of the contract (2).

Unfair advantage.—Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or mis representation on the plaintiff's part, the Court may properly exercise a discretion not to decree specific performance (3). But the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal (4). "In truth the exercise of the whole breach of Equity Jurisprudence respecting the recession and specific performance of contracts is not a matter of right in either party, but it is a matter of discretion in Court (5); not indeed of arbitrary or capricious discretion, dependent upon the mere pleasure of the Judge, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but which at the same time withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. On this account it is not possible to lay down any rules and principles which are of absolute obligation and authority in all cases ; and therefore it would be waste of time to attempt to limit the principles or the exceptions which the complicated transactions of the parties and the ever-changing habits of society may at different times and under different circumatances require the Court to recognize or consider" (6).

In order that a Court of Equity may exercise the jurisdiction to compel its performance, the contract must be perfectly fair, equal and just in its terms and in its circumstances (7). A tenant for life of certain property, assigns his interest therein to B. C contracts to buy and B contracts to sell that interest. Before the contract is completed A receives a mortal injury from the efforts of which he dies the day after the contract is executed. If B and C were equally ignorant or equally aware of the fact B is entitled to specific performance of the contract. If B knew the fact and C did not, specific

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(1) *Ramchand* v. *Gobindram*, 13 S. L. R. 193.

(2) *Dwarka* v. *Ram Jatan*, 53 A. 16=1930 A. L. J. 1537=A. I. R. 1930 All. 877 =128 Ind. Cas. 755.

(3) Specific Relief Act s. 22, Cl. (1).

(4) *Ibid.* This discretion cannot be invoked by a party guilty of laches or where want of relief would involve hardships and inequity to the other parties concerned. *Jadunath* v. *Chandrabhusan*, 36 C. W. N. 285=138 Ind. Cas. 498=A. I. R. 1932 Cal. 493.

(5) *City of London* v. *Nash*, 1 Ves. 13 ; *Joynes* v. *Statham*, 3 Atk 389 ; *Underwood* v. *Hitchcox*, 1 Ves. 279 ; *Clowes* v. *Higginson*, 1 Ves & B. 527.

(6) Story's Eq. Jur. § 1026 ; see also *White* v. *Davimon*, 7 Ves. 70 ; *Lamare* v. *Dixon*, L. R. 6 H. L. 414 (423) ; *Sreelal* v. *Hariram*, 88 Ind. Cas. 737 ; *Gangabai* v. *Sonabai*, 44 B. 69=28 Ind. Cas. 544 ; *Munshi Habibar* v *Maulavi Ali*, 44 C. L. J. 162=A. I R. 1926 Cal. 1237 ; *Kokil* v. *Bonbahadur*, A. I. R. 1926 P. C. 539.

(7) Pomeroy's Eq. Jur. § 1405.

performance of the contract should be refused to B (1). A contracts to sell to B the interest of C in certain stock-in trade. It is stipulated that the sale shall stand good, even though it should turn out that C's interest is worth nothing. In fact, the value of C's interest depends on the result of certain partnership accounts, on which he is heavily in debt to his partners. This indebtedness is known to A, but not to B. Specific performance of the contract should be refused to A (2). A contracts to sell and B contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. A does not know of this circumstance, and A conceals it from him. Specific performance of the contract should be refused to A (3). A's property is put to auction. B requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding think that he is a mere puffer and cease to compete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B (4).

The conduct of the plaintiff may amount to a personal bar to specific performance, as in the cases of sharp practice, concealment contrivance, etc., or even if he is not barred by inequitable conduct, he may have obtained the contract under such conditions of advantage, that equity regards it as unfair, and its enforcement a hardship. Such cases arise where the plaintiff takes advantage of the condition of the defendant, as of his pressing necessity, to drive a very hard bargain (5). Even though the plaintiff was free from intention to take an unfair advantage, if the actual result is an inequality and unfair advantage, equity will not aid the plaintiff. The inequality which equity regards may be of two kinds, (*a*) that in the inception, existing when the contract is made, either between the parties or arising from the situation; as where defendant acted under great and pressing necessity, or was otherwise at a dis-advantage by reason of old age, mental weakness, poverty, ignorance, inexperience, sex (6), etc., or (*b*) that inequality which the Court of Equity finds in the operation of the contract, as where the terms are so indefinite, unqualified, or assented to with such lack of caution, that their enforcement would produce an inequality not foreseen by the defendant (7).

Complete intoxication; such that the defendant had no comprehension of his act, "that extreme state of intoxication that deprive a man of his reason" (8) would be a ground for complete relief in equity, rescission, as well as a defence to specific performance. Ordinary intoxication is not a ground for rescission where the plaintiff did not cause it or make it a means

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(1) Illustration (*a*) to section 22 of Specific Relief Act; *Ellard* v. *Landoff* (1809) 1 Ball & Beatty 241.

(2) Illustration (*b*) to section 22 of the Specific Relief Act; see also *Smith* v. *Harrison*, 26 L. J. Ch. 412=5 W. R. 408.

(3) Illustration (*c*) to section 22; see also *Shirley* v. *Stratton*, 1 Bro. C. C. 440.

(4) Illustration (*d*) to section 22; see also *Twining* v. *Morris*, (1788) 2 Bro. C. C. 326.

(5) Pomeroy's Eq. Jur. § 2208.

(6) *Kedarnath* v. *Mannu Bibi*, 16 C. W. N. 247=13 Ind. Cas. 879.

(7) Pomeroy's Eq. Jur. § 2209.

(8) *Cook* v. *Klayworth*, 18 Ves. 12, 15.

of fraud, but it generally has the effect of neutralising the equities of the parties, in a suit for specific performance, so that the court "will not act on either side (1)." As the *Master of the Rolls, Sir William Grant*, said: "A court of equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication (2)." But, "intoxication which merely exhilarates and does not materially affect the understanding and the will, does not constitute a defence to the enforcement of an executory agreement, and much less is it any ground for affirmative relief (3)," Under some circumstances, especially where any inequality exists between the parties, a highly improvident contract will not be enforced (4).

Courts of equity frequently state the rule to be that the hardship and unfairness must be judged of in relation to the time of making the contract, and that specific performance will not be refused because of hard conditions brought about by subsequent events, or changes in circumstances (5).

In *Calliangi Harjivan* v. *Narsi Tricum* (6) the plaintiff was a milliner carrying on business in Bombay and the defendant was in his employment upto the year 1890. In that year he left the plaintiff's service, and the plaintiff alleged that at the time he left he was indebted to the plaintiff for moneys not accounted for and also in respect of loans made to him. The plaintiff instituted criminal proceedings in the Police Court against the defendant for criminal breach of trust, and procured a warrant for his arrest. The defendant surrendered and at the time of the agreement here after mentioned the proceedings in this matter was going on. The defendant was out on bail, and was then in the service of a rival milliner named *Bhimje Jivan*. On the first February, 1893, an agreement in writing was made between the plaintiff and the defendant, whereby the defendant agreed as follows :—(i) to pay the plaintiff Rs. 1950 in full settlement of the plaintiff's claim ; (ii) to enter plaintiff's service as cutter and to serve him for ten years from the date of agreement ; (iii) to serve plaintiff honestly ; (iv) in case plaintiff was obliged to dismiss him for some "fault," then until the expiration of the said period of ten years the defendant should not carry on the business of a cutter or tailor, either directly or indirectly, on his own account or as partner or servant of another, and in case he should do so, the plaintiff should be at liberty to stop him. On the 15th February 1893, the charge of criminal breach of trust against the defendant was dismissed, the plaintiff offering no evidence in support of it. The plaintiff subsequently called upon the defendant to enter his employment in accordance with the agreement, but the defendant refused, and remained in the service of Bhimji Jiban. The

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(1) *Cragg* v. *Holme*, 18 Ves. 14.

(2) *Cook*. v. *Clayworth*, 18 Ves. 12, 15 ; *Sher Singh* v. *Udham Singh*, 72 Ind. Cas. 586.

(3) Pomeroy's Eq. Jur. § 949.

(4) Pomeroy's Eq. Jur. § 2211.

(5) *Ganga* v. *Jagat*, 23 C. 15 (25) P. C. ; Fry § 399.

(6) 18 B. 702, on appeal 19 B. 764.

plaintiff therefore filed this suit for an injunction restraining the defendant from carrying on a business as a cutter or tailor for ten years from the date of agreement. The original court dismissed the suit holding that the parties were not really on equal terms, and that in the exercise of the discretion permitted to the court by section 22 of the Specific Relief Act, the injunction should be refused.

Against this decision the plaintiff appealed. The appellate court in partially decreeing the appeal observed: "Now we think it is impossible to believe that in entering into this agreement with the plaintiff the defendant was not influenced by the idea that by doing so he was getting rid of the criminal charge against him. It is surely much more likely that this was his object than that the should have been led to do so by a desire to re-enter the plaintiff's service. The case was pending against him and might be proceeded with, and it was no doubt a matter of great importance to him that it should be withdrawn. If that was so, it is clear that the parties at the time of making the agreement cannot be said to have been on equal terms. The defendant was at a disadvantage. He was to some extent in the power of the plaintiff and was apparently without any legal advice. Thus situated, and without taking any time for consideration, he signed the agreement. If we look at the terms of the agreement, we find it to be one which we think it is unlikely that a man could sign unless under some pressure of circumstances, for by it the defendant bound himself to serve the plaintiff for a long period of time, and during all that time his remuneration was to remain the same. Having regard to circumstances, we think that the parties to the agreement of the 1st February were not on equal terms, and that the Judge of the lower court was right in refusing either to grant specific performance of the agreement or an injunction against the defendant. The lower court was also of opinion that pecuniary compensation was sufficient to satisfy the plaintiff's claim against the defendant Speaking for myself, I question whether compensation can be regarded as an equivalent for the defendant's agreement to work for him for ten years. There is always a difficulty in proving damages with any accuracy in such a case. It is, indeed, almost impossible, and I confess that this fact has caused me to feel much doubt as to whether an injunction is not the proper remedy for the plaintiff, but on the whole think I that the considerations which I have mentioned should prevail (1)."

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(1) *Callanji Harjivan* v. *Narsi Tricum*, 19 B. 764, 769. In the same case *Farran C. J.*, also observed: "In considering this question we must keep in mind that to grant an injunction in a case like the present amounts in substance, although not in form to a decree for specific performance. It is obvious that to a man in the defendant's position there would be no alternative—in the event of his being prevented by order of the court from taking other employment—than to enter the plaintiff's service, and to remain in it as long as the injunction remained in force. It would be practically impossible for him now to learn another trade or to find other employment. It is clear, therefore, that the same considerations which would prevent us from giving the plaintiff a decree for specific performance of the contract ought to prevent us from

Hardship.—Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the p'aintiff, the court may properly exercise a discretion not to decree specific preformance (1). So if the enforcement of the contract would be offensive or hard on the defendant, or would prevent his enjoyment of his own right, or would work injustice,—then a specific performance will be refused (2). Where the court is satisfied that the result which bears so hard upon the defendant, though legally a constituent part of the contract, was not intented by the parties at the time of the agreement,—in fact, was not in contemplation as the effect of the agreement which was expressed in terms too unqualified,—it will not specifically enforce the agreement (3). Thus, where a lease of a water front and wharves contained a covenant to make all repairs, and a flood of the river washed away and destroyed the property to a large extent, specific performance was refused (4).

Analogous to the case of unintended consequence, is that arising from mere inadvertence of act or covenant (5), as where a covenant bound trustees personally in a warranty of land sold under the trust (6). On this case the following illustration (7) is founded. A and B, trustees, join their beneficiaries C, in a contract to sell the trust estate to D and personally agree to exonerate the estate from heavy incumbrances, to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused. This was considered such an inadvertent assumption of a personal obligation that equity would not enforce it. Similarly in an auction sale, by an inadvertent act of a third party, there was a suppression of the bidding. Specific performance was therefore refused (8). "In rare instances" says *Prof. Pomeroy* "the mere onerousness or oppressiveness of the consequences of enforcement may be so great that although there is no other reason, equity will not grant specific performance that plaintiff is otherwise entitled to, as where by the clause of a certain will, the sale of the land would cause the losses to the defendant of one half of the purchase money, a large sum (9). But generally speaking, where the defendant entered upon the contract with his eyes open, the hardship arising from collateral circumstances cannot give him a defence (10)."

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granting such an injunction. The circumstances we are required to take into consideration in granting specific performance are indicated in section 22 of the Specific Relief Act, and it, therefore, becomes necessary to state the facts of this case in order to see whether they bring it within that section."

(1) Specific Relief Act s. 22 clause (ii).

(2) Pomeroy's Eq. Jur. § 1405.

(3) *Ibid* § 2213.

(4) *Waite* v. *O'Neil*, 72 Fed. 348.

(5) *Dunne* v. *Light*, 8 De G. M. & G. 774, 778, where defendant by oversight did not notice that the land he agreed to buy had no assurance of any rightful mode of access. On this case the illustration (j) is based.

(6) *Wedgwood* v. *Adams*, 6 Beav. 600.

(7) Vide illustration (f) of section 22 of the Specific Relief Act (1 of 1877).

(8) Vide illus. (d) of s. 21 S. R. Act; *Twining* v. *Morrice*, 2 Bro. C. C. 326; Pomeroy's Eq. Jur. 2214.

(9) Illustration (e), which is based on *Paine* v. *Brown*, 2 Ves. Sr. 307.

(10) Pomeroy's Eq. Remedies § 793.

A, a lessee of mines contracts with B his lessor, that at any time during the continuance of the lease B may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B (1). A, the owner of an estate, contracts to sell it to B, and stipulates that he, A shall not be obliged to define its boundary. The estate really comprises a valuable property, not known to either to be part of it. Specific performance of the contract should be refused to B, unless he waives his claim to the unknown property (2). A contracts with B to sell him certain land, and to make a road to it from a certain railway station. It is found afterwards that A cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road (3). A contracts with B to buy from B's manufactory, not elsewhere, all the goods of a certain class used by A in his trade. The court cannot compel B to supply the goods; but if he does not supply them, A may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B (4).

Specific performance not being an absolute right, the fact that enforcement would be of little or no benefit to the complainant, and a burden upon the defendant, is sufficient to constitute performance oppressive, and it will not be given. The disproportion between the burden upon the defendant and the gain to the plaintiff makes performance inequitable (5).

'Courts of equity frequently state the rule to be that the hardship and unfairness must be judged of in relation to the time of making the contract, and that specific performance will not be refused because of hard conditions brought about by subsequent events, or changes in circumstances. A more accurate formulation of the rule is this: equity will not relieve against hardship arising from a change in circumstances or the result of subsequent events, where these should have been in contemplation of the parties as possible contingencies, when they entered upon the agreement. And of such a nature are the ordinary changes like a rise or fall in values, profit or loss in the undertaking, mistake of judgment, unforeseen events, which yet were fairly possible contingencies, etc. Thus, no hardship arising from a great change in values between the time of making of the agreement and the conveyance can be a ground for any relief. Nor can hardship arising from bad judgment, miscalculation, or changes of conditions that ought fairly to have been in

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(1) Illustration (i) to section 22 of the Specific Relief Act; see also *Talbot* v. *Ford*, 13 Sim. 173, 175.

(2) Illustration (g) of ibid; *Barundale* v. *Scale*, 19 Beav. 601.

(3) Illustration (h) to section 22 of the Specific Relief Act.

(4) Illustration (k) to ibid.

(5) Pomeroy's Eq. Jur. § 2218.

contemplation of the defendant to be considered by the court. Those results of contract are what the complainant has a clear right to receive, and the defendant no equity for refusing (1)."

Part performance of contract.—Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance, a Court may properly exercise a discretion to decree specific performance (2). A sells land to a Railway Company who contract to excute certain work for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the work should be decreed in favour of A. (3) The doctrine of part performance was purely a creation of equity and was not recognized at law. The application of the doctrine obtained recognition in the Chancery Courts of England in connection with parol agreements, notwithstanding the Statute of Frauds. "The doctrine was settled at an early day in England, that a verbal contract for the sale or leasing of land, or for a settlement made upon consideration of marriage, if part performed by the party seeking the remedy, may be specifically enforced by Courts of Equity notwithstanding the Statute of Frauds (4)." The contract must possess all the elements and features necessary to the specific enforcement of any agreement, except the written memorandum required by the statutes (5). The mere delivery and taking of possession in pursuance of the agreement is, by the rule of English cases, sufficient part performance to warrant equity in granting relief (6). This is rested upon the ground that "the acknowledged possession of a stranger of the land of another is not explicable, except on the supposition of an agreement, and has therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an enquiry into its terms ; the Court regarding what has been done as a consequence of contract or tenure (7)." The possession must be actual, notorious and exclusive, not shared with the vendor ; and must be taken with the consent or acquiescence of the vendor (8). In *Mathewson* v. *Ramkanai* (9), *Dass J.* said : "The laying out of considerable sums of money by the lessee in the erection of permanent structures on the land for those very purposes that are mentioned in the covenant and hence referrible to the covenant and to the covenant alone, and all this done undoubtedly to the knowledge of the lessor who resided close by, must be regarded as part performance, and, indeed, a substantial part performance of the covenant for a perpetual lease, such as would entitle the covenatee to claim specific performance of the covenant on the ground that it would be inequitable and fraudulent for the covenantor to refuse to perform the covenant:

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(1) Pomerory's Equity Jur. § 2219.
(2) Specific Relief Act s. 22 cl. (*iii*).
(3) Illustration to *ibid* ; see also *Storer* v. *G. W. Ry. Co*, 2 Y & C. C. 48 ;
(4) Pomeroy's Eq. Jur. § 1409.
(5) *Ibid.*
(6) *Butcher* v. *Stapely*, 1 Vern. 363 ; *Clinan* v. *Cooke*, 2 Schoales & L. 22, 41.
(7) *Morfett* v. *Jones*, 1 Swanst. 172.
(8) Pomeroy's Eq. Jur. § 2241.
(9) 36 C. 675 at p. 699.

Farrall v. *Davenport* (1), *Howard* v. *Patent Ivory Manufacturing Co.* (2); see also section 22, clause III of the Specific Relief Act."

Who may obtain specific performance—"Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by—

(*a*) by any party thereto (3);

(*b*) the representative in interest, or the principal, of any party thereto: provided that, where the learning, skill, solvency, or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed (4);

(*c*) where the contract is a settlement on marriage (5) or a compromise of doubtful rights (6) between members of the same family, any person beneficially entitled thereunder;

(*d*) where the contract has been entered into by a tenant for life in due exercise of a power (7), the remainderman;

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(1) 3 Giff. 363.

(2) 38 Ch. D. 156.

(3) Third parties cannot sue. *Ahmedbhoy* v. *Petit*, 11 Bom. L. R. 544 (559); *Lakshman* v. *Muthria*, 30 Ind. Cas. 785 The parties to the contract are necessary and sufficient parties to the action. *Safiur Rahaman* v. *Maharamunissa*, 24 C. 834. As a general rule a contract cannot be enforced except by a party to a contract. That rule however, is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B so that B is entitled to say he has a beneficial right as *cestui que* trust under that contract, then B is entitled to enforce the contract in a Court of Equity. *Jiban* v. *Nirupama*, 30 C. W. N. 812; see also *Deb Narayan* v. *Chuni Lal*, 41 C. 137=17 C. W. N. 1143; *Touche* v. *Metropolitan*, L. R. 6 Ch. D. 671; *Gandy* v. *Gandy*, 30 Ch. D. 57; *Itti Pankh a* v. *Dharman*, 41 M. 488=43 Ind. Cas. 625; *Dwarki* v. *Priyanath*, 22 C. W. N. 279; *Mahamed Khan* v. *Hussaini Begum*, 32 A. 410. Both parties are entitled' to execute the decree. *Heramba* v. *Jyotish*, 59 C. 501=36 C. W. N. 172.

(4) *Proviso*: 'This means that when personal considerations are of the foundation of the contract, as in cases of principal and agent and master or servant, the death of either party puts an end, to the relation; and in respect of services after the death the contract is dissolved, unless there be a stipulation, express or implied, to the contrary. *Farrow* v. *Wilson*, 4 C. P. 744, 746." *Banerjee'e* T. L. L. for 1906 p. 397; see also *Mohendra* v. *Kali prosad*, 30 C. 265; *Manuswami* v. *Sagalaguna*, A. I. R 1926 M. 699 (703)=49 M 387. *Doraiswami* v. *Thangavalu*, A. I. R. 1929 Mad. 251; *Vithoba* v. *Madhub*, 42 B. 344=46 Ind. Cas. 734.

(5) *Nawab Khwaja Mahommed* v. *Nawab Husaini*, 14 C. W. N. 865.

(6) "In the case of *Cann* v. *C* (1 P. W. 723, 727). it was laid down by *Lord Macclesfield* that an agreement entered upon a supposition of a right or of a doubtful right though it afterwards comes out that the right was on the otherside, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and therefore the compromise of a doubtful right is sufficient foundation of an agreement.....It was to save the honour of the father and his family, and was a reasonable agreement; and, therefore, if it is possible for a Court of Equity to decree a performance of it, it ought to be done." *Per Hardwicke L.C* in *Stapilton* v. *Stapilton*, 1 Atk. 2=1 Wh. & Tud. L. C 8th Ed. p. 234; see also *Rameswar* v. *Rambahadur*, 31 C. 111 =7 C. W. N. 688.

(7) "The object of the power is the better management and enjoyment of the estate, and it is duly exercised when the contract is made on behalf both of the tenant for life and remainder man."—Banerjee's T. L. L. for 1906 p. 77.

(*e*) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant, (1) ;

(*f*) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach (2) ;

(*g*) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation (3) ;

(*h*) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company (4)."

personal bar to the relief.—"Specific performance of a contract cannot be enforced in favour of a person :—

(a) who could not recover compensation for its breach (5) ;

(b) who has become incapable of performing, or violates any essential term of the contract that on his part remains to be performed (6) ;

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(1) When a tenant in fee grants the land to another person for a term of years or for life, or in tail, the estate so created is called a particular estate, being only a part of the estate in fee, and the interest of the tenant in fee simple which still remains undisposed of, is called his reversion. It is a present or vested estate by virtue of which he will have the possession of land again on the determination of the particular estate. *Byrne's Dictionary*. Here the expression 'reversioner" is used loosely to signify the owner of any estate in expectancy and includes a remainder man or an assignee. Banerjee's T. L. L. for 1906 p. 78.

(2) "Reversioner in possession" as distinguished from "reversioner in remainder." in cl. (*f*). Both the expressions according to Dr. Banerjee are inaccurate. What is intended by the first is a person who had an estate in expectancy when the covenant was made in favour of the owner for the time being, but has since entered into possession and is the owner now. The second expression means the owner of an estate in expectancy who has not yet come into possession." Banerjees T. L. L. for 1906 p. 78.

(3) Cf *Stanely* v. *Chester* & *Birkenhead Ry Co*, (1838) 9 Sim. 264 ; *Earl of Lindsey* v. *G. N. Ry Co*, 10 Hare, 664.

(4) Section 23 of the Specific Relief Act (I of 1877).

(5) *Illustration* : "A, in the character of agent for B.. enters into an agreement with C to buy C's house. A is in reality acting not as an agent of B but on his own account. A cannot enforce specific performance of this contract." "A fraudulent concealment, defeating a contract of sale at law, and furnishing ground for its canceallation in equity, is, of course. a complete defence to its specific performance. In addition to these concealments properly so called, the suppression of a material fact, or the failure to communicate a material fact by the vendor, without any purpose of deceiving or misleading the other party, and even without having himself any knowledge of the fact, while not affecting the validity of the agreement at law, and not being sufficient ground for its cancellation in equity, because not fraudulent. may still render the agreement so unfair, unequal or hard, that a court of equity, in accordance with its settled principles in administering the remedy of specific performance, will refuse to enforce the contract against the party who was misled. The two contracting parties do not stand upon an equality ; either one had a knowledge of important facts of which the other was ignorant, or else there was a mistake by one or perhaps by both. Such misdescription, consisting of omitting material particulars, however free of wrongful intent they may be, have often been held a sufficiant defence to suits for specific enforcements." Pomeroy's .Eq. Jur. § 905.

(6) *Illustrations* :—"(i) A contracts

(c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract ; or (1).

(d) who previously to the contract, had notice that a settlement of the subject matter thereof (though not founded on any valuable consideration) had been made and was then in force (2)."

Contracts to sell property by one who has no title, or who is a voluntary settlor.—"A contract for the sale or letting of property, whether movable, or immovable cannot be specifically enforced in favour of a vendor or lessor—

(a) who knowing himself not to have any title to the property, has contracted to sell or let the same (3) ;

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to sell B, a house and become tenant thereof for a term of fourteen years from the date of the sale at a specific yearly rent. A becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract. (ii) A contracts to sell B a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. A without B's consent fells the trees. A cannot enforce specific performance of the contract. (iii) A holding land under a contract with B. for a lease, commits waste, or treats the land in an unhusbandlike manner. A cannot enforce specific performance of the contract. (iv) A contracts to let, and B contracts to take, an unfinished house, B contracting to finish the house and the lease to contain covenants on the part of A, to keep the house in repair. B finishes the house in a very defective manner ; he cannot enforce the contract specifically though A and B may sue each other for compensation for breach of it." "The plaintiff who seeks specific performance of the contract has to show first, that he has performed or been ready and willing to perform the terms of the contract on his part to be then performed, [*Bungsheedhar* v. *Calcutta Auction*, 1 Hyde 45 ; *Ram Tunoo* v. *Mullicka Dassee*. 14 W. R. 338 ; *Ghillis* v. *Mc Ghee* 13 Ir. Ch. R. 48] ; and secondly that he is ready and willing to do all matters and things on his part thereafter to be done [*Walker* v. *Jeffreys*, 1 Hare 341 ; *Vishvanath* v. *Bapu Narayana*, 1 B. H. C. R. 262]. A default on his part in either of these respects furnishes a ground upon which the action may be resisted [*General Billposting Co.* v. *Akinson*, (1909) App. Cas. 118 at p. 122.]. "Although so far as the Act is concerned. ; there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England [Sec. 24 (b) is the nearest], it seems invariably to have been recognised, and, on principle, their lordships think rightly, that the Indian and English requirements in this matter, are the same. See e. g. *Kursandas* v. *Chhotalal*. (24 Bom. L. R. 1037, 1050)" *Adelsir* v. *Flora Sassoon*, 32 C. W. N. 953 (969) P. C. The doctrine is fundamental that either of the parties seeking a specific performance against the other must show as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit. and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms." Pomeroy's Eq. Jurisprudence § 1407.

(1) *Illustration* : "A contracts to let, and B contracts to take, a house for a specified term at a specified rent. B refuses to perform the contract. A thereupon sues for and obtains, compensation for the breach. A cannot obtain specific performance of the contract.." See also *Sainter* v. *Ferguson*, (1849) 1 Mac. & G. 286. A decree for damages, even if executed, will bar a subsequent suit for specific performance, for the decree-holder should execute his decree. Banerjee's T. L. L. for 1906 p. 81.

(2) Section 24 of the Specific Relief Act.

(3) "A, without C's authority, contracts to sell to B. an estate which A knows to belong to *C*. A cannot enforce specific performance of this contract, even though C is willing to confirm it." *Illustration* (a) to section 25 S. R. Act,

(b) who though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties, or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt (1).

(c) who previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract (2)" (3)

Non-enforcement except with variation.—"Where a plaintiff seeks specific performance of a contract in writing, to which the defendants set up a variation, the plaintiff cannot obtain the performance sought except with a variation so set up in the following cases (4) (namely) :—

(a) Where by fraud or mistake of fact, the contract of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it (5) ;

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(1) *Illustrations* : (b) A bequeaths his lands to trustees, declaring that they may sell it with the consent in writing of B. B gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with C to sell him the land. C refuses to carry out the contract. The trustees cannot specifically enforce this contract, as in the absence of B's consent to the particular sale to C, the title which they can give C is, as the law stands, not free from reasonable doubt" *Sykes* v. *Sheard*, 2 De. G. J. & S. 6 ; *Mullings* v. *Trinder*, 10 Eq. 449.

(c) "A, being in possession of certain land, contracts to sell it to Z. On enquiry it turns out that A claims the land as heir of B who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. A cannot compel Z specifically to perform the contract."

(2) *Illustration* (d)—"A out of natural love and affection maks a settlement of certain property on his brothers and their issues, and afterwards enters into a contract to sell the property to a stranger. A cannot enforce specific performance of this contract so as to override the settlement and thus prejudice the interests of the persons claiming under it." *Johnson* v. *Legard*, (1822). T, R. 281 294.

(3) Section 25 of the Specific Relief Act.

(4) "Section 26 sets out cases in which contracts cannot be specifically enforced except with a variation ; and there are five particular cases set out in which a contract may be enforced subject to a variation, such variation being in favour of the defendant, and the section in our opinion assumes that the parties or vakils representing them are agreed as to the existence of the contract but not agreed as to specific terms. The section provides that, when fraud or mistake of fact, or misrepresentation has induced the defendant to sign an agreement, the agreement can only be enforced on the terms which the defendant intended to agree to. There is no provision of law of which we are aware which entitles the plaintiff to claim a variation in the terms of his contract, when he finds that the contract itself cannot be carried out." *Narain Petro* v. *Aukhoy Naram*, 12 C. 152 (155)

(5) *Illustrartion* :—(a) A, B and C sign a writing by which they purport to contract each to enter into a bond to D for Rs, 1000. In a suit by D to make A B and C separately liable each to the extent of Rs, 1,000, they prove that the word "each" was inserted by mistake ; that the intention was that they should give a joint bond for Rs, 1,000. D can obtain the performance sought only with the variation thus set up." *Gordon* v. *Hert ford*, 2 Mad. 106. "In every case, it must clearly and satisfactorily appear that the precise terms of the contract had been orally agreed upon, and that the writing afterwards signed fails to be, as it was intended, an execution of such previous agreement, but, on the contrary, expresses a different contract." Pomeroy's Eq. Jur. § 2096. A court of equity will not make a contract for the parties. *Ibid.*

(*b*) Where by fraud, mistake of fact, or surprise, defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff (1) ;

(*c*) Where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract but which he refuses to fulfil (2) ;

(*d*) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce (3) ;

(*e*) where the parties have, subsequently to the execution of the contract contracted to vary it (4)." (5)

Persons against whom contract may be enforced specifically.—"Except as otherwise provided by this Chapter (Chapter II of the Specific Relief Act), specific performance of a contract may be enforced against :—

(a) either party thereto (6) ;

(b) any other person claiming under him by title arising subsequently to the contract, except a transferee for value who has paid his money in good faith without notice of the original contract (7) ;

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(1) *Illustration* (b)—"A sues B to compel specific performance of a contract in writing to buy a dwelling house. B proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was included or not. The Court will refuse to enforce the contract, except with the variation set up by B."

(2) *Illustration* (*c*)—"A contracts in writing to let to B a wharf, together with a strip of A's land delineated in a map. Before signing the contract B proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of A's land of the same dimensions, and to this A expressly assented. B then signed the written contract. A cannot obtain specific performance of the writen contract' except with the variation set up by B." See also *Cutts* v. *Brown*, 6 C. 328.

(3) *Illustration* (*d*)—"A and B enter into negotiations for the purpose of securing land to B for his life, with remainder to his issue. They execute a contract the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced." "As mistake is no defence in a Court of law to the obligation under his contract one must look for relief, if at all in equity. For certain kinds of mistakes equity will give the affirmative relief of rescession, or reformation with specific performance." *Pomesory's* Equity Jur. § 2199.

(4) *Illustration* (*e*)—"A contracts in writing to let a house to B, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing, so with B's consent, A pulls it down and erects a new house in its place, B contracting orally to pay rent at Rs. 120 per mensem. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract."

(5) Section 26 of the Specific Relief Act.

(6) *Gregson* v. *Udoy*, 17 C. 223 P. C.

(7) *Illustrations* to cl. (b) of section 27 of the Specfic Relief Act :—"(i) A contracts to covey certain land to B by a particular day, A dies intestate before that day, without having conveyed the land. B may compel A's heir or other representative in interest to perform the contract specifically." "(ii) A contracts to sell certain land to B for Rs. 5,000. A afterwards coveys the land for Rs. 6,000 to C: who has notice of the original contract. B may enforce specific performance of the contract as against C." '(iii) A

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant (1) ;

(d) when a public company has entered in a contract and subsequently becomes amalgamated with another public company, the new company, which arises out of the amalgamation ;

(e) when the promoters of a public company have, before its incorporation, entered into a contract, the company, provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorportion (2)."

Against whom contract cannot be specifically enforced.—"Specific performance of a contract can not be enforced against a party thereto in any of the following cases (3) :—If the consideration to be received by him is so grossly inadequate with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff (4) ;

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contracts to sell land to B for Rs. 5 000. B takes possession of the land. Afterwards A sells it to C for Rs. 6.000. C makes no inquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C." "(iv) A contracts in consideration of Rs. 1,000 to bequeath certain of his land's to B. Immediately after the contract A dies intestate, and C takes out administration to his estate. B. may enforce specific performance of the contract against C." '(v) A contracts to sell certain land to B. Before the completion of the contract, A becomes a lunatic and C is appointed his committee. B may specifically enforce the contract against C." Where a person claims to be a transferee for value wtthout notice of the original contract, the burden lies upon him to prove that he fulfils the contract. *Harendra* v. *Nanda*, 36 C. W. N. 1002. Where a transferee has knowledge of such facts which would put him on inquiry which if prosecuted would have disclosed a previous agreement, such transferee is not a transferee without notice of the original contract within the meaning of the exception in section 27 (b) of the Specific Relief Act. *Mahomed Aslam* v. *Feroze Shah*, 59 I. A. 386=37 C. W. N. 71=138 Ind. Cas. 770=A. I. R. 1932 (P. C.) 238=63 M. L. J. 694 (P. C).

(1) *Illustration* to cl (c) of ibid :—

"(i) A, the tenant for life of an estate, with remainder to B, in due exercise of a power conferred, by the settlement under which he is tenant for life, contracts to sell the estate to C, who has notice of the settlement. Before the sale is completed, A dies C may enforce specific ferformance of the contract against B." "(ii) A and B are joint tenants of land, his undivided moiety of which either may alien in his life time, but which, subject to that right devolves on the survivor. A contracts to sell his moiety to C and dies. C may enforce specific performance of the contract against B"

(2) Vide Section 27 of the Specific Relief Act (I of 1877).

(3) Section 28 of the Specific Relief Act.

(4) The usual statement of modern rule is that mere inadequacy of consideration is not such hardship as will prevent specific performance, unless the inadequacy is so gross as to shock the conscience of the court and amount to a decisive evidence of fraud. Pomeroy's Eq. Jur. § 2212. In *Coles* v. *Trecothick, Lord Eldon* says : "Unless the inadequacy of the price is such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing specific performance." For an analysis of the earlier and modern rule, see 2 Pom. Eq. Jur. §§ 926, 927, and notes, where Professor Pomerory indicates that the gross inadequacy does not create a presumption of fraud, but may be evi-

(b) if his assent was obtained by the mis-representation (1) (whether witful or innocent), concealment (2), circumvention or unfair practices (3), of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled ;

(c) if his assent was given under the influence of mistake of fact, mis-apprehension or surprise ; provided that when the contract provides for compensation in case of mistake, compensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respect if proper to be so enforced (4).

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dence of fraud as a fact. *Borell* v. *Dann* 2 Hare 446, 450, where *Vice Chancellor Wigram* says the only exception is "where the inadequacy is so gross as of itself to prove fraud or imposition on the part of the purchaser." The earlier cases were inclined to make mere inadequacy a sufficient hardship to defeat specific performance, but this tendency was checked by *Lord Eldon in Coles* v. *Trecothick* (9 Ves 946). The courts generally give much weight to inadequacy when coupled with other evidence of hardship, as some degree of inequality, improvidence, etc. Pomerory's Eq. Jur. § 2212 ; see also *Kedari* v. *Atma*, 3 B. H. C. A. C. 11.

(1) "one of the largest classes of cases in which courts of equity are accustomed to grant relief is where there has been a misrepresentation or *suggestio falsi*. It is said indeed to be a very old head of equity that if a representation is made to another person giving to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false. To justify however an inter position is such cases, it is not only necessary to establish the fact of misrepresentation, but that it is in a matter of substance, or important to the interests of the other party that it actually does mislead him. For if the misrepresentation was of a trifling or immaterial thing, or if the other party did not trust to it or was not misled by it, or if it was vague and inconclusive in its own nature, or if it was upon a matter of opinion or fact equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other,—in these and the like cases there is no reason for a court of equity to interfere to grant relief upon the ground of fraud Story's Eq. Jur. § 269."

(2) "Another class of cases for relief in equity is where there is an undue concealment, or *suppressio veri*, to the injury or prejudice of another. It is not every concealment even of facts material to the interest of the party, which will entitle him to the interpo:ition of a court of equity. The case must amount to the suppression of facts, which one party under the circumstances is bound in conscience and duty to disclose to the other party and in respect to which he cannot innocently be silent-" Story's Eq. Jur. § 292.

(3) " The plaintiff's conduct may amount to a personal bar to specific performance, as in the cases of sharp practices, concealment, contrivance, etc., or even if he is not barred by inequitable conduct, he may have obtained the contract under such conditions of advantage, that equity regards it as unfair, and its enforcement a hardship. Such cases arise where the plaintiff takes advantage of the condition of the defendant, as of pressing necessity. to drive a very hard bargain." Pomeroy's Eq. Jur. 2208.

(4) *Illuscration* : "(i) A, one of two executors, in the erroneous belief that he had the authority of his co-executors, enters into an agreement for the sale to B of his testator's property. B cannot insist on the sale being completed. (ii) A directs an auctioneer to sell certain land. A afterwards revokes the auctioneer's authority as to 20 bighas of this land but the auctioneer in advertently sells the whole to B. who has no notice of the revocation. B cannot enforce specific performance of the agreement,"

Mitake Induced, or cantributed to by the plaintiff.—Where the mistake was materially contributed to, or induced by the act or words of the plaintiff, equity will not decree a specific performance against the defendant, if the mistake is mutual. The plaintiff's part in misleading the defendant, whether the plaintiff was innocent in intention or not, prevents him from

Indian Registration Act and Specific performance of contract—Except where it is herein otherwise expressly enacted, nothing in the Specific Relief Act (1), shall be deemed to affect the operation of the Indian Registration Act on documents (2). The object of this clause seems to be that no provision in the Specific Relief Act would by implication override the provision of the Indian Registration Act (3). So no Specific Relief is to be given, in the shape of specific performance, injunction or otherwise, in any transaction, [in the absence of an express provision for the same (4)], where requirements of the Indian Registration Act has not been fulfilled (5). Section 17 of the Registration Act, enumerates the documents in which registration is compu'sory. Section 18 gives a list of documents of which registration is optional. No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be regisered shall—(a) affect any immoveable property comprised thereon, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or comferring such power, unless it has been registered: Provided that an unregistered document affecting immoveable property and required by the Registration Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purpose of section 53 of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be affected by registered instruments (6). Section 49 enacts that a document which is required

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casting the consequences of the mistake on the defendant by the aid of equity." Pomerory's Eq. Jur. § 2202.

Mistake known to Plaintiff—'When the plaintiff knows of the defendant's mistake or must reasonably suppose a mistake had been made, the circumstances are often such that the plaintiff cannot equitably ask a Court of Chancery to force a hard bargain due to his mistake on the defendant. A mistake which in itself might not be sufficient ground to save the defendant from his bargain, may often protect the defendant when the plaintiff knows of the advantage he was getting when the contract was made." Pomerory's Eq. Jur. § 2203.

Mistake due to defendant's negligence. 'Where the court is satisfied that the mistake is due to the defendant's culpable negligence, it will not, as a general rule, accept the mistake as a defence, the plaintiff not being barred himself by act of inequitable advantage." Ibid § 2204 ; 1931 M. W. N. 234.

Mistake due solely to defendant.—'The most difficult cases are those where the mistake is due solely to the defendant, without negligence on his part, or inducement or advantage taken by the plaintiff. It is plain that not every material mistake in such a case will enable the defendant to avoid performance of the contract. The rule may be stated that where the mistake is solely due to the defendant, but without his fault, equity will refuse specific performance only where the mistake is of a vital part of the contract,—of the corpus of the agreement,—and of such nature that enforcement would be a great hardship. It is thus apparent that in most cases of mistake solely due to the defendant, the court is finally governed by the principle of hardship and unfairness equally with that of mistake." Pomeroy's Eq. Jur. § 2205.

(1) I of 1877.

(2) Section 4 of the Specific Relief Act, (I of 1877).

(3) XVI of 1908.

(4) Vide s. 27 A where express provision has been made to grant specific performance even where the requirements of the Registration Act has not been fulfilled.

(5) Vide Woodroffe on Injunction p. 213 ; Collet, 68 ; Nelson, 79, 114, 115.

(6) Section 49 of the Indian Registration Act ; the proviso has been added by Act XXI of 1929.

to be registered, and is not registered, cannot be received in evidence. It has been held by the Judicial Committee that such documents, although not admissible for the purpose of proving the transaction purported to have been effected by them, are admissible in evidence for collateral purposes, such as for ascertaining the nature of possession (1). In giving effect to the doctrine of part performance when transactions are not complete owing to the omission of registration ; it is necessary that courts should be empowered to admit them in evidence for the pu:pose of proving part performance. A proviso has accordingly been added to the section (2).

Section 53 A of the Transfer of Property Act (3) enacts :—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer that transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract : Provided that nothing in this section shall affect the right of a transferee for consideration who has notice of the contract or of the part performance thereof (4). The reason of the enactment of this section is thus stated by the framers of the section:

"We have proposed a more rigorous use of registration in the transfer of immoveable properties than is now enjoined by law, and the changes we have proposed are, we think, calculated to minimise, if not to prevent perjuries and frauds. We cannot however ignore the fact that in actual practice circumstances do arise when the rigorous application of the law of registration may result in fraud instead of preventing it. Similar circumstances led to the introduction of the doctrine of part performance in England.

By section 4 of the Statute of Frauds (1677) (29 Car. II, C. 3), it is provided that no action or suit shall be maintained on an agreement relating to land which is not in writing signed by the party to be charged with it. The strict application of the provision led to great hardship in cases where a parol agreement relating to land had been partly performed by one party and yet he could not sue the other party for specific performance. Thus, the latter party

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(1) I. L. R. 43 Mad. 244 P. C.
(2) Report of tha Special Committee to frame Transfer of Property (Amendment) Supplement Act.
(3) Added by Act XX of 1929,
(4) Section 53 of the T. P. Act.

was enabled to practise a fraud upon the former. In such cases the Courts intervened on equity and enforced specific performance, holding that part performance took the cases out of the Statute of Frauds. The general ground upon which the doctrine is based is prevention of fraud. It is said that where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obviovs that, if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice (*see* Story on Equity, section 1045). Again, "a more general ground and that which ought to be the governing rule in cases of this sort is that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him unless the agreement is fully performed." (*Ibid*, section 1047).

In applying the doctrine of part performance the Courts have confined it within strict limits. From the decided cases the following may be taken to be the essential elements necessary for the application of the doctrine :--

(1) that the transferee has been put in possession of the property ;

(2) that his possession can be referred to the particular transfer and not to any other relationship ;

(3) that it will amount to a fraud on the part of the transferor to back out of such transfer ; and

(4) that the terms of the transfer can be ascertained with reasonable certainty.

Notwithstanding weighty opinion to the contrary, the doctrine is still found to be necessary in England. In India the position is somewhat different though the doctrine is just as applicable. In England the Statute of Frauds is a bar to a suit or action when the agreement is not in writing ; in India registration is necessary to the validity of a transfer. Notwithstanding this difference the need for the prevention of fraud is the same in both countries. Hence, the doctrine has been applied by the Indian Courts to cases where the transfer was not effected by a registered instrument. In the case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (42 I. A. 1.), their Lordships of the Privy Council observed :—

> "They do not think that there is anything either in the law of India or of England inconsistent with it (the doctrine of part performance) but, upon the contrary, that these laws follow the same rule. 'In a suit' said *Lord Selborne* in *Maddison* v. *Alderson* (8 App. Cas. 467), 'founded on such part performance.....the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not.....upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow.' "

Their Lordships further said :—

> "The matter has advanced beyond the stage of contract ; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded."

They go on to say :—

"Many authorities are cited in support of these propositions from English and Scotch Law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by *Lord Selborne* from *Sir John Strange* (1 Ves. 441) may be here repeated : 'if confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity.' Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary it follows them."

The doctrine has been applied to numerous cases in India, as in :—

(1914) 18 C. W. N. 445 ; (1915) 20 C. W. N. 149 ; (1917) 22 C. W. N. 522 ; (1918) 23 C. W. N. 284 ; (1919) 24 C. W. N. 462 ; (1920) 25 C. W. N. 905 ; (1917) 41 Bom. 438 ; (1921) 45 Bom. 1170 ; (1918) 40 All. 187 ; (1920) 46 Mad, 919 ; (1923) 1 Rang. 419 ; (1925) 3 Rang. 243.

We do not think that the time has arrived when this equitable doctrine can be safely abrogated in favour of a rigid application of the law of registration. Ignorant transferees in this country who have partly performed the contract require a greater measure of protection than even a transferee in England. When a transferee has, in the faith that the transfer would be completed according to law, taken possession, it would be inequitable to allow the transferor to treat the transferee as a trespasser. We, therefore, think that statutory recognition should be given to the doctrine of part performance At the same time care should be taken that the law of registration is not evaded and that the introduction of the doctrine does not lead to "perjuries and frauds" which it is the object of the doctrine to prevent. With this end in view we propose—

(1) that the agreement should be in writing signed by the party or his agent whom it is sought to bind ;

(2) that the transferee should in part performance of the contract take possession of the property or, if already in possession, should continue in possession and in the latter case should do some act in furtherance of the contract ;

(3) that the transferee, seeking to avail himself of the doctrine, should perform or be willing to perform his part of the bargain as contained in the writing ;

(4) that when the contract has been partly performed all rights and liabilities under the contract should arise and be enforceable as between the parties to the contract notwithstanding that the transaction has not been completed according to law : and

(5) that the application of the doctrine should not affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

We think that it should be made clear that by reason of the part performance, although the terms of the contract are made binding on the parties thereto, the transferee will not get a good title unless the transfer is effected according to law, that is, executed and registered. In this view registration would still be necessary in order that the transferee may acquire a perfected and marketable title. But, although on account of non-registration no title has passed, yet by reason of part performance equities have arisen which Courts of law ought to recognise and enforce. As pointed out in Mahomed Musa's case, "when a contract has been partly performed, the matter has advanced beyond the stage of contract and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded," i. e., as if the transaction had been completed according to law. We propose, therefore, that all the rights and liabilities arising under the contract as expressed in the writing should be enforceable but no more. There is no difficulty in the case of a sale or a mortgage because a contract for sale or mortgage need not be in writing or registered. Questions may arise in the case of an agreement for a lease which creates a present demise. Such agreements require to be in writing and registered. If in performance of such an agreement the lessee takes possession, he may not even sue for specific performance because he cannot prove the agreement if it be not registered. (See 26 C. W. N. 329). Such a state of things enables the lessor to treat the lessee in possession as a trespasser and thereby practice a fraud upon him. We think that the Courts should be in a position to give relief to such a lessee in possession. We propose therefore that in such a case the writing containing the agreement may be proved in Court notwithstanding non-registration. In order to avoid perjured evidence, it is desirable in our opinion that the agreement should in all cases be in writing when the doctrine of part performance is sought to be invoked.

We are not unmindful of the weighty opinion expressed in Chapter 35 of the report of the Civil Justice Committee. That Committee has recommended a rigid application of the law of registration and the rejection of the doctrine of part performance The principal objections formulated by the Committee are—

(1) The recognition of the doctrine is inconsistent with the necessity for registration. We have shown that, in as much as part performance cannot confer a title, registration would still be necessary.

(2) A mass of perjured evidence will be introduced if oral agreements are allowed to be proved. To meet this objection we have proposed that the agreement should be in writing.

(3) If registration is made essential in every case people will get accustomed to it and there will be no necessity for the application of the doctrine of part performance. We do not think the country has arrived at the stage when the necessity for the application of this equitable doctrine has ceased to exist.

We think that with the safeguards we have suggested the doctrine should be given statutory recognition. In fact, our proposal does not go beyond what the Courts in India have already recognised by judicial decisions. We have deliberately excluded voluntary transfers from the operation of the doctrine of part performance because obviously no equities arise in favour of volunteers.

There is some conflict of decisions in the Indian Courts with regard to the period within which equitable relief can be given to parties to a transaction when there has been no registered instrument. One view is that such relief can be given only within the period during which a suit for specific performance would lie, the other view being that such relief can be given even after that period has expired. It seems to us that the first view, to which we propose to give effect by adding section 30A to the Specific Relief Act, 1877, does not go far enough, in all cases, to afford the relief which the equities arising out of part performance require. Because, even after the period of limitation, when part performance has taken place, the parties stand in the same relation to each other as they did within the period of limitation and the equities which arose within that period remain the same. In fact, the longer the possession in part performance, the higher will be the equities. We, therefore, think that, in order that the relief may be effective, it ought to be available at all times during which the transferee is in possession in part performance of the contract and subject to the other conditions which we have proposed. In 46 Mad. 919 and 23 C. W. N. 284, the Courts took the view that the relief was available even after the period of limitation for specific performance was over. We feel that, in order that the relief may be real, it ought to be available as between the parties to the transaction even after such period of limitation.

It is necessary in this connection to have a new section in the Specific Relief Act dealing with the same subject, and we have, therefore, proposed the addition of section 30A at the end of Chapter II in the Specific Relief Act. We propose that section 49 of the Registration Act should be amended so as to provide for the admission of unregistered documents, required by law to be registered, for the purpose of proving part performance within the meaning of the new section 53A of the Transfer of Property Act and section 30A of the Specific Relief Act. Inasmuch as the statutory recognition of part performance is a matter of considerable importance, we think it desirable to explain in further details the reasons for the various recommendations we are making.

(1) In order to avoid perjured evidence which is likely to centre round an oral agreement we are providing for the agreement to be in writing.

(2) If possession be taken in part performance of the contract, that fact along with the writing ought to be sufficient to attribute the possession to the agreement. But in the case of a person already in possession we have recommended some further act of part performance, *e. g.* by payment of different rent or the spending of money, because the possession may not be exclusively referable to the agreement.

(3) In providing that the transferer shall be debarred from enforcing agaisnt a transferee any rights except such as arise out of the agreement, we desire to make it clear that the rights arising out of the contract as between the transferor and the transferee should be enforceable as if the transfer has been completed according to law. This provision will prevent a transferor from ejecting a transferee who has in part performance of the contract taken possession, and at the same time enable the transferor to sue the transferee upon his covenant, say, to pay rent. The effect of this provision will be that the mutual covenants between the transferor and the transferee will be operative, though by reason of non-registration no title has passed. This will necessitate the completion of the transfer according to law by execution and registration in order that the transferee may get a marketable title. Thus, the law of registration will not be evaded.

(4) We have provided for a further safeguard in that the equities arising out of part performance may not affect the rights of a transferee for value without notice. This will again have the effect of requiring the completion of the transfer according to law because, otherwise, the first transferee will be in a precarious position in the case of a subsequent transferee for value without notice asserting his right under such subsequent transfer. The claims of the subsequent transferee will, of course be subject to the doctrine that, ordinarily possession will constitute notice of the title of the person in possession. Thus the transferor will not find it easy to practise a fraud upon the transferee in possession by making a second transfer. The second transferee will have notice of the title of the first transferee in possession whatever that title may be. The protection given to the second transferee is not illusory because under the amended section 3 of this Act he will be regarded as having notice of the title of the person in actual possession and not of the title of the prior transferee who may be only in constructive possession. Therefore, it would be still necessary for the first transferee in constructive possession to have his transfer perfected according to law by registration and thereby acquire an indefeasible title (1). "It is in general of the essence of such an act (viz., an act of part performance), that the courts shall by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. But an act which though in truth done in persuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the statute of frauds ; as for example, the payment of a sum of money alleged to be purchase money (2)."

"The ground is equitable fraud, not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute

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(1) Report of the special committee. *Dale* v. *Hamilton*. 5 Hare. 369, per
(2) Pomerory's Eq. Jur. § 2239 ; *Wigram* V. C.

as a defence. If the defendant knowingly permits the plaintiff to do acts in part performance of the verbal agreement, acts done in reliance on the agreement, which change the relations of the parties and prevent a restoration to their former condition, it would be a virtual fraud for the defendant to interpose the statute as a defence, and thus to secure for himself the profit of the acts of part performance, while the plaintiff would be left not only without adequate remedy at law, but also liable for damages as a trespasser (1)"

Specific performance in case of part performance of contract to lease.—"Subject to provisions of this chapter (2), where a contract to lease immoveable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,—

(*a*) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract ; and

(*b*) where specific performance is claimed by the lessee, he has in part performance of the contract, taken possession of the property, or being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract :

"Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the performance thereof (3)."

Ultra vires contract not to be enforced by injunction.—Where a contract is ultra vires a court of equity will not interfere by injunction so as to enforce its execution. So where two cotton compress companies made an agreement to consolidate, which was beyond their corporate powers, and pending the procurement of a charter for the consolidated company both plants where put into the hands of a governing committee to manage, and subsequently the stock holders of one company voted against consolidation, and it was proceeding to act in disregard of the agreement, when the other company obtained an injunction against it to restrain any interference with the action of the governing committee, it was held on appeal that the lower court erred in granting and perpetuating such injunction, as it in effect specifically executed an *ultra vires* contract (4).

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(1) Pomerory's Eq. Jur, § 1409 note.

(2) Chapter II of the Specific Relief Act.

(3) Section 27 A of the Specific Relief Act added by Act XXI of 1929 : Vide Seetion 53 A of the Transfer of Property Act.

(4) *Granville Compress Co.* v. *Planter's Compress Co.*, (Miss) 13So. 879 ; H. C. Joyce on Injunction § 427 ; see also *Railroad Co.* v. *Riche.* L. R. 7 H. L. 653 ; *In re Cork Co.*, 4 Ch. App. 748. In such a case, the contract cannot be specifically enforced in India also by virtue of section 21 (f) of the Specific Relief Act and as such no injunction can also be granted, to prevent the breach of such an agreement Vide s. 56 (f) of the Specific Relief Act.

Complainants must have performed—clean-hands.—A party who seeks the aid of a court of equity to restrain an alleged breach of a contract by the other party must have performed his part of the contract so far as possible or the court will not interfere (1). The ordinary rule is that it is only with regard to the plaintiff's right against the defendant that the plaintiff must come into court with clean hands (2). Where plaintiff, an electric company, entered into a contract with defendant, an electric sub-way company, by which plaintiff was to use defendent's sub-ways paying therefor a certain sum as rent, and after several years' use of the sub-way without payment of rent, the sub way company demanded the rent, and threatened to cut out and remove plaintiff's cables in default of payment ; it was held, in an action for an injunction to restrain such proceedings, waiving the question whether the court had or had not jurisdiction to grant an injunction under special laws relating to the subject matter of the controversy, that plaintiff would not ask the intervention of a court of equity until it had paid whatever rent was due before the commencement of its proceedings (3). So where a covenant was not intended as a reservation by the grantor but as a restriction to operate in favour of the adjacent property generally an injunction against the violation of the covenant will not lie in favour of the grantor if he has himself violated it (4). In British India also the rule for granting injunction seems to be the same. Here also no injunction can be granted to prevent the breach of a contract, the performance of which would not be specifically enforced (5). In *Ardeshir* v. *Flora Sassoon* (6)., *Lord Blanesburgh* said : "Although so far as the Act (4) is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England [section 54 (b) is the nearest], it seems invariably to have been recognized, and, on principle, their lordships think rightly, that the Indian and the English requirements in this matter are the same. See e. g., *Karsandas* v. *Chhotalal* (8)."

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(1) H. C, Joyce on Injunction § 431 citing *Pullman's Palace Car Co* v. *Missouri K. & T. R.* Co., 55 Fed. 138. "An injunction will not be granted if the plaintiff has acted so as to make its issuance inequitable. A person who seeks to enforce such a covenant must permit no such breach of the stipulation as will frustrate all the benefit that would other wise accrue to the other parties to the agreement." Pomerory's Eq. Jur. § 1702

(2) *Beekman* v. *Marsters*. (Mass) 80 N. E. 817 ; H. C. Joyce § 431 ; *Stiff* v. *Cassell*, 2 Jur. N. S. 348 ; *Maythorn* v. *Palmer*, 11 Jur. N. S. 230.

(3) *Brush Electric Illuminating Co.* v. *Consolidated Telegraph*. 15 N. Y. Sup. 477.

(4) H. C. Joyce on Injunction § 431.

(5) Section 56 (f).

(6) 32 C. W. N. 953 (969) = 52 B. 597 = 55 I. A. 360 = 55 M. L. J. 573 = 26 A. L. J, 1220

(7) *i.e.* the Specific Relief Act (I of 1877).

(8) 25 Bom. L. R. 1037, 1050, see also *De Mattos* v. *Gibson*, 4 De G. & J. 276 ; *Pets* v. *Brighton*. 1 H. & M. 468 ; *Fechter* v. *Montgomery*, 33 Beav. 22 ; *Measures* v. *Measures*. (1910) 2 Ch. 254.

A preliminary injunction will not be awarded to a grantor, to restrain the grantee of a certain lot and others from drilling an oil or gas well thereon, in violation of a covenant in the deed from the grantor, where he has himself violated the covenant by drilling wells in the same addition in which the lot lies, and the affidavit of the lot owners in the addition shew that the covenant was not intended as a reservation of the oil and gas, but as a restriction to be placed in all the deeds of lots sold in the addition, to secure them, as dwelling places, from the annoyances of oil, and gas-wells (1).

So the ground relied upon for relief by injunction agninst the violation of a contract, must, as in other cases when the remedy is sought, come within the rules according to which the court usually exercise jurisdiction ; and the party must show himself free from all just imputations of wrong-doing in connection with the contract forming the subject of his application (2). Not only must complainant show himself free from all blame as just stated, but he must present equitable, as contra-distinguished from legal, grounds for relief (3). On this principle it was held that a preliminary injunction would not be granted to compel the lessees of an opera-house to allow the complainants to use the house in accordance with a contract therefor, where such injunction would compel the lessees to break a similar contract made by them with an innocent third party, and the complainants could not use the house with profit to themselves (4).

Stipulation for forfeiture and Liquidated damages.—There is apparently considerable conflict of authority in England and America as to the effect upon the right of a party to an injunction to prevent its violation of a provision in a contract, for a forfeiture of the contract or for the payment of a fixed sum as liquidated damages (5). In India the conflict has been set at rest by section 20 of the Specific Relief Act which enacts that a contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same (6). In *Madras Railway Co.* v. *Rust* (7) the defendant signed an agreement in England with a railway company, wherely he contracted to serve the company exclusively for four years in India under a penalty of £100. The defendant having come to India at the expense of the company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent. The plaintiff instituted a suit against the defendant prayed for an injunction

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(1) H. C. Joyce on Injunction § 431 citing *Appeal of Acheson*, 130 Pa. St. 633,

(2) Spelling on Injunctions and other Extra-ordinary Remedies § 479.

(3) Ibid § 480.

(4) *Foster* v. *Ballenburgh*. 43 F. 821 ; Spelling on Injunctions and other Extra Ordinary Remedies § 480.

(5) Spelling on Injunction and other Extraordinary Remedies § 471 ; Vide pp. 345, 316 suppra where the subject has been discussed.

(6) Section 20 of the Specific Relief Act. See also *Nawab* v. *Rukandini*, A. I. R. 1925 Lah 605=87 Ind. Cas. 612 ; *Metta Ram* v. *Annyya*, A. I. R. 1926 Mad. 144=90 Ind. Cas. 605=49 M. L. J. 152.

(7) 14 M. 18 (22).

restraining the defendant from serving, working for, or being employed by any person or persons other than the plaintiff company during the term of the agreement. They also prayed for an *interim* injunction during the pendency of the suit. The defendant contended that in the face of the agreement it appears that the parties regarded money-payment as sufficient compensation for its breach and as such no injunction should be granted. In granting the injunction the Court observed : "It is also argued for the defendant that an injunction should not be granted because the agreement provides for a penalty for its non-performance. But section 20 of the Specific Relief Act provides that this should be no bar to the remedy by specific performance and the same principle applies to injunctions (1)." But a man cannot come to the Court for an injunction to restrain the further breach of the agreement after obtaining damages at law. (2).

Injury to be threatened.—In accordance with the general rule for the administration of relief in equity before considered, an injunction will not be granted to prevent the breach of a contract unless an actual and not merely a conjectural injury to the plaintiff is threatened, and will not be granted to prevent a merely theoretical violation of his rights (3). Where the construction of a contract is clear, and the breach or the intended breach is clear, it is not a question of damage ; but the mere circumstance of the breach or intended breach of contract affords sufficient ground for the Court to interfere by injunction (4). In the above case *Sir W Pagewood* said : "And I apprehend the Court may so interfere whether the defendant has or has not actually committed the breach, in respect of which the interference of the Court is sought. For, in a case of contract, it is enough if the defendant claims and insists on a right to do the act, although he has not already done it, *modo et forma*, as alleged. In such a case I should have no difficulty in granting an injunction" (5). But no assumption is to be made by the Court that a man means to violate his agreement (6). An injunction will not be granted to prevent a merely nominal or technical violation of the plaintiff's right. Thus where injunction was asked to prevent defendant, of a similar name to plaintiff, from opening his mail, the rights of the parties being clearly defined by contract, which defendant had observed, defendant having erroneously opened only 129 letters out of 2,000,000 or 3,000,000 pieces of mail, it was held the injunction should be refused (7). But a distinction is made between the class of cases just mentioned and those in which the violation of a substantial right is threatened, damage being uncertain. And if an applicant for injunction *pendnte lite* shows the existence of a contract right, and a probability that such

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(1) See also *Callianji* v. *Narsi*, 18 B. 702 (711).
(2) Kerr on Injunction p. 453.
(3) H. C. Joyce injunction § 428.
(4) *Tipping* v. *Eckersley* 2 Kay & J. 264=110 R. R. 216.
(5) See also *Sharp* v. *Harrison*, (1922) 1 Ch. 511=91 L. J. Ch. 446.
(6) *Foster* v. *Birmingham Wolverhampton Ry*, 2 W. R. 378 ; *Worseley* v. *Swan*, 51 L. J. Ch. 576 ; Kerr on Injunction 411.
(7) *Kilmer* v. *Dr. Kilmer & Co* 162 N. Y. S. 617=175 App. Div. 670.

right will be defeated, that is sufficient (1). An obligee may enjoin an obligor from doing things in contravention of a contract not to do them, where he proves an attempt by the obligor to do the act covenanted against (2). And it has been held that a showing that a breach of contract was intended was sufficient to warrant interference of a Court of equity by injunction (3).

In granting injunction whether insolvency of defendant is taken into consideration.—Insolvency of a defendant is seldom if ever alone a sufficient ground for injunction to prevent breach of a contract, but is an element that may be sometimes considered in an otherwise doubtful case, for instance the insolvent proprietor of a moving picture show, who licensed the plaintiff to visit his show at any time without payment, was enjoined from preventing the plaintiff from visiting his performances (4). And it was held that, under a contract by defendant to transport coal in certain vessels for complainant for term of three years, plain iff was entitled to restrain defendant from selling vessels for foreign service, where plaintiff's profits were dependant on water transportation, and such sale would leave defendant insolvent (5). "Insolvency of the defendant" says Prof. Pomeroy, rendering him unable to respond in damages, is recognized by dicta in a few cases as a sufficient ground for relief (by specific performance), although damages if collectible, would be an adequate remedy (6)".

Diligence in seeking Relief—Laches—Waiver of Breach.—A complainant seeking extraordinary relief by injunction against the breach of a contract or covenant must come in due time to assert his right, and will be denied an injunction if he has delayed acting until the rights of innocent third parties have become involved, or the parties against whom the remedy is sought have been induced by his acquiescence, without fault of their own, to alter their positions to the injury. Accordingly an injunction was refused to restrain the breach of a covenant that buildings should be erected upon a general plan, it appearing that the covenantee had acquiesced in a partial deviation from the plan and had not made immediate application to the Court (7). The general rule was laid down in this case that a landlord who relaxes in favour of some of his tenants a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant (8). Where a vendor, having taken from each of several purchasers of plots of building land, formerly the same estate, a covenant to build only in specified manner, has permitted, without interference, material breaches of the covenant to be committed by some of the purchasers, he cannot obtain an

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(1) *Sanitary Reduction Works* v. *California Reduction Co*, 94 Fed. 693.

(2) *Algiers Ry* v. *New Orleans Ry*. 137 La. 579.

(3) *Guilford County* v. *Poster*, 167 N. C. 366 ; Lewis & Spelling on Injunctions § 134.

(4) *Prickett* v. *Steiner*, (Tex. Civ. App). 161 S. W, 35.

(5) *Greek Lakes* v. *Scranton* 239 F. 603 ; Lewis and Spelling on Injunctions § 135.

(6) Pomeroy's Eq. Jur. § 2171.

(7) *Roper* v. *Williams*, T. & R. 18 ; see also *Sobey* v. *Sains bury*, (1913) 2 Ch. 513.

(8) Spelling on Injunctions and other Extra-ordinary Remidies § 486.

injunction to compel another purchaser to observe the same covenant ; there is no difference in the case where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others ; nor in the case where the breaches have been committed before the defendant became a purchaser and executed the deed of covenant (1). After twenty years' user of demised premises, converted into a shop without licence contrary to the covenants contained in the lease an assignee of the reversion cannot take advantage of a condition of re-entry for such user subsequently to the assignment (2). But a passive acquiescence in a breach of covenant attended with no damage, or at least with trifling damage, preclude a man from complaining of a breach whereby his enjoyment is directly and substantially affected (3). Acquiescence in the violation of a covenant to a certain extent, is sufficient objection to an interlocutory application for an injunction against a greater violation of it (4).

Rights of third persons.—The granting of injunction is discretionary with the Court, and as such in granting it the Court should consider whether the rights of the third parties will be affected by the granting of it (5).

Restrictive covenants creating Equitable Easements.—The doctrine is well settled that restrictive covenants in deeds, leases and agreements limiting the use of land in a specified manner, or prescribing a particular use, which create equitable servitudes on the land, will be specifically enforced in equity by means of an injunction, not only between the immediate parties, but also against subsequent purchasers with notice even when the covenants are not of the kind which technically run with the land. The injunction in this class of cases is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, are wholly immaterial (6). So "when the owner of land enters into a covenant concerning it, when in a deed the grantor or the grantee covenants, or in a lease the lessor or the lessee covenants, concerning the land, concerning its use, restricting certain specifised uses, stipulating for certain specified uses, subjecting it to easements or servitudes, and the like, and the land is afterwards conveyed, or sold or passes to one who has actual or constructive notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it, at the

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(1) *Peek* v. *Mathews*, L. R. 3 Eq. 515 ; Spelling on Injunctions and other Extraordinary Remedies § 486. 'One who stands by and acquiesces in repeated violations by the defendant and others cannot be heard to deny the right." Pomeroy's Eq. Jur. § 1702 ; see also *Knight* v. *Simmonds*, (1896) 2 Ch. 294.

(2) *Gibson* v. *Doeg*, 2 H & N. 615 ; see also *Sheard* v. *Webb*, 2 W. R. 343.

(3) Kerr on Injunction p. 417.

(4) *Child* v. *Douglas*, 5 De G. M & G. 739.

(5) Kerr on Injunction p. 418 citing *Hope* v. *Gloucester Corporation*, 1 Jur. N. S 320 ; *Maythorne* v. *Palmer*, 11 Jur. N. S. 230 ; *Tubbs* v. *Esser*, 26 T. L. R. 146 ; *Deverell* v. *Milne*, 34 T. L. R. 576 : *Sharp* v. *Harrison*. (1922) 1 Ch. 502.

(6) Pomeroy's Eq. Jur. § 1342 ; see also *Leech* v. *Schewider*, L. R. 9 Ch. 463, 465, *per Jessel M. R.*

suit of the original covenantee or of any other person who has a sufficient equitable interest, although perhaps without any legal interest, in such performance (1)."

Different kinds of agreement.—An agreement may be affirmative or negative in nature. Again the negative nature of an agreement may be implied or express. Conditions not expressed will not be imported into an agreement, unless there is something in the agreement which show that the parties must have intended such conditions. There must be words in the instrument capable of sustaining the meaning which is sought to be implied from them (2). When a man covenants to do a certain thing, it is necessarily implied that he will not incapacitate himself from doing it (3). "Every agreement to do a particular thing in one sense" sand *Lindley L. J.*, 'involves a negative. It involves the negative of doing that which is consistent with the thing you are to do If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on *ad infinitum* (4)." Where A covenants that he would before commencing any building submit plans for the vendor's approval, a negative covenant is implied that no building operation should be commenced by him unless such approval be obtained from the vendor (5). There are also agreements, which though expressed in a positive form are in substance negative (6). Implied obligations in a contract are governed by the common intention of the contracting parties. When their common intention has been ascertained, the court holds them to all that is implied in their common intention (7).

"A prohibition preventing the commission of an act, may as effectually perform an agreement," said *Lord St. Leonards*, "as an order for the performance of the act agreed to be done (8)." In respect to purely negative covenants annexed to or contained in contracts or leases, courts of equity will frequently interpose by injunction and indirectly enforce specific performance thereof by prohibiting their breach (9). The specific enforcement of such contracts can only be effected by an injunction (10). A covenant may contain both affirmative and negative clauses. Thus A contracts with B to sing for twelve months at B's theatre and not to sing elsewhere (11). In such a case it is settled that specific performance of the affirmative portion of the contract cannot be enforced by the court. Now the question is whether the court can grant injunction restraining A from singing at any other place of public entertainment in view of the latter part, that the affirmative portion cannot be

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(1) Pomeroy's Eq. Jur. § 1295.
(2) Kerr on Injunction p. 420 citing *Churchward Ry* v, *Reg*, 1 Q. B. 195, 211.
(3) Ibid 421 citing *M'Intyre* v. *Belcher*, 14 C. B. N. S. 654.
(4) *Whitwood Chemical Co.* v. *Hardman*, (1891) 1 Ch. 416.
(5) *Powell* v. *Hemsley*, 78 J. Ch. 741 = (1909) 2 Ch. 252.
(6) Banerjee's T. L. L. 615 citing *Catt* v. *Tourle* (1869) 4 Ch. 654.
(7) Kerr on Injunction p. 421.
(8) *Lumley* v. *Wagner*, 1, De G. M. & G. 604.
(9) Lewis and Spelling on Injunction § 154.
(10) Banerjee's T. L. L. p. for 1906 p. 616.
(11) Section 57 illustration (c)

specifically enforced by the court. *Lord Cairns* ruled that if parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that this shall not be done. It is not in such a case a question of balance of convenience or inconvenience or of the amount of damage, or of injury ; but the specific performance by the court of that negative bargain which the parties have made, with their eyes open, between themselves (1). This seems to be an exception to the general rule that "it is of the essence of specific performance that, except under special circumstances, part only of an agreement ought not to be demeed to be performed (2)."

Injunction to perform negative agreement.—A decree for specific performance, as its name implies, enforces the performance of some specific act. An injunction is the converse of this ; it judicially forbids the performance of some specific act or series of acts (3). So the general rule is that in granting injunctions in cases of obligations arising from contract, the court should be guided by the rules and provisions which a Court of Equity followes in enforcing specific performance of a contract (4). Therefore an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced (5). But there is an exception to the above rule, namely, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement : provided that the applicant has not failed to perform the contract so far as it is binding on him (6). Where the agreement stipulates that certain acts shall not be done, an injunction preventing the commission of those acts is evidently the only mode of agreement ; but the remedy of injunction is not confined to contracts whose stipulations are negative ; it often extends to those which are affirmative in their provisions where the affirmative stipulation implies or includes a negative (7). In adjudicating upon covenants in the nature of restrictive covenants, where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative and partly negative, the court in a proper case enforces the negative portion of the covenant (8).

(1) Banerjee's T. L. L. for 1906 citing *Doherty* v. *Allman*, (1878) A. C. 709, 720 ; *Collins* v. *Castle*, 36 Ch. D. 243, 254.

(2) *Cutts* v. *Brown*, 6 C. 328 (336) ; see also *Merchant's Trading Co.* v. *Banner*. L. R. Eq. 18.

(3) Smith's Principles of Equity p. 721.

(4) Section 54 of the Specific Relief Act, para (2) ; Pomeroy's Eq. Jur, 1641 : "It may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit."

(5) Specific Relief Act s. 56 (f).

(6) Section 57 of the Specific Relief Act.

(7) Pomeroy's Eq. Jur. §§ 1691, 1341.

(8) *Clegg* v. *Hands*, 59 L. J. Ch. 477 = 44 Ch. D. 503. The general rule of equity is that the court will not enforce

Where a contract stipulates for special, unique or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique, and extraordinary qualifications,—as, for example, by an eminent actor, singer, artist, and the like,—it is plain that the remedy at law for damages for its breach might be wholly in-adequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person. It is, however, a familiar doctrine to grant the remedy of an affirmative specific performance, however inadequate may be the remedy of damages, whenever the contract is of such a nature that the decree for its specific performance cannot be enforced and its obedience compelled by the ordinary processes of the court. A specific performance in such cases is said to be impossible ; and contracts stipulated for personal acts have been regarded as the most familiar illustrations of the doctrine, since the court cannot in any direct manner compel an actor to act, a singer to sing, or an artist to paint. Applying the same course of reasoning, the English courts formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation (1). Those courts however, entirely receded from this latter conclusion. The rule, (as late as 1891), appeared to be firmly established in England that the violation of such contracts may be restrained by injunction, whenever the legal remedy of damages would be inadequate, and the contract is of such a nature that its negative specific performance is possible (2).

Whether stipulation must be expressly negative in form.—The leading case on the subject is *Lumley* v. *Wagner* (3). In that case a famous

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a part of the contract to be performed where a part of it cannot be performed. Vide s. 17 of the Specific Relief Act ; see also *Gervais* v. *Edwards*, 2 Dr. & War. 80 ; *South Wales Co.*, v. *Wythes*, 5 De. G. M. & G, 880 ; *Phiffs* v. *Jackson* 56 L. J. Ch. 550 ; *Merchant's Trading* v. *Tampar ville*, (1909) 2 Ch. 443.

(1) Pomeroy's Eq. Jur. § 1343 citing. *Kemble* v. *Kean*, 6 Sim. 333 ; *Kimberley* v. *Jennings*, 6 Sim. 340. These cases were expressly overruled by *Lumley* v. *Wagner*, 1 Deg. M. & G. 604 : "The bill was filed simply for an injunction to prevent A from setting up as a tailor within the prescribed limits, and the Vice-chancellor granted the injunction. It was objected that this Court could not grant the injunction where there was something remaining to be performed, for that A had a right to be employed as a cutter, which right this Court would not even attempt to deal with or enforce as against C. That case therefore was open to a difficulty which does not occur here ; in fact the same difficulty which might have arisen in *Hills* v. *Croll* (2 Ph. 60), before *Lord Lydhurst*. But the Vice-chancellor held that to be no difficulty at all, observing that the bill simply asked for an injunction which he would grant ; although he could not give effect to the affirmative covenant to do the act in respect of which no specific performance was asked : his own decision in *Kemble* v. *Kean* (supra) and in *Kimberley* v. *Jennings* (supra) were pressed upon him but he observed ; 'that the bills in the cases cited asked for specific performance of the agreement, and that the injunction were sought only ancillary to that relief : but the bill in the present case asked merely for an injunction.' He no longer put it on the inability of the court to enforce a negative covenant, but he put it on the form of the pleadings."

(2) Pomeroy's Eq. Jur. §§ 1343. 1710.

(3) 1 DeG. M. & G. 604. On this case illustration (c) to section 57 of the Specific Relief Act is based : "A contracts with B to sing for twelve

"*prima dona*" agreed to sing in the complainant's opera house for a certain time and not to sing for any one else during that time. The court held that the services were of such a character that damages would be inadequate, and that therefore an injunction was proper to restrain the defendant from singing elsewhere. The opinion of *Lord Chancellor St. Leonards* fully reviews the previous authorities and has been generally accepted, both in England and in America, upon a similar state of facts. The most frequent application has been in cases of actors and actresses of established reputation. Contracts for their services often stipulate that they shall not perform elsewhere during their engagement with a particular manager. Their services being extraordinary and special an injunction is generally granted against the breach of such a stipulation. It will like-wise be granted when an artist agrees to work for the complainant and for no one else. Upon the question whether a negative

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months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of this contract. But he is entitled to an injunction restraining A from singing at any other place of public entertainment." "The first case which proceeded upon this doctrine "was that of *Martin* v. *Nutkin* (2 P. Wms. 266) in which the court issued an injunction restraining an act from being done where it clearly could not have granted any specific performance; but then it was said that the case, fell within one of the exceptions which the defendant admits are proper cases for the interference of the court, because there the requiring of the bills, sought to be restrained, had been agreed to be suspended by the defendant in consideration of the erection by the plaintiff of a coupola and dock, the agreement being in effect the price stipulated for the defendants relinquishing bell ringing at stated periods; the defendant having accepted the benefit, but rejected the corresponding obligation, *Lord Macclesfield* first granted the injunction which the Lords Commissioners, at the hearing of the case continued for the lives of the plaintiffs. That case therefore, however, it may be explained as one of the exceptional cases, is nevertheless a clear authority showing that this court has granted an injunction prohibiting the commission of an act in respect of which the court could never have interfered by way of specific performance." *Per Lord St. Leonards* in *Lumley* v. *Wagner*, 1 Deg. M. & G. 604. In delivering the judgment in the case of *Lumley* v. *Wagner* supra *Lord St. Leonards L. C.* said: "The present case is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants, which state of facts may have and in some cases has introduced a very important difference,—but of an act to be done by J. Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant the one being ancilary to, concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and duing that time not to sing for any body else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the time spent of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion, that she had attempted, even in the absence of any negative stipulation to perform at another therefore, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she had actually entered. Wherever this court has not proper jurisdictson to enforce specific performance, it operates to bind man's consciences, as far as they can be bound to a true and liberal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted

covenant must be express there is now a direct conflict of opinion in England. It was formerly (1873) held there that a negative would be implied in cases of this kind, and the implied covenant would be imposed by injunction (1). Later (1891) it was held that a negative will not be implied even where the defendant has agreed to give the "whole of his time" to the complainant's business ; and the case last referred to was expressly overruled in *Whitwood Chemical Co.* v. *Hardman* (2). In that case *Lindley M, R.* took strong ground against the policy of enjoining breaches of negative contracts, and spoke of *Lumley* v. *Wagner* (3) as an anomaly. He admitted that every agreement to do a particular thing in one sense involves a negative but said (4) : "It involves the negative of doing that which is inconsistent with the thing you are to do...but it does not at all follow that because a person has agreed to do a particular thing, he is therefere to be restrained from doing anything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will. It is a contract involving the performance of

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to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other ; and although the jurisdiction is not to be extended, yet a Judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity. It was objected that the operation of the injunction in the present case was mischievous, excludihg the defendant *J. Wager* from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true, that I have not the means of compeling her to sing (vide *Clarke* v. *Price*, 2 Wils. 157) but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the courts and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect of the injunction in restraining *J. Wagner* from singing elsewhere may in the event of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre : the injunction may also, as I have said, tend to the fulfilment of her engagement ; though, in continuing the injunction, I disclaim chosing indirectly what I cannot do directly." In *Montague* v. *Flockton*, L. R. 16 Eq. 189, the rule was extended to a contract by an actor which contained no negattve stipulation. See also *Wolverhamton, etc. Ry* v. *London etc. Ry* L. R. 16 Eq. 433 ; *Ward* v. *Buton*, L. R. 19 Eq. 207 , *Donnell* v. *Bennet*, L. R. 22 Ch. D. 835 ; *Forther gill* v. *Rowland* L R. 17. Eq. 132, 141 ; *Garret* v. *Banstead etc. Ry*, 4 De G. J. & S. 462 ; *Munro* v. *Wivenhoe etc. Ry.* 4 De G. J. & S. 723 ; *Jennings* v. *Bighton etc. Board.* 4 De G. J. & S. 735 ; *De Mattos* v. *Gibson*, 4 De G. & J. 276 ; *Johnson* v. *Shrewsbury etc. Ry.* 3 De G. M & G. 914 ; *Stocker* v. *Brocklebank*, 3 Macn. & G. 250 ; *Sainter* v. *Ferguson*, 1 Macn & G. 286.

(1) *Montague* v. *Flockton*, L R. 16 Eq. 189. See also *De Mattos* v. *Gibson*, 4 De G. & J. 276 (*Semble*, injunction proper to enforce a charter party containing no express negative stipulation) ; Pomeroy's Eq. Jur. 1711.

(2) (1891) 2 Ch. 416. In this case the defendant convenanted to be the plaintiff's manager for a term of years, and during that period to give the whole of his time to the plaintiff's business. Yet he was endeavouring to set up within the district a rival company to work the very same patent the plaintiffs were making and was devoting part of his time to the business of that rival company. The court of appeal held that the plaintiff's remedy was that by injunction.

(3) 1 De G. M. & G. 604.

(4) at pp. 426, 427,

personal service, and, as a rule, the court does not decree specific performance of such contracts. That is a general rule. There has been engrafted upon that rule an exception, which is explained more or less definitely in *Lumley* v. *Wagner* (1),—that is to to say, where a person has engaged not to serve any other master...the court can lay hold of that and restrain him from so doing.. and the principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this or the other—some specific thing on which you can put your finger. But there is this to be considered. What are we to say in this particular case? what injunction can be granted in this particular case which will not be in substance and effect a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiff is this, that they cannot suggest anything which, when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now there, it appears to me, the case goes beyond *Lumley* v. *Wagner* (1)...The principle is that the court does not decree specific performance of contract for personal service, and the question is, whether there is anything in this case which takes it out of that principle."

The Lord Justice held that plaintiffs failed to show that there was some recognised exception in the particular case, and after expressing agreement with *Jeesel M. R.* about there being no definite line, and with *Fry L. J.* that cases of this kind are not to be extended, he proceeded (2):—"I confess I look upon *Lumley* v. *Wagner* (1) rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend. I make that observation for this reason that I think the court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree for a specific performance, or indirectly by an injnnction, appears to me to be immaterial. It is on the ground that mischief will be done to one at all events of the parties that the court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have apart from the extraordinary remedy of injunction (3)."

In *Clarke* v. *Price* (4), *Lord Eldon* had refused to enjoin the defendant from writing law books for another firm. There was no express negative stipulation. And no injunction will be granted where the covenant, though negative in form, is positive in substance: thus an agreement that an employer will not require his manager to leave his employ is equivalent to a stipulation that he will retain the manager in his employ, and will not be enforced by injunction (5).

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(1) 1 De G. M. & G. 604.
(2) at p. 428.
(3) *Callianji Hargivan* v. *Narsi Tricum*, 18 B, 709, 710.
(4) 2 Wills. Ch. 157,
(5) *Davis* v. *Foreman*, (1894) 3 Ch. 654; *Kirchner & Co.* v. *Gurban*, (1909) 1 Ch. 413. It should be observed that

According to English law Scope of *Lumley v. Wagner* is not to be extended.—In *Davis* v. *Foreman* (1) *Kakewich J.* said : "In that respect this agreement (2) differs entirely from that in *Lumley* v. *Wagner* (3). Where there was a distinct engagement by the defendant (which is set out on p. 606 of the report) that she would not use her talents at any other theatre than the plaintiff's. What the court there had to consider was not the engagement of the defendant, and how far that could be enforced, but whether she could with propriety remove her services from the plaintiff and transfer them to another theatre. The Court has declined to extend the principle of *Lumley* v. *Wagner*. The matter has been gone into time after time by different Judges, and *Vice-Chancellor Malins*, in *Montague* v. *Flockton* (4) applied what he and some others conceived, to be the principle of *Lumley* v. *Wagner*, but the court of Appeal, in the recent case of *Whitwood Chemical Company* v. *Hardman* (5), have held that the Vice-chancellor acted as he did in misapprehension of the real decision in *Lumley* v. *Wagner*. Again, there is a well known case, in another branch of practice and experience, but coming within the same lines of *De Mattos* v. *Gibson* (6), where the negative stipulation was not expressed, but was implied, and the court granted an injunction. It seems, however, to be perfectly settled that an agreement for personal service cannot be enforced otherwise than by an action for damages, though it may possibly be enforced in certain exceptional cases, not to be extendcd, where there is a strictly negative stipulation. In the case which I have already referred to of *Donnell* v. *Bennet* (7), *Mr. Justice Fry* says : 'If...the breach of the covenant is properly satisfied by damages, then the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases.' I do not find that that has been adopted in the other cases, but they are quite consistent with it. Now, having regard to the principle expounded by the court of Appeal in *Whitewood Chemical* v *Hardman* (5), and recognised again in the case of *Ryan* v. *Mutual Tontine Westminster Chamber Association* (8), which is not directly in point, what ought I to do here, in dealing with a covenant or stipulation which, as I have said, though negative in form is posi-

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this restrictive rule of *Whitwood* v. *Hardman*, supra, applies to contracts for personal services only ; in other kinds of contracts a negative may still be implied. Vide *Metropolitan* v. *Gender*, (1901) 2 Ch. 799.

(1) (1894) 3 Ch. 654.

(2) An agreement for the employment of a manager of a business contained a clause providing that the employer would not except in the case of misconduct or a breach of the agreement, require the manager to leave his employ. The employer gave to the manager notice purporting to determine the agreement and the service created thereby, and the manager brought an action for an injunction to restrain the employer from acting on the notice.

(3) 1 De G. M. & G- 604.

(4) L. R. 16 Eq. 189.

(5) (1891) 2 Ch. 416.

(6) 4 De G & J. 276.

(7) 22 Ch. D. 837.

(8) (1893) 1 Ch. 116.

tive in substance ? There is a clause in the agreement that the employer will not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ—in other words, give him notice to quit. That is, to my mind, distinctly equivalent to a stipulation by the employer that he will retain the manager in his employ. It is only the form that is negative. If the court comes to the conclusion that there is really the substance of the agreement (which, being an agreement of service cannot be specifically enforced), is it right, having regard to the time the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted ? To my mind, I should be going distinctly against the last decision in the court of Appeal if I were to apply the doctrine of *Lumley* v. *Wagner* which is not to be extended to a case of this character"(1).

In *Mortimer* v. *Beckett* (2) M had for some years before 1914 arranged boxing matches for B, a young professional boxer. In January 1914, B entered into an agreement by a letter written to B in the following terms : "In consideration of the sum of ten shillings and also in consideration of your many services rendered and to be rendered to me I undertake that you shall have the sole arrangements of matching me for all my boxing contests during the period of the next seven years and in making such arrangements for me I undertake that for the consideration as set out above, you to benefit to the extent of fifty (50 per cent) of any purses above the sum of £25, and for music hall and other engagements you are to receive also a sum of 50%." M acted as B's manager until December, 1919, during which time B attained considerable reputation as a professional boxer. In December, 1919, B wrote to M, that he had decided for the future to act as his own manager, M moved for an injunction to restrain B from entering into any boxing contests except such as had been arranged by M. In refusing the injunction *Russel J.* said : "The first case is *Lumley* v. *Wagner* which came before *Lord St. Leonards* on appeal from *Sir James* Parker, and is therefore a case of high authority..... ...*Lord St. Leonards* came to the conclusion that.....in order that the agreement should be enforceable by injunction, there must be an independent negative stipulation that she would perform nowhere else. But there was an added independent negative clause, and *Lord St. Leonards*, although he had come to the conclusion that in the absence of such an express negative stipulation he would not grant an injunction, granted it on finding that independent negative stipulation.....Applying these authorities (3) to the case before me, if I grant an injunction here, the effect will be to force the defendant to employ

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(1) (1891) 2 Ch. 416 ; see also per *Romer J.* in *Ehrman* v. *Bartholomew*, (1898) 1 Ch. 671.

(2) 89 L. J. Ch. 245=(1920) 1 Ch. 571.

(3) *Davis* v. *Foreman*, (1894) 3 Ch. 654 ; *Kirchner* v. *Gurban*, (1909) 1 Ch. 413 ; *Lumley* v. *Wagner*, 1 De G M & G. 604 ; *Montague* v. *Flockton*, 41 L. J. Ch. 677 ; *Ryan* v. *Mutual Tontine*, (1893) 1 Ch. 116 ; *Whitwood* v. *Hardman*, 60 L. J. Ch. 428=(1891) 2 Ch. 416 ; *Wolverhampton* v. *London and North Western Ry.* L. R. 16 Eq. 433.

a particular person as his agent as far as his boxing engagements are concerned, and to accept that agent's service. Therefore, I should, to that extent, be granting specific performance of a contract for personal services. The contract is not negative save so far as a negative stipulation can be inferred from the word 'sole'. It is, therefore, positive in form, and there is no independent negative stipulation to bring the case within *Lumley* v. *Wagner* and *Whitwood Chemical Co.* v. *Hardman.* I hold therefore, that no injunction ought to be granted." So if an agreement affirmative in form is of such a nature that it cannot be specifically enforced, and the application for an injunction is, in effect and spirit, an application for a decree for specific performance, the Court will not import a negative quality into the agreement, but will leave the plaintiff to his remedy by damages (1).

If A sells a work to B and covenant not to do anything which may be detrimental to the sale or circulation of that work, and if afterwards A, and a partner, publish a rival work on the same subject, the partner will be restrained as well as A (2).

Scope of Lumley v. Wagner is to be extended in British India.— "Section 57 of the Specific Relief Act provides in the case of an affirmative agreement coupled with a negative agreement *express or implied*, that an injunction may be granted though specific performance could not, and it gives as illustrations some of the contracts specific performance of which is precluded by section 21, clause (*b*)." (3) But in *Callianji* v. *Narsi Tricum* (4) *Candy J.* while admitting that in a case mentioned in illustration (*d*) of section 57 of Specific Relief Act, the Court is not precluded from granting an injunction, otherwise it would make section 57 of the Act a nullity, said: "but the question still remains whether the Court is bound to grant the injunction..... As I have already shown, section 57 of the Specific Relief Act (I of 1877) does in some respects apparently depart from principles which guide Courts of Equity in England. But the general principle remains that in granting an injunction the Court must exercise its discretion. Section 22 of the Specific Relief Act provides that 'the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. The same holds good for injunctions (section 52); and this is particularly so in the special case where specific performance is indirectly sought

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(1) Kerr on Injunction p. 459.

(2) *Barfield* v. *Nicholson*, 2 Sim. & S. 1=25 R. R. 144; see also *Morris* v. *Coleman*, 18 Ves. 437=11 R. R. 230; *Stiff* v. *Assel.* 2 Jur. N. S. 348=106 R. R. 943.

(3) *Handly J.* in *Madras Ry Co* v. *Thomas Rust*, 14 M. 18 (22). Illustration (d) of section 57 of the Specific Relief Act: 'B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for a specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk." Here the negative contract is implied and not express as in *Lumley* v, *Wagner* for which see illustration (c) which is based on this case.

(4) 18 B. 702,

by the enforcement of an implied negative covenant. Even in *Lumley* v. *Wagner* (1), where there was held to be a direct negative covenant, the plaintiff was only held to be entitled to the benefit of the principle of law, because looking at the merits and the circumstances of the case he was in the right (2).....Again, I take it that though the section includes the words 'notwithstanidng section 56, clause (*f*)'... ..still the discretion of the Court, which must always be exercised before granting an injunction (section 52), must be the discretion set forth in section 22, which recites cases in which the Court may properly exercise a discretion not to decree specific performance. It is true that section 56, clause (*f*), speaks of contracts the performance of which would not be specifically enforced, but section 57 says that the circumstances that the Court is unable to compel specific performance of the affirmative agreement etc.' This apparently relates to section 21, which treats of contracts which 'cannot be specifically enforced'. Section 57 can hardly mean that though the Court would not in the proper exercise of its discretion (as explained in section 22) decree specific performance of a contract, though it would be lawful to do so (as explained in section 21), yet when indirectly decreeing specific performance by granting an injunction under section 57, and exercising its discretion as provided by section 52, the Court must not be guided by the rules laid down in section 22 as to the exercise of its discretion" (3).

In *Burn & Co. Ltd.* v. *Colin Mac Donald* (4) the defendant covenanted under an agreement, "diligently and to the best of his ability to devote himself to the duties as a draftsman and geneal assistant" to the plaintiff company for five years. The defendant after serving for sometime absented himself at the Engineering Works of the Plaintiff company and entered into the service of another party. The Plaintiff company thereupon instituted a suit, praying for Rs. 2,000 as damages for breach of the said agreement and for an injunction restraining the defendant from serving any person or persons other than the plaintiff company until the said agreement was determined, by efflux of time. In the Court of first instance *Fletcher J.* after citing the provisions of section 57 of Specific Relief Act said : "From this section it appears, first, that there must be in this contract a negative agreement, express or implied, and secondly, the jurisdiction conferred on the Court is a discretionary jurisdiction. Then, first, does the contract contain a negative agreement, express or implied ? 'Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you

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(1) 1 Deg. M. & G. at p. 633.

(2) See also *Doherty* v. *Allman*, 3 Ap. Cas. 709 ; *Peto* v. *Bighton & Uckfield Ry. Co*, 1 H & M. 468 ; *Shamnugger Jute Factory* v. *Ram Narain*, 14 C. 189, 199, 200 ; *Nusserwanji* v. *Gordon*, 6 B. 266 (284) ; *Eley* v. *Positive Government Security Life*, 1 Exch. D 20.

(3) On appeal *Callianji* v. *Narsi Tricum*, 19 B. 766, *Farran C. J.* approved of the argument. He observed : 'Illustration (*s*) to section 57 leaves no doubt as to the power of the Court to do this. The Judge, however in his discretion has decided not to grant this injunction, and we have now to enquire whether the discretion was properly exercised."

(4) 13 C. W. N. 255=36 C. 354.

are to do but it does not at all follow that, because a person has agreed to do a particular thing, he is therefore to be restrained from doing everything else which is inconsistent with it (1).' In my opinion, it is impossible to infer from the contract in question a negative agreement by which the defendant undertook that whether the plaintiffs should or should not continue to employ him he would not during the period of 5 years from the commencement of the agreement work for any one else in the world. Bnt even if I had come to the conclusion that such a negative agreement should be implied I should have held such agreement to be .void as being in restraint of trade and being wider than what was necessary for the reasonable protection of the Plaintiffs."

On appeal *Maclean C. J.* said : "The law of England no doubt is that a mandatory injunction will not be granted for the specific performance of a personal service—but ever since the day of *Lumley* v. *Wagner* (2), which is a decision now some 50 or 60 years old, it has been laid down that, although the court cannot grant a mandatory injunction to that effect, yet where in the agreement, there is a negative clause, that is to say, a clause to the effect that the contracting party will not serve any body else, effect can be given to that and an injunction granted. In the present contract, there is no such negative condition in terms. But, although I do not think that authorities in England are useful to us, in dealing with questions codified by the law of India, I should like to call attention to the observations of *Lord Selborne*, then Lord Chancellor, sitting as Master of the Rolls in the case of *Wolverhampton and Walsall Railway Co.*, v. *London and North Western Ry. Co.*, (3). The passage I propose to read is at page 440. This is what this great Judge says :—'With regard to the case of *Lumley* v. *Wagner* (2), to which reference was made, really when it comes to be examined, it is not a case which tends in any way to limit the ordinary jurisdiction of this court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend to it to an ordinary case of hiring and service, which is not properly a case of specific performance the technical distinction being made, that if you find the word 'not' in an agreement—'I will not do a thing', as well as the words 'I will', even although the negative term might have been implied from the positive, yet the court, refusing to act on an application of the negative, will act on the expression of it I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an

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(1) *Per Lindly L. J.* in *Whitwood chemical* v. *Hordmas*, (1891) 2 Ch. 416.

(2) 1 Deg. M. & G. 604 at p. 615.

(3) L. R. 16 Eq 433.

affirmative form of expression. If on the other hand, the substance of the thing is such, that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative.' If it had been necessary, I should have applied that principle to the present case, but here we have to deal with the law in India. The law in India on the subject is codified by section 57 of the Specific Relief Act. The language of that section is reasonably clear and it appears to give legislative sanction in India to the view expressed by *Lord Selborne* in the passages I have read. If there had been any doubt as to the meaning of the language of the section, Illustration (d) is conclusive on the subject.....The view I entertain coincides with that of the late *Chief Justice Farran* in the case of *Charles worth* v. *Macdonald* (1). In that case, the court thought that there was a negative covenant, although the terms of the agreement were not very clear. After dealing with the case of *Lumley* v. *Wagner* (2), *Farran C. J.* says : 'In my opinion it would be most unfair to gentlemen in the position of the Plaintiffs not to protect them in such cases. It would virtually debar them from engaging an assistant at all. An action for damages would afford them no protection, certainly no adequate protection ; and, in a previous part of his judgment he refers to section 57 of the Specific Relief Act and speaks of it 'as a legislative decision to the same effect.' Now, can we in the present case properly say, that a negative covenant is implied. I feel no doubt about it. Here the covenant is that the defendant will diligently and to the best of his ability devote himself to the duties as a draftsman and general assistant. Surely when a man says that he will devote himself during a period of years to the business of a particular firm, it does imply that he will not give his services during that period to any other firm. It would be dangerous to hold the contrary. Here to my mind, an injunction is not only the most effective but the only remedy according to the principles of equity, justice and good conscience. To give damages in a case of this sort—damages which perhaps will never be recovered—will be very small consolation to the Plaintiffs. It is said that if we grant an injunction the defendant will starve. We have nothing to do with that ; he ought to have thought of that, before he deliberately broke his contract (3)".

In the same case *Harrington J.* said : "It is said that no injunction ought to be granted on two substantial grounds. One is that the agreement contained no negative stipulation under which the defendant undertook not to serve any rival firm of engineers ; and secondly, on the ground that the granting of an injunction is an indirect means of enforcing a covenant of which the specific performance would not be granted, that is to say, covenant to perform personal service. Now, no doubt, these two grounds influenced the learned *Lord Justices* in England who decided the case of *Whitwood Chemical Co.*,

(1) 23 B. 106.
(2) 1 De G. M. & G. 604 (615).
(3) 13 C. W N. 255=36 C. 354.

v. *Hardman* (1) and they were further influenced by the danger which they considered there was in a country like England, of extending the case of *Lumley* v. *Wagner* (2). The case of *Whitwood Chemical Co.*, v. *Hardman* (1) was afterwards followed by *Mr. Justice Romer* in the later case, *Ehrman* v. *Bartholomew* (3) in which refusing an injunction, the learned judge adopted and assented to the observations of *Lord Justices* in *Whitwood Chemical Co.*, v. *Hardman* (1) as to the danger of extending the case of *Lumley* v. *Wagner* (2). So, if those cases represented what was the law here, there might be, at any rate, a good deal to be said on behalf of the Respondents. But the answer is that the law here is expressed in section 57 of the Specific Relief Act which provides that an injunction may be granted for a negative agreement, either express or implied, notwithstanding the fact that the specific performance of the positive agreement cannot be enforced under the law. So that disposes at once of one of the grounds on which the Respondents must rely. I therefore, think that there are no grounds for refusing an injunction in the present case" *Bett J* also concurred with the Chief Justice.

The rule of law as above laid down is in accord with English law. "If there is a negative covenant" says *Mr. Kerr* "the court has as a general rule (4), no discretion to consider the balance of convenience or matter of that nature but is bound to give effect to the contract between the parties, unless the party seeking to enforce the covenant has, by his own conduct or by that of the person through whom he claims, become disentitled to sue (5)." But the case of an employer stands on a different footing. He may be content with paying the fixed remuneration to the employee without requiring his services. So where a contract forbade the defendants (a steam ship company) to employ as stevadores none but the plaintiffs, held that the plaintiffs could not be granted a temporary injunction to enforce the covenant (6).

Where one of the terms of a contruct of service is that the person contracting shall not take service elsewhere during the stipulated period and there is a threatened breach of this term a court has jurisdiction to restrain such breach by issuing a temporary injunction not only against the party contracting but

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(1) (1891) 2 Ch. 416.
(2) 1 De G. M. & G. 604 (615)
(3) (1898) 1 Ch. 671.
(4) *Doherty* v. *Allman*, 3 A. C. 720 ; *Osbrone* v. *Bradegy*. (1903) 2 Ch. 451 ; *Sharp* v. *Harrison*. (1922). 1 Ch. 502.
(5) Kerr on Injunction p. 478 citing *Roper* v. *Williams*, T. & R. 18 ; *Bedford* v. *Trustees*, 2 M. & K. 552 ; *Peek* v. *Mathews*, 3 Eq. 515 ; *Sayess* v. *Colleyer*, 28 Ch. D. 103 ; *Knight* v, *Simmons*, (1896) 2 Ch. 294 ; *Craig* v. *Creer*, 1 I. R. 258 ; *Osborne* v. *Bradegy*, (1903) 2 Ch. 451 ; *Sobuy* v. *Sainsburry* (1913) 2 Ch. 513 ; *Pulleyne* v. *France*, 57 S. J. 173.
(6) *Deotsche* v. *Prestonji*, 89 Ind. Cas. 321=A. I. R. 1925 Sind 347 ; *N. W. Ry.* v. *N. W. Ry.* A. I. R. 1933 Lah. 203 ; *Kirchner Co.* v. *Gurban*, (1909) 1 Ch. 413. Pomeroy's Eq. Jur. § 1713 : "It is held that an employee cannot restrain his employer from discharging him. In general, in applying the remedy the courts will be bound by the equitable principles which govern the remedy of specific performance. The rights of third parties will be considered." See also *Davis* v. *Foreman*, (1894) 3 Ch. 654.

also against the third party who proposes to employ him (1). In delivering the judgment the Court observed : "There is precedent for issuing injunctions in these cases against third parties. In *Stiff* v. *Cassel* (2) an injunction was issued to restrain a firm of publishers from employing an author who had contracted to write for another publisher only. In *Donnell* v. *Benett* (3) a fish curer contracted to sell all his fish to Donnell, and to no other person, but broke his contract, and sold the fish to Bennet. The court granted an injunction against both parties. These cases are authority for the issue of an injunction restraining both parties from committing an injury. The issue of such an injunction as that now prayed for is clearly provided for in section 57 of the Specific Relief Act, and illustration (d), is expressly in point. The High Courts of Calcutta and Madras have ruled this. See *Burn and Company* v. *McDonald* (4) ; *Madras Railway Co.* v. *Thomas Rust* (5) and *Subba Naidu* v *Hari Badha Sahib* (6). In *Charlesworth* v. *MacDonald* (7), in which the cause of action arose in Zanzibar, and which was decided according to English law, the High Court restrained an assistant, who had contracted to serve a physician for three years, from setting up a practice on his own account I do not think any useful purpose would be served by discussing the various English cases cited, when it seems to me that the law in India has been settled by legislative enactment. But even in England an injunction has been issued to restrain a confidential clerk from leaving his employers during the period of his employment. [See *William Robinson and Company Limited* v. *Heur* (8)]. In that case as in the present one, the company refused to accept the employee's resignation. I think the plaintiff company has shown sufficient ground to justify the issue of an *interim* injunction against both the defendants (9)"

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(1) *Burma Oil Co.* v. *Sampson*, 64 Ind. Cas. 534=13 Bur. L. T. 227.

(2) 106 R. R. 943=2 Jur. N. S. 348.

(3) 22 Ch. D. 835.

(4) 36 C. 354=13 C. W. N. 255=9 C. L. J, 190.

(5) 14 M. 18.

(6) 26 M. 168=13 M. L. J. 13.

(7) 23 B. 103.

(8) (1898) 2 Ch D. 451.

(9) But see *H. Rubeinstin & Co.* v. *Edgar Francis*, A. I. R. (1930) 597=31 P. L. R. 54=122 Ind. Cas. 231, where *Dalip Singh J.* said : "The only question, therefore, left is whether the trial court was right in refusing to grant the plaintiff the injunction claimed. In my opinion the trial court was right. The learned counsel for the appellants has relied on s. 57 of the Specific Relief Act, but that section does not say that every affirmative contract includes by necessary implication a negative agreement to refrain from doing certain things. It is therefore, a question of interpretation in each case whether a particular contract can be said to have a negative covenant express or implied contained in it. I find a case reported in 75 Law Times. p. 528, which. is practically on all fours with this case There the learned Judges have held that the mere use of the word 'exclusively' does not imply a negative to refrain from service of other people and the learned Judges, therefore, refused the injunction on that ground. They relied on another case *Whitwood Chemical Co.* v. *Hardman* 64 L. T. 716=(1886) 2 Ch. 416=60 L. J. Ch. 428, where a similar contract was held not to be a good ground for basing a claim for injunction. Apart from this as pointed out by *Lindley L. J.* in 75 Law Times p. 528, the plaintiff must either waive the breach or let the five years go. They must waive their right at all events to take advantage of those breaches. They cannot put an end to the contract and also claim the injunction based on contract for the complete term of five years."

Section 57 of the Specific Reiief Act, deals only with such objection to the enforcement of a negative agreement as might arise from the inability of the court to compel specific performance of the affirmative agreement coupled therewith, and leave unaffected objections that might arise on other grounds such as the invalidity of a negative agreement, so far as it would operate to restrain any one from exercising a lawful trade or business. The section extends to agreements of a negative character such as are necessarily implied from contracts for whole time service, even if not expressed therein and the operation of such contracts as contracts for service, appears in such cases to prevent the applications of section 27 of the Contract Act 1872 to such negative agreements so far as they purport to impose restrictions only during the period of affirmative agreement for service after the expiring of that period, such negative agreement could form no part of a contract to exercise the business or trade, and would then be void as agreements purporting to do nothing else than restrain (1). Where W, having contracted with C to play for C and not to play in any other theatre on his own or on some one else's behalf until after the expiration of the period contracted for and until after his return to England, performed in another theatre after the expiration of the period for which he was under contract with C but before his return to England, it was held that under section 27 of the Indian Contract Act, the agreement being in restraint of a lawful profession, trade or business is void and as such would not be enforced by injunction. Section 57 of the Specific Relief Act is not applicable in such a case (2).

Effect of *Lumley* v. *Wagner* on American law.—In the United States ordinarily courts of equity refuse to enjoin the violation of restrictive covenants in contracts for personal services, the remedy at law being deemed adequate. It is otherwise, however, when the services contracted for require particular skill, or are unique, or extraordinary in their nature, such as those of eminent singers, actors, artists and the like. While courts will not undertake to compel the specific performance of such contracts, they will restrain by injunction their violation, especially in the case of singers and actors, by enjoining their singing or acting elsewhere or for others (3). So where a person enters into a definite contract to render to another, and to no one else, personal services of such a nature that their loss to the employer and acquisition by another would cause injury not to be compensated for in damages, a breach of contract in leaving the employer and contracting with a rival may be restrained by injunction. But even where there is an express negative covenant it is said that the authorities all agree that an iniunction will not be granted save in those exceptional cases where the promised service is of a special, unique, unusual, and extraordinary or intellectual

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(1) *Pragji Soorji* v. *Panjiwan*, 5 Bom. L. R. 878.

(2) *E. M. D. Cohen* v. *Allen Wilkie*, 16 C. W, N. 534.

(3) Spelling in Injunctions and other Extra-ordinary Remedies § 493.

character which gives it a peculiar value the loss of which cannot be reasonably or adequately compensated in damages in an action at law (1). This has been the rule in England since 1852, and is the settled rule in the United States in respect to actors and opera singers of great reputation (2). And in a recent case in New York it is said in this connection that because of the special nature of contracts for the employment of actors or singers, although the affirmative contract cannot be enforced, Courts of Equity have enforced negative covenants, either *express or implied* where there was no legal remedy, for a breach of the contract and where upon the nature of the case, the parties to the contract, ready and willing to perform, have no remedy except to prevent the breach of negative covenants (3). So the rule established in England in *Whitwood Chemical Co.* v. *Hardman* (4), that a negative will not be implied even where the defendant has agreed to give the "whole of his time" to the complainant's business, appears to have had little influence in the United States (5). In *Cost* v. *Lassard* (6), the Court observed: "The aggreement to perform at particular theatre for a particular time, of necessity involves an agreement not to perform at any other during that time. According to the true spirit of such an agreement, the implication precluding the defendant from acting at any other theatre during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as if it was expressed." In New York, where this class of contracts has most frequently come before the Courts, it seems to be established that when a contract is intended, to give the plaintiffs, not divided, but exclusive, services of the defendant.....a negative clause is unnecessary." (7) "The American Courts" says *Prof Pomeroy* "generally have either rejected the doctrine of *Lumley* v. *Wagner* entirely, or have accepted it only to a partial extent.. ...In all cases, English and American, the inadequacy of the legal remedy is the sole criterion for interference by injunction to prevent violation of any contract (8)."

Where the services contracted for are neither special, extraordinary nor unique, the Courts generally refuse equitable relief. It may sometimes be difficult to say just what is a special, unique and extraordinary service, or whether the employee possesses special, unique or extraordinary qualifications. The solution may generally be reached by an inquiry as to whether a substitute for the employee can readily be obtained, and whether the substitute will substantially answer the purpose of the contract; in other words, whether the individual service specially contracted for is essential to prevent irreparable

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(1) H. C. Joyce on Injunction § 452 (*a*)

(2) *Lumley* v. *Wagner*, 1 De G. M & G. 604; *Montague* v. *Flockton*, L. R. 18 Eq. 189; *Daly* v. *Smith*, 49 How. Pr. 150.

(3) *Lawrence* v. *Diney*, 119 Ap. Div. (N. Y) 295.

(4) (1891) 2 Ch. 416.

(5) Pomeroy's Eq. Jur, § 1711.

(6) 17 Am. St. Rep. 726=22 Pac. 1054 =18 Or. 221.

(7) *Hoyt* v. *Fuller*, 19 N. Y. Sup. 962; *Duff* v. *Russel*, 133 N. Y. 678; Pomeroy's Eq. Jur. § 1711.

(8) Pomeroy's Eq. Jur. § 1343 note.

injury. Accordingly, when it appears that the plaintiff has himself substituted another in place of the defendant, an injunction has been refused (1).

Scope of section 57 of the Specific Relief Act.—Section 57 does not say that every affirmative contract includes by necessary implication a negative agreement to refrain from doing certain things. It is there on a question of interpretation in each case whether a particular contract can be said to have a negative covenant express or implied, contained in it. The mere use of the word "exclusively" does not imply a negative covenant to refrain from service of other people (2).

In *Subba Naidu* v. *Haji Badsha* (3), plaintiffs advanced money to the defendants for the purpose of carrying on work in certain mines, in pursuance of an agreement by which defendants undertook, in consideration of the advance, to sell all the mica produced from the mines to plaintiffs and bound themselves not to send any of it to any firm other than plaintiffs' or keep any in stock. Plaintiffs now complained that defendants had, in breach of their agreement, arranged to consign and had already made consignments of mica to another firm and were keeping mica in stock. Plaintiffs filed this suit for specific performance and for an injunction restraining defendants from acting in violation of the terms of the agreement ; a temporary injunction was subsequently applied for and obtained, upon an appeal being preferred by defendants against the order granting the temporary injunction, held, that the injunction was rightly granted. Before the Appellate Court *Mr. Grant* on behalf of the defendant contended that in as much as the positive covenant could not be enforced by a decree of specific performance, a breach of the negative covenant ought not to be restrained by an injunction. *Sir Arnold White C. J.* in delivering the judgment said : "Now, we are relieved from considering the question as to whether the positive covenant in this case can or cannot be specifically enforced, because it is conceded by the counsel on behalf of the plaintiffs that it cannot. In this state of things, therefore, it has to be considered whether, under the law of this country, a breach of the negative covenant not to consign to third parties can be restrained by injunction. The law with regard to the granting of permanent injunction is regulated by the provisions of the Specific Relief Act. Section 56 says an injunction cannot be granted in certain specified cases, including an injunction to prevent the breach of a contract, the performance of which would not be specifically enforced. That is clause (*f*) of section 56.

"Section 57 says 'Notwithstanding section 56, clause (*f*), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, expressed or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement

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(1) Pomeroy's Eq. Jur. § 1712.
(2) *Rubenstein* v, *Edgar Francis* A. I. R. 1930 Lah. 597=31 P. L. R. 154=122 Ind. Cas. 231.
(3) 26 M. 168.

shall not preclude it from granting an injunction to perform the negative agreement, provided the applicant has not failed to perform the contrrct so far as it is binding on him.'

"Then, section 54, which is the first section of Chapter X which deals with perpetual injunction, is as follows :—'Subject to the other provisions contained in, or referred to by, this chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant whether expressly or by implication, When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

"Now, some of the rules and provisions are to be found in section 21, which speaks of contracts which cannot be specifically enforced, and one of the contracts which under that section cannot be specifically enforced is referred to in paragraph (*b*)—'a contract which runs into such minute or numerous details, or which is dependant on the personal qualifications or volition of the parties, or otherwise from its nature, is such, that Court cannot enforce specific performance, of its material terms', and *Mr. Grant's* proposition of law is that section 57 only applies to the case of contracts which are specified in section 21, clause (*b*). In other words, he says that section 57 only applies to cases which I may describe compendiously as cases like *Lumley* v. *Wagner* (1). There is certainly nothing in the words of section 57 to suggest that so narrow a construction should be placed upon it. The section is really a proviso to section 56, which cuts down the operation of the preceding section. *Mr. Grant* has been unable to cite any decision of the Courts in this country in support of the proposition which he put forward, though no doubt there are expressions of opinion in the text-books which support his proposition. The authorities, such as there are, are against the proposition which he invites us to adopt. Although the facts in *Madras Railway Co.* v. *Rust* (3) are not precisely the same as those in the present case, it supports the view that section 57 means what it says and that it is not to be cut down as Mr. Grant suggests. That decision no doubt was only the decision of a single Judge. With reference to the point the learned Judge says, 'It is argued that when the remedy by specific performance of a contract is expressly refused by chapter II of the Specific Relief Act, then by virtue of section 54, clause (2), an injunction cannot be granted, and therefore that this contract being one extending over more than three years, and therefore not capable by section 21, clause (*g*) of specific performance cannot be the subject of an injunction. It seems to me that this argument would make section 57 of the Act a nullity.' In that case Mr. Grant appeared as counsel and he advanced precisely the same argument which he advanced to-day. In that case the Court declined to adopt his argument and I think rightly. As regards *Charlesworth* v. *Mac Donald* (1), I do not think

(1) 1 De G. M. & G 604.
(2) 14 M. 18.
(3) 23 B. 103.

it can be said to afford us any assistance, because the question in that case arose in Zanzibar, where the Specific Relief Act has no application. With regard to Mr. Grant's contention that section 57 only applies to what I have described as cases like *Lumley* v. *Wagner* (1), it has to be observed that one of the illustrations to section 57 viz., illustration (c) is a reproduction of the decision in *Lumley* v. *Wagner* (1). But that is only one of the five illustrations. The other illustrations relate to facts which are quite distinct from the facts which were in question in *Lumley* v. *Wagner* (1). That, I should have thought was decisive as to the question whether the Legislature intended that section 57 should only apply to cases falling under section 21 (b). If the Legislature intended that section 21 should apply nothing would have been easier than to have said so. It seems to me it may well be that the Legislature designedly adopted these general terms for the purpose of avoiding in this country the difficulties which have arisen in the English Courts with regard to cases of this character—difficulties which resulted in the English authority being somewhat confused and not altogether reconcilable." Section 57 of the Specific Relief Act, 1877, deals only with such objection to the enforcement of a negative agreement as might arise from the inability of the court to compel specific performance of affirmative agreement coupled therewith, and leave unaffected objections that might arise on other grounds such as the invalidity of a negative agreement, so far as it would operate to restrain any one from exercising a lawful trade or business. The section extends to agreements of a negative character such as are necessarily implied from contracts for whole time service, even if not expressed therein and the operation of such contracts for service, appears in such cases to prevent the application of section 27 of the Contract, Act 1872, to such negative agreements so far as they purport to impose restrictions only during the period of affirmative agreement for service after the expiring of that period, such negative agreement could form no part of a contract to exercise the business or trade, and would then be void as agreements purporting to do nothing else than restrain (2). Moreover contracts to do personal services involving skill and fidelity are not generally protected by means of injunctions, as the order is not easily enforceable (3). So where a charter-party has been actually completed, the court will, by injunction, prevent an employment of the ship inconsistent with the terms of the charter-party; but where there is only an agreement for a charter-party, no such injunction will be granted (4).

In consequence of negotiations between the plaintiff and defendant No 3, the latter confirmed on the 22nd November 1911, the charter of his steamer (Gymeric) for twelve voyages with plaintiff's coal from Calcutta to

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(1) 1 De G M & G. 604.

(2) *Pragji* v. *Prangiwan*, 5 Bom. L. R. 878; see also *South Indian Export Co.* v. *Subba Nidu*, 8 M. L. T. 149=7 Ind. Cas. 243.

(3) *Deutsche* v. *Firm of Pestonji*. 89 Ind. Cas. 321.=A. I. R. 1925 Sind. 347.

(4) *Haji Abdul* v. *Hazi Abdul*, 6 B. 5.

Bombay. On the 15th December twelve charter-parties for twelve consecutive voyages were signed by the parties. The ship was used under four successive charter parties, but owing to the intervention of J, the mortgagee, the plaintiff was unable to obtain the use of the ship under the remaining eight charter parties. Subsequently the steamer was transferred to defendants nos 1 and 2 by J who obtained possession of the steamer in time of his mortgage decree. The present suit was intended by the plaintiff for injunction against the defendants restraining them until the completion of the eight remaining voyages from dealing with the vessel in any manner inconsistent with the agreement of the 22nd November 1911. The defendants among other objections raised the objection that no injunction can be granted against them having regard to the provisions of the Specific Relief Act and the law relating to charter parties. In refusing the injunction the court of first instance (1) observed : "Assuming the agreement of the 22nd November 1911, to charter the S. S. Gymeric to the plaintiff for twelve consecutive voyages to be in all respects good, there is still a question to be answered *in limine*, whether a charter party of such a character will support the injunction prayed for. If not, then it follows that the suit would immediately be restricted to an ordinary suit for damages against the defendant No 3, Ghulam Hussain Issaji. Section 57 of the Specific Relief Act is no doubt, intended to give legislative effect to a group of English cases, of which, in the domain of personal service *Lumley* v. *Wagner* (2) is the best known, and in the domain of shipping law *De Mattos* v. *Gibson* (3) and *Collins* v. *Lamport* (4) are good examples.

"I have gone over all the authorities, to which my attention has been drawn, very carefully, and I doubt whether any one of them has gone the length I am now asked to go. It is interesting to note, how in subsequent decisions the cautiously worded and designedly very restricted judgment of *Lord St Leonards* in *Lumley* v. *Wagner*, has at times been overstated, if not actually misrepresented. There the case was of the simplest A singer agreed to sing for a certain *impressairo*, for a given time, and not to sing for any other *impressario*, during that period. Specific performance of the affirmative part of the agreement obviously could not be decreed, but *Lord St. Leonards* thought that he might safely give effect to the expressed negative undertaking. He is careful to add that he would not have done so had it not been expressed. Upon this decision, followed cases which extended it to the length of taking in every case in which, while the courts could not decree specific performance of the affirmative agreement, they tried to bring about the same result indirectly by enforcing by injunction, what was taken to be an implied (not as in *Lumley* v. *Wagner*, an expressed) negative agreement. That is why *implied* is used in section 57. The section as a whole provides that where there is coupled

(1) *Andrew Yule*, v. *Adeshir Bomanji*, 15 Bom. L. R. 724=20 Ind. Cas. 844 ; on appeal reversed vide 24 Ind. Cas. 758= 16 Bom. L. R. 178.

(2) 1 De G. M. &. G, 604.

(3) 4 De G. & J. 276=124 R. R, 250.

(4) 34 L. J. Ch. 196.

with an affirmative agreement to do a certain act, a negative agreement expressed or implied, not to do a certain act, the court is not precluded from enforcing the negative agreement by injunction, although it cannot enforce the affirmative agreement by way of specific performance. It might be thought a pity, in the interests of a straightforward and intelligible administration of the law, to have engrafted an exception involving such nice distinction and difficult determinations, upon the salutory general rule laid down in section 56. One obvious objection is that where an agreement contains no more than a simple affirmative, it always must imply a negative agreement not to do any thing else at the same time and place. This was pointed out by *Lindley L. J.* in *Whitewood Chemical Co.*, v. *Hardman* (1). So that in strict logic, every affirmative agreement ever yet made in the world, standing alone and unqualified, would seemingly fall within the scope of the section and give ground for an injunction restraining the party in breach from doing anything else, till he had performed it. No one has supposed that the law was meant to be carried that length. But little help can be gained from the actual words of the section, when read with the illustrations. It is only too plain whence those illustrations are drawn, and that the words 'not to do a certain act' need to be much widened to meet all the cases contemplated. A man, who engages himself to be the skilled manager of a certain business, may be held to have impliedly agreed not to be the skilled manager of any other business. But it could hardly be said that he had impliedly agreed not to do anything else at all, say, ship as a common seaman before the mast; yet in effect the latter is really as much implied as the former agreement if the court is only looking at the enforcement of the affirmative agreement. And all the decisions which have given support to the rule will be found, I think, on careful analysis to have that aim in view. Little practical difficulty is occasioned by cases of personal service; but that can hardly be said of the decisions upon shipping contracts. This is, no doubt, partly due to the special character always attaching to ships in the English law, and the resultant ambiguity of thought and conception which seem often enough to obscure arguments about the legal obligations and true legal relations arising out of shipping contracts.

"It is safe to say that in dealing with contracts of personal service, the better opinion in the English Courts has always been against extending the decision in *Lumley* v. *Wagner*, one inch further than need be; and that in all cases in which a supposed negative contract, that is to say, an implied agreement not to do a certian act, has been enforced by injunction, that has been done with a clear eye to a very plain principle. It is only where the particular act, not to do which is held to have been implied, is in itself calculated to injure the party who was expecting to benefit by the affirmative agreement, that its performance has been restrained by injunction. A, having agreed to do a certain thing for B, may be thought impliedly to have agreed

(1) (1891) 2 Ch. 416.

not to do that very thing for C, a rival of B. The Court, in such circumstances, might restrain him from doing for C, what he had promised to do for B, not, I apprehend, in reality to compel him to do it for B, but merely to prevent him thus doing B still further harm by giving his skill to a rival. But nothing like the same simplicity and intelligibility runs through the decisions upon shipping contracts. If the judgment of *Lord Chelmsford* in *De Mattos'* case (1) be analytically studied, it will be found, so far as its reasoning goes to be founded on this proposition, that the charterer of a ship has a special fancy for the ship he has chosen, and, therefore, no other ship will serve his purpose as well. That proposition serves the learned *Lord Chancellor* well as the ground work of his reasoning. But it may be doubted whether tested by actual experience it is true. Except in the rare cases in which ships are chartered for passenger and holiday trips, I doubt whether any merchant really cares a penny piece in what ship his goods are carried, provided that they are carried in some ship of equal capacity, class, position and speed, as the one named in the charter-party. But were it true that shippers on a large scale had these curious sentimental preferences for particular ships, then certainly it might be said that a ship so chosen and promised became a chattel of peculiar value in the eyes of the charterer, and the agreement of a kind which ought to be, if it could be, specifically enforced. Unfortunately, it can not be specifically enforced owing, as the courts have always thought, to the complexity of details, and the interfusion of elements of personal skill, always to be found in these bargains. No injunction was granted in *De Mattos'* case, so that the judgment was really *obiter*; but there can be no doubt that it was made the starting point of many decisions intended to give effect to the reasoning of that judgment. It is thus of importance to keep in mind what the *Lord Chancellor* had meant to be the reasoned ground of his conclusion, namely, that in chartering a particular ship, the charterer had picked it out from all other available ships, had a special preference for it, and could not have contemplated the sub-titution of any other ship for it. This is perfectly plain from the language used throughout that part of the judgment. It is true that in latter cases, professing to the based upon and to follow *De Mattos* v. *Gibson* (1), this narrow ground has either been much enlarged or wholly lost sight of. Such expressions for example as that in the chartering of ships, courts are face to face with a contract of such a special character that either party ought to be restrained by injunction from departing from the terms of the contract, plunge us at once into a wider and much more confused sea of considerations which would, I think, be extremely difficult to classify and reduce to anything like a simple intelligible principle. Adopting the test suggested in *De Mattos' case* (r), however, what becomes of the reasoning as soon as it appears from the charter party itself that the charterer

(1) 4 De G. & J. 276=28 L. J. Ch. 165.

had no such special sentimental preference ? In the last clause but two of this agreement of chartering will be found a substitution clause. The owner has the privilege of substituting any other ship for S. S. *Gymeric* provided the other ship be of equal class, position, etc. Here then it could not possibly be contended that *Yule & Co.* when they chartered the *Gymeric*, regarded her as a chattel of peculiar value, a prize among ships, more to be desired than any other of her class, tonnage, speed, position, etc. I have not been able to verify this from the reports, but I apprehended that the charter-parties in all the reported cases, such as *De Mattos* v. *Gibson* (1), *The Heather Bill* (2). *The Celtic king* (3): *Collins* v. *Lamport* (4), *Messageries Imperial Co.* v. *Banies* (5), *Sevius* v. *Deslandes* (6) were restricted to the particular ship in question. This must have been so in *De Mattos' case* (1) and the *Messageries' case* (5), from the language used by *Lord Chelmsford* in the former and the facts themselves of the latter. Here we have the language of the statute to deal with, and we have a charter party The statute allows (though it does not compel) a court to enforce by injunction a negative agreement express or implied not to do a certain act, although it cannot specifically enforce the affirmative agreement with which this happens to be coupled. Now had this charter-party not contained this substitution clause I have mentioned, it might have been fairly argued upon the authority of the English cases (though not perhaps consistently with rigorous logic) that the agreement to employ the *Gymeric* for twelve voyages between Calcutta and Bombay implied a promise on the part of her owners not to employ her in any other manner until those twelve voyages have been made. Had this been a contract for personal service instead of a shipping contract, the test of what negative agreement, if any, was implied, would have been whether the other employment contemplated was in itself a further wrong to the party seeking the use of the ship. But I cannot say that that test appears to have been applied decisively, if at all, in any of the shipping cases I have studied. Suppose the owners of the *Gymeric*, instead of fulfilling their charter-party with *Yule & Co*, had employed the ship in the interests of a rival firm in Calcutta to carry coal against the first charterer, then the case would have been clearly within the scope of the English decisions and the intention of section 57. But if, merely because they were able to get better terms for carrying hydes to *Genoa* they refused to perform their charter party with *Yule & Co.* and sent the ship off to *Genoa*, it might well be doubted whether this would really bring the matter as a whole within the reach of section 57. For in truth the position would be very like that suggested by *Lord Lindley.* If a man contracts to serve A in a special capacity and afterwards refuses to do so, he may well be restrained from serving Z a rival of A, in that capacity, but surely no Court would compel him to remain idle or carry out his contract with A. That difficulty would

(1) 4 De G & I 276.
(2) (1901) P. 272.
(3) (1894) P. 175.
(4) 34 L. J. Ch. 196.
(5) 7 L. T. 763.
(6) 30 L. J. Ch. 457.

arise if the charter-party contained no substitution clause. Where it does, how can it be said that the owner expressly agreed not to do certain act, that act being to employ the *Gymeric* on any other voyage than the voyages mentioned in the charter-party, until those voyages had been finished ?.....Viewed in an ordinary light, not in the curiously special light in which English courts always look at ships and shipping contracts it is clear that a charter contract is exactly the same as any other contract, and that its breach could always be compensated for in damages. The reason why the charterer requires specific performance (only obtainable indirectly by injunction against the owner for the time being) is that by the time the contract is broken, the owner is in all probability insolvent. If for example, the plaintiffs here could obtain their full measure of damages from defendant no 3, they probably would be content with that and would not care to have an injunction against the defendants Nos. 1 and 2 as well. In all the English cases I have examined with the single exception of *Sevin* v. *Deslandes* (1), the owner had parted with his ship, and the charterer, as far as I can gather from the reports, would have had but a poor chance of recovering anything from him in damages.....In this case, it certainly appears that the plaintiffs are not likely to be able to recover their damages from *Ghulam Hussain Issaji*. That is why they press for an injunction against the purchasers, defendants Nos. 1 and 2. The effect of such an injunction might be to lay the ship up indefinitely And many considerations would have to be very carefully weighed before the court would be disposed to grant it. It has been said, in the broadest terms, that any person taking a chattel, with the knowledge that it has been made the subject of an agreement for use or employment in a special way, takes it subject to that agreement, so that mortgagees or purchasers of a ship under a charter-party, must take her subject to that charter party. In principle, this is opposed to the general law expressed in the third resolution in *Spencer's* case and I confess that I think that it is something largely expressed. I should not perhaps in strictness have mentioned that point at all, for it properly arises only in connection with the liability of the mortgagees or purchasers. I limit myself, to the narrowest ground, whether this agreement could be enforced negatively, against the maker himself, supposing he had retained possession of the ship by way of injunction ? I do not think that it could. I do not think that there is a single English case which goes that length. I have said that the best opinion later expressed in the English courts has been against any extension whatever of the principle founded on *Lumley* v. *Wagner* (2). That is my own view. It follows of course, that if the owner could not be restrained by injunction as upon an agreement, express or implied, not to do a certain act, neither could his mortgagees nor purchasers. If I am right in this opinion, it narrows the inquiry in this case into the liability of the owner *Ghulam Hussain Issaji* to the charterers for any damages sustained by them in consequence of the

(1) 30 L. J. Ch. 457.

(2) 1 De G. M. & G. 604.

owner's breach of contract in failing to carry out the conditions of the charter-party."

The court of appeal in reversing the decree of the court of the first instance observed (1): "The statute law relevant to the question is contained in the Specific Relief Act, section 21 of which enacts that classes of contracts cannot be specifically enforced, namely, (b) contracts which run into minute or numerous details or from their nature are such that the court cannot enforce specific performance of their material terms, and as an illustration to clause (b) the instance is given of a charter-party whereby it is agreed that a ship shall proceed to Rangoon to load a cargo of rice and take it to London for a certain freight. This is a re-enactment of the English law. It shows that specific performance cannot be decreed of the plaintiff's charter-parties. Section 56 deals with perpetual injunction and clause (f) provides that an injunction cannot be granted to prevent the breach of a contract which would not be specifically enforced. This again speaking generally, is a statement of the English law: Section 57 provides that notwithstanding section 56 clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not perclude it from granting an injunction to perform the negative agreement.

"It has for many years been held that an agreement for the letting of a ship to a certain charterer implies that she shall not during the currency of the charter-party, provided the charterer is ready to supply cargo, be employed for any other person or purpose (2).

"The learned Judge, however, thought that in the circumstances of the case the negative could not be implied because each of the charter-parties giving the use of the *Gymeric* to the plaintiffs contains a provision that "owners are to have the privilege of substituting another steamer of the same class and similar size and position not exceeding 6,500 tons." This it appears to us merely qualifies the implied negative by condition subsequent. If the condition is not fulfilled the negative, implied upon the authority of *De Mattos* v. *Gibson* (2) and many other cases, is enforceable by injunction under section 57. An injunction granted in the terms of the prayer will not prevent the defendants from exercising their option to substitute another ship for the *Gymeric* if it is convenient for them to do so in terms of the charter-parties. The evidence, however, shows that *Ghulam Hussein* at no time had at his disposal another steamer similar to the *Gymeric*. 'It has been argued that the illustrations to section 57 indicate that an injunction should not be granted when it is not required to preserve the plaintiff from the competition of a rival, but we have in this case evidence that the very first employment on which the *Gymeric*

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(1) *Andrew Yule & Co* v. *A Bomanji*, 16 Bom. L. R. 178=24 Ind. Cas. 756 (768).

(2) *De Mattos* v. *Gibson* 4 De. G & J 276.

was sent after the transfer to the defendants Nos. 1 and 2 was a voyage to Calcutta to bring a cargo of coal to Bombay for a shipping firm who are competitors of the plaintiffs in the Calcutta—Bombay coal trade."

"For the above reasons we set aside the decree and pass a decree for injunction against all the defendants in terms of the prayer of the plaint and the defendants must pay the costs throughout." (1).

But the implied terms of a contract, the violation of which will be prevented, must be such as follow naturally from a reasonable construction. For this purpose, no covenant abridging the ordinary rights of a party outside the subject matter of the contract are implied. Thus, an injunction will not be granted restraining a party from resuming business by reason of his having sold the good-will of his trade, unless he has expressly covenanted not to resume his trade in that vicinity (2). An injunction restraining a person from selling his portion of the property to a stranger can be granted, where there is an agreement not to do so (3).

Importation of a negative quality into an affirmative agreement —It has already been seen that covenants or contracts, though affirmative in form, may involve negative in substance. So where there is coupled with an affirmative agreement to do a certain act, a negative implied agreement not to do a certain act, the performance of the latter will be restrained by injunction only where the particular act, not to do which is held to have been implied, is in itself calculated to injure the party who was expecting to benefit by the affirmative agreement (4). In England the doctrine of implied covenants are applied with scrupulous care (5). The defendant held two plots of building land, B and C, under a lease which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure to houses on plot B a sea view over plot C. H having entered into a treaty with the defendant for an under lease of B, made enquiries of the defendant as to what could be built on the land in front. The defendant replied that he, the defendant could not build on C closer than thirty feet, as his lease did not allow it. H after having inspected the original lease took an under lease of B, containing a covenant by the defendant that he, his executors, administrators and assigns, would observe the lessee's covenants in the original lease. The defendant afterwards surrendered his lease to the ground landlord, took a new lease not containing the old restrictions, and commenced building on C in a way which would obstruct the sea view from houses on B belonging to

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(1) See also *Lord Strathcona* v. *Dominion Coal Co*, (1926) A. C. 108=95 L. J. P. C. 71=134 L. T. 227 ; *Sevin* v. *Deslandes*, 30 L. J. Ch. 457.

(2) *Shacket* v. *Baker*, 14 Ves. 468 ; Spelling on Injunction and other Extraordinary Remedies § 477.

(3) *Nathu Lal* v. *Muni Lal*, 28 P. L. R. 655=103 Ind Cas. 715.

(4) *Andrew Yule* v. *Ardeshir Bomanji*, 20 Ind. Cas. 913=15 Bom. L. R. 724 ; *Lumley* v. *Wagner*, 1 De G. M & G. 604 ; *De Mattos* v. *Gibson*, 4 De G & J. 299 ; *Lord Strath cona* v. *Dominion coal*, 95 L. J. P. C. 71.

(5) Kerr on Injunction p. 457 citing *Cescinsky* v. *George Routledge*, (1916) 2 K. B. 329 ; *Barnes* v. *City of London* (1918) 2 Ch. 35.

the plaintiff who was the assignee of H : *Held* that the rights of H, under the defendant's covenant to observe the covenant in the original lease, were not affected by the defendant's surrender of that lease, and that the plaintiff on that ground was entitled to an injunction to restrain the defendant from building in contravention of that covenant (1). *Held* further, that even if by reason of the surrender the covenant was gone, the plaintiff was entitled to an injunction on equitable grounds, for what the defendant had said to H, amounted to a representation that the defendant could not during the term of his lease build otherwise than in a particular way, which representation he was bound to make good (2). S purchased from commissioners by several conveyances the fee simple of several houses forming one block of buildings upon a site laid out in accordance with a building scheme, each conveyance containing a covenant by S not to carry on or permit to be carried on upon the premises conveyed any trade or business but to keep the house as a private dwelling-house only, and not to do or suffer to be done upon the premises conveyed anything which might grow to the annoyance of any person who might be or become the owner, tenant or occupier of any part of the premises then or late belonging to the commissioners. S afterwards granted to the respondent a lease of one of the houses containing a restrictive covenant of the same nature and a block plan of the houses. During the negotiations for the lease statements were made by S's solicitors to the respondent whereby he became aware that similar restrictive covenants were contained in all the leases granted by S of houses in that block, and also became aware of the terms of the conveyances of the respondent's house from the commissioners to S :—*Held* that although the statement made to the respondent did not amount to collateral contract with him as to the future management of the estate, the respondent was from the nature of the transaction entitled to an injunction restraining S from authorising any of the other houses in the block to be used for the purpose of trade (3). An agreement by an owner of land to give to another person the 'first refusal" of the land in certain events either means that he must on the happening of the events give the other person the opportunity of refusing a fair and reasonable offer or that he must give the other person the opportunity of refusing the land at a price acceptable to the owner offered by some third persons (4). Where the consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period not less than five years, held that the contract implied a contract by the defendant not to take energy from any one except the company which in case of this kind—a trade contract for supply and not for personal services—could be enforced by injunction (5).

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(1) See *Wheaton* v. *Maple* & *Co*, (1893) 3 Ch. 62.

(2) *Piggott* v. *Stratton*, 1 D. F & J. 33=29 L. J. Ch. 1.

(3) *Spicer* v. *Marten*, 14 App. Cas. 12 ; The principles defined by Hall V. C. in *Renals* v. *Cawlishaw*, 9 Ch. D. 129.

(4) *Manchester Ship Co* v. *Manchester Race Course Co*, 70 L. J. Ch. 468.

(5) *Metropolitan Electric Supply Co*, v. *Ginder*, 70 L. J. Ch. 862=(1901) 2 Ch. 799.

The lessee of an inn covenanted to use and keep it open as an inn during the term and not to do any act whereby the licenses become forfeited. The lessee having threatened to do certain acts, inconsistent with the first branch of the covenant, the lessor obtained an *ex parte* injunction restraining him from discontinuing to use and keep open the premises as an inn, and from doing any act whereby the licenses might become forfeited, or be refused. But the injunction was afterwards dissolved, the Court having no jurisdiction to restrain a person from discontinuing to use premises as an inn, which was the same in effects as ordering him to keep an inn ; and no intention having been shown on the part of the defendant to violate the negative part of the covenant (1). Similarly an injunction was refused in restraining a banking company from closing a customer's account (2).

Other agreements, generally Negative and their Nature.—In England and America all these agreements, where the stipulations are expressly negative in form, and where they belong to a class of which specific performance would be enforced if they were affirmative in form, an injunction to restrain their violation will be granted as a general rule, and as a matter of course. The inadequacy of the general remedy is the criterion ; but the fact that the agreements belong to a class which would be specifically enforced necessarily shows that the legal remedy is inadequate (3). Amongst the commonest of such agreements are those (*i*) not to carry on a trade or (*ii*) not to compete ; and (*iii*) agreements giving an exclusive right (4). So one of the most frequent cases calling for preventive relief according to English Law is where parties seek to restrain the violation of provisions in contracts for not engaging in a particular kind of business, or not setting up in business or in a profession in the same town or vicinity, or not selling an article to any other person than the complainant, or not engaging to perform services for others, or not to do other acts. Such provisions are designated by the general term of negative stipulations, and will be enforced by injunction when reasonable and not in general restraint of trade (5). But to warrant relief the violation must be substantial and not merely nominal or trivial (6).

Agreement in restraint of trade.—In England covenants in total restraint of trade are absolutely void upon grounds of public policy (7). In *Leather Company* v. *Lorsont* (8) the Court observed : "Public policy requires

(1) *Hooper* v. *Brodrick*, 11 Sim. 47 = 9 L. J. Ch. 321 ; see also *Ryan* v. *Mutual Tontine Westminster Chambers*, (1893) 1 Ch. 116.

(2) *Prosperity Ltd.* v. *Lloyds Bank Ltd.*, 39 T. L. R. 375.

(3) Pom. Eq Jur. §§ 1344, 1714 ; cited in *Harris* v. *Theus*, 123 Am. St. Rep. 17

(4) Pom. Eq. Jur. § 1714.

(5) *Dubowski* v. *Goldstin*, (1896) 1 Q. B. 478 ; Spelling on Injunction and other Extra-ordinary Remedies § 487 ; see also *Hepworth Manufacturing Co.* v. *Ryott*, (1920) 1 Ch 26=89 L. J. Ch. 76.

(6) Spelling on Injunctions § 487 citing *Weil* v. *Anebach*, 53 N. Y. S 339.

(7) Kerr on Injunction p. 432 citing *Mitchell* v. *Rynolds*, 1 P. Wms. 181 ; *Mallan* v. *May*, 11 M & W. 665 ; *Nordenfelt* v *Maxim Nordenfelt*, (1894) A. C. 565 ; *Morris* v. *Ryle*, (1910) 103 L. T. 547 ; *Mason* v. *Provident Clothing & Supply Co*, (1913) A. C. 733 ; *Attwood* v. *Lamont*, (1920) 3 K. B. 588 ; *Hepworth* v. *Ryott*, (1920) 1 Ch. 22.

(8) L. R. 9 Eq. 354 cited in *Mills* v.

that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the state of his labour, skill, or talent, by any contract that he enters into. On the other hand public policy requires that, when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market ; and, in order to enable him to sell it advantageously, in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy enables him to enter into any stipulation however restrictive it is, provided that the restriction is in the judgment of the Court not unreasonable, having regard to the subject-matter of the contract." The result of the English cases seems to be this that agreements in total restraint of a trade are void, but the Court will enforce by injunction a negative agreements in partial restraint of a trade where they are made on good consideration and are reasonable (1). But in British India under section 27 of the Contract Act whether the restraint is general or partial, unqualified or qualified, if it is in the nature of a restraint of trade, it is void. (2) In the above case the court observed : "Section 27 provides that every agreement by which one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void." To the general rule thus laid down in broad and comprehensive terms, three (3) exceptions were specified ; viz., the case of an agreement not to carry on business the good will of which is sold, the case of an agreement between partners prior to dissolution and the case of an agreement between the parties during the continuance of partnership.....In *Madhub Chunder* v.

Durham, (1891) 1 Ch. p. 586 ; Cunningham & Spephard Contract Act. 129.

(1) *Hepworth Manufacturing Co.* v. *Ryott*, (1920) 1 Ch. 26=89 L. J. Ch 76 ; see also *Nordenfelt* v. *Maxim Nordenfelt* (1894) A. C. 535, 565 ; *Masson* v. *Provident Clothing & Supply Co.* (1913) A. C. 725 ; *Morris* v. *Saxelby* (1916) 1 A. C. 707, 708=85 L. J. Ch. 223, 224 ; *Whitmore* v. *King*, (1919) 87 L. J. Ch. 647 ; *Attwood* v. *Lamont* (1920) 3 K. B. 571=90 L. J. K. B. 121.

(2) *Shaikh Kalu* v. *Ram Saran*, 13 C. W. N. 388=9 C. L. J. 216

(3) Exceptions 2 and 3 are now repealed by the Indian Partnership Act (IX of 1932). These two exceptions are now enacted by ss. 54, 55 and ss. 30, 11 (2) of the Indian Partnership Act. Section 54 : "Patners may, upon or in anticipation of the dissolution of the firm make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits ; and notwithstanding any thing contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.' Section 55 (3). "Any patner may, upon the sale of the good will of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within specified local limits and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872. such agreement shall be valid if the restrictions imposed are reasonable." Section 36 (2) "A patner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within specified period or within specified local limits ; and notwithstanding anything contained in section 27 of the Contract Act, 1872, such restrictions are valid if the restrictions are reasonable." Section 11 (2) : Notwithstanding anything contained in section 27 of the Indian Contract Act, 1872. such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner."

Raj Coomer (1), the learned Chief Justice (*Sir Richard Couch*) with the concurrence of *Mr. Justice Pontifex*, held that the case then before the Court was governed by the Indian Contract Act, and ruled that whether the restraint was general or partial, unqualified or qualified, if it was in the nature of a restraint of trade it was void. He observed that the words 'restrained from exercising a lawful trade, an l business' did not mean an absolute restriction and were intended to apply to a partial restriction—a restriction limited to some particular place ; otherwise the first exception would have been unnecessary. He also contrasted the language of section 27 with that of section 28, where the legislature introduced the word absolute when they intended to speak of an absolute restraint and not a partial one. It cannot be disputed that the interpretation terms put upon the section is plainly justified by the language used, and has been subsequently approved in the case of *Brahmaputra Tea Co*, v. *Scurth* (2) and *Nur Ali* v. *Abdul Ali* (3), where it was observed that section 27, had abolished the distinction between partial and total restraint of trade. On the other land, in the case of *Carlisles Nephews & Co.*, v. *Ricknauth* (4), *Sir Richard Garth*, with the concurrence of *Mr. Justice White*, appears to have placed a much narrower construction upon section 27 and the view was adopted by *Mr. Justice Handly* in *Mackenzie* v. *Streamiahs* (5). As we have observed, the wider construction put by *Sir Richard Couch* is undoubtedly justified by the comprehensive language of the section, and that the section was intentionally framed in the widest possible terms, becomes obvious from an examination of the history of the legislation on the subject. *As it is well known*, section 27 *of the Indian Contract Act was reproduced from section* 833 *of the draft Civil Code of the State of New York*, which was in the following terms :—'Section 833—Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by the next two sections is to that extent :void.'

"The framers of the New York Code added the following explanatory note : 'Contracts in restraint of trade have been allowed by modern decisions to a very large extent. In *Dunlop* v. *Gregory* (6), a contract not to run a certain steam boat before *Sangarties* on the Hudson was enforced, although there was no sale of a good will nor any circumstance to justify the contract, except that it was made upon a sale of the vessel by an association of persons, who had previously used it to run before *Sangerties* and wished to avoid competition. In *Whittaker* v. *Howe* (7) a contract not to practice law anywhere in England was specifically enforced. Such a contract mainly tends to enforce idleness and deprives the state of the services of its citizens.

"The two following sections referred to in section 833 lay down the exceptions in favour of sales of good-will and of partnership arrangements, and

(1) 14 B. L. R. 76=22 W. R. 370.
(2) 11 C. 545
(3) 19 C. 765.
(4) 8 Cal. 809
(5) 13 M. 427.
(6) 10 N. Y. 241.
(7) 3 Beav. 387.

exceptions 1 and 2 of section 27 of the Indian Contract Act are taken with slight variations from them. It is obvious therefore, that the framers of the Indian Contract Act deliberately reproduced the provisions of section 833 of the New York Civil Code with the full knowledge that the effect would be to lay down a rule much narrower than what was recognized at the time by the common law. The rules of the common law, on the other hand, have since then been considerably widened and developed. The result is that the rule as embodied in section 27 of the Indian Contract Act presents an almost startling dissimilarily to the modern place of the English rule on the subject. As observed, however, by *Sir Richard Couch* in the case to which we have referred, we have nothing to do with the policy of the law, specially as the legislature has deliberately left the provisions in section 27 in its original form, though other provisions of the contract Act have from time to time been amended. The inference would be almost irresistible, under these circumstances, that the courts have rightly ascertained the intention of the legislature (1). The silence of the legislature in a case of this description is at most as emphatic as an express recognition of the construction which has been judicially put upon the statute during many years past. In this view of the matter if we adopt the construction of section 27 of the Indian Contract Act as first suggested by *Sir Richard Couch* and subsequently affirmed in the cases to which we have referred, a construction which is consistent with the plain language of the section, the agreement in this case must be pronounced void (2)." But where one sells the good will of a business, he may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person desiring title to the good-will from him, carries on a like business therein: provided that such limits appear to the court reasonable regard being had to the nature of the business (3). An agreement entered into by an owner of land with the owner of adjoining land, to the effect that a market for the sale of cattle shall not be held on the same day on the lands of both of them, is not an agreement in restraint of trade and not void under s. 27 of the contract Act (4).

"It was pointed out by *Sir Frederick Pollock* in his treaties on the Principles of Contract, 7th Ed. p. 354, that according to the early Common Law of England, an arrangement which placed any restriction upon a man's right to exercise his trade or calling, was void as against public policy. In the course of time the strict doctrine of the early common law was relaxed in

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(1) *Phelan* v. *Johnson*, 7 Ir. Rep. 535.

(2) See also *E. M. D. Cohen* v. *Allen Wilkie*, 16 C.W.N. 534; *Har Bilas* v. *Mahadeo*, A. I. R. 1931 All 539; *Oakes* v. *Jackson*, 1 M. 134; *Mahomed* v. *Ona Mahomed*, 70 Ind. Cas. 882; *Frazer* v. *Bombay Ice*, 29 B. 107; *Harry Krishna* v. *Adit Utchmi*, 33 Ind. Cas. 238 (F.B.)=8 L. B. R. 389.

(3) Exception 1 to section 27 of the Contract Act; see also *Chandra Kanta* v. *Parasulla*, 48 I. A. 508 (P. C.)=41 M. L. J 65?.

(4) *Pothi Fam* v. *Islam Fatema*, 13 A. L. J. 281=37 A. 212=27 Ind. Cas. 871.

the courts, and agreements in restraint of trade were classified under thre heads *viz.*, (i) where the restraint was unlimited as to both time and space : (ii) where it was limited as to time but unlimited as to space : and (iii) where it was limited as to the space, but unlimited as to time. In the first and second cases the agreement was void, while in the third it was valid. In recent times however, the law has been developed on entirely new lines, and it has been ruled that the sole test of the validity of a contract in restraint of trade is its reasonableness in the interest of the covenantee, to which the proviso must be added that the covenant must not otherwise offend against public policy (1). In the words of *Lord Macnaghten* 'the public have an interest in every person carrying on his trade freely ; so has the individual ; all interference with indidual liberty of action in trading and all restrains of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule but there are exceptions. Restraint of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed, it is the only justification, if the restriction is reasonable ; that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.' The substance of the matter therefore, is that contracts which impose an unreasonable restraint upon the exercise of a business, trade or profession are void, but contracts in reasonable restraint thereof are valid. Whether the limits prescribed in the contract are reasonable or not, depends upon the kind of business to protect which the contract is made, and the reasonableness of the restraint imposed must be ascertained in every case by reference to the nature of the business in question and to the situation of the parties. This question of the reasonableness of the restriction is one of law for the court (2). It is impossible to formulate any abstract rules to enable the court to determine the reasonableness of the restraint in any particular case, but the following tests are deducible from an analysis of the judgment in *Nordenfelt* v. *Maxim Nordenfelt* (3) :—(a) the generality of the covenant, whether as to time or space may render it unreasonable i.e., a covenant is not necessarily valid because restricted as to time, but may be void because it is not so restricted ; (b) different degrees of protection are reasonable in different cases ; (c) the reasonableness of the restriction must be judged by the character and nature of the business or of its customers.(4). In fact, no better

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(1) *Nordenfelt v. Maxim Nordenfelt Guns, etc.* Co. (1894) A. C. 535

(2) Eddy on combinations § 786 ; *Haynes* v. *Doman* (1899) 2 Ch. 13 at p. 24 ; *Mallan* v. *May*, 11 M. & W. 653 ; *Wiley* v. *Bannu Jardner*, 97 Ind. 66=49 Am. Rep. 427.

(3) (1894) A.C. 535.

(4) See also *Mason* v. *Provident Clothing* (1913) A. C. 725 ; *Morris* v. *Saxelby* (1916) 1 A. C 707 ; *Whitmore* v. *King*, 87 L. J. Ch. 647 ; *Attwood* v. *Lamont* (1920) 3 K. B. 571 ; *Horner* v. *Graves*, 7 Bing. 735 ; *Leetham* v. *Johnston* (1907) 1 Ch. 326 ; *Bromley* v. *Smith*, (1909) 2 K. B. 240, 241 ; *Great Western* v. *Gibbs*, 34 T. L. R. 344.

test has been laid down of what is reasonable restraint than the one indicated in the judgment of *Tindal C, J.* in *Horner* v *Graves* (1): "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given and not so large as to interfere with the interest of the public, whatever restraint is larger than the necessary pretection of the party can be no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable (2)."

Agreement not to carry on a Trade—sale of good will.—One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein : provided that such limits appear to the court reasonable, regard being had to the nature of the the business (3). It is very common, when a tradesman sells his business to another or retires from a partnership, to insert a stipulation in the agreement that the selling party shall not engage in a similar business within certain prescribed limits. These agreements are usually upheld as reasonable restraint of trade. Equity courts will grant injunctive relief against violations because generally the remedy of damages is inadequate (4). The relief is not confined to contracts between parties engaged in trade, but applies equally to contracts between professional men, such as physicians, lawyers and the like (5). But the limits of such restraint must appear to the court reasonable regard being had to the nature of the business (6). But the restrictive covenant should not go beyond what is necessary for the protection of the plaintiff's business (7). The reasonableness or unreasonableness of the restriction in respect of space depends in a great measure on the nature of the business and the mode in which it is usually carried on (8). Ordinarily such contracts are valid only so far as they exclude a party from engaging in business in the same town, city, or other local sub-division of a province or country. If they attempt to prevent a person from resuming his business or calling anywhere in the whole realm, they are

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(1) 7 Bing. 735.

(2) *Shaik Kalu* v. *Ram Saran*, 13 C. W. N. 388 (394).

(3) Section 27, Exception 1 of the Contract Act (IX of 1872).

(4) *Rolfe* v. *Rolfe*, 15 Sim. 88 ; *Williams* v. *Williams*, 2 Swanst 253 ; *Nordenfelt* v *Maxim Nordenfelt*, (1894) A. C. 535 ; Pomeroy's Eq. Jur. § (1715),

(5) Pomeroy's Eq Jur. § 1715.

(6) *Oakes* v. *Jackson*, 1 M. 134 ; see also *Badische* v. *Schott*, (1892) 3 Ch. 447. 451 ; *Lang* v. *Andrews*, (1909) 1 Ch. 767 ; *Bromley* v. *Smith*, (1909) 2 K. B. 241 ; *Cade* v. *Daly* (1910) 1 Ir. 319 ; *Mason* v. *Provident Clothing* (1913) A. C. 724 ; *Goldsoll* v. *Goldman*. (1915) 1 Ch. 292 ; *Attwood* v. *Lament*, (1920) 3 K. B. 571 ; *Dewes* v. *Fitch*, 89 L. J. Ch. 499 Sc. 90 L. J. Ch. 436 ; *Spence* v. *Mercantile Bank of India* (1921) 37 T. L. R. 745.

(7) *Mason* v. *Provident Clothing* (1913) A. C. 724=82 L. J. K. B. 1153.

(8) Kerr on Injunction p. 435 citing *Hitchcock* v. *Coker*, 6 A. & E. 439 ; *Avery* v. *Langford*, Kay 663 ; *Lamson* v. *Phipps*, (1904) W. N. 134 ; *Lang* v. *Andrews* (1909) 1 Ch. 767 ; *Bromley* v. *Smith*, (1909) 2 K. B. 240. 241 ; *Morris* v. *Reyle* (1910) 103 L. T. 545.

generally invalid because in restraint of trade, and their violation will not be enjoined (1). But strictly speaking no certain and precise boundary can be laid down within which the restraint would be proper and reasonable, and beyond which it would be held excessive. It depends upon the nature of the trade or business. Some trades and professions require a limit of a much larger range than others. An area of exclusion which would be unreasonable in one trade or profession is in another necessary for its protection (2). The court may and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But that ought only to be done in cases where the part so enforceable is clearly severable, and, even so, only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause (3).

It must be certain that there has been a violation before the court will interfere or that a violation is threatened. The benefit of the covenant may be assigned with the business, and the assignee's rights will be protected by injunction (4). What amounts to a breach is a question of substantive law, but the courts of equity will not allow a violation under colour of compliance with the letter of the contract. Thus an injunction will not be denied because the promisor has taken in a partner or has formed a corporation to compete with the plaintiff, or has put the business in his wife's name (5).

But since contracts in partial restraint of trade constitute and are allowed as exceptions to a prohibitory rule of public policy they will be strictly construed (6). If a merchant, upon sale of his stock in trade and good will, covenants not to carry on the same business at the same place or within a definite territory, and thereupon gives up his place of business, he will not be enjoined from afterwards soliciting and taking orders for others within the specified territory (7). Nor will the prohibitory terms of such a contract extend to members of a co-partnership bound by it after a dissolution of the firm, unless so provided expressly or by clear implication (8). But a party who had covenanted not directly or indirectly, either alone or in partnership, with or without the assistance of any other person, to set up or follow or

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(1) Spelling on Injunctions and other Extraordinary Remedies § 488.

(2) *Mallan* v. *May*, 11 M & W. 653 ; *Jallis* v. *Jallis*, 1 E. & B. 391 ; *Rousillon* v. *Rousillon*, 14 Ch. D. 766 ; *Ropeways Limited* v. *Hoyle* (1919) 88 L. J. Ch. 446 ; *Spence* v. *Mercantile Bank* 37 T. L. R. 745 cited in Kerr on Injunction p. 435.

(3) *Mason* v. *Provident Clothing and Supply*, (1913) A, C. 724=82 L. J. K. B. 1153, per *Lord Moulton*.

(4) Pomeroy's Eq. Jur. § 1715 ; *Jacoby* v. *Whitmore*, 49 L. T. 335 ; *Townsend* v. *Jarman*, (1900) 2 Ch. 698 ; *Welstead* v. *Hadley* (1904) 21 T. L. R. 165 ; *Leetham* v. *Johnstone White*, (1907) 1 Ch. 327 ; *Automobile Carriage Builders* v. *Sayers*, 101 L. T. 419 ; *White* v. *Southend* (1897) 1 Ch. 767 ; *Robert Stephenson Inre*, (1915) 1 Ch. 807.

(5) Pomeroy's Eq. Jur. § 1715.

(6) *Goddard* v. *American Queen*, 59 N. Y. S. 46.

(7) *Turner* v *Evans*, 2 De G M & G. 740 ; *Bird* v. *Lake*. H & M. 338 ; *Clark* v. *Watkins*, 9 Jur. N. S. 142 ; *Allen* v. *Taylor*, 18 W. R. 888=22 L. T. N. S. 651 ; but see *Brampton* v. *Rhodes*, 13 C. B. N. S. 538.

(8) *Baker* v. *Pottmeyer*, 75 Ind. 451.

practice any particular business was held to have violated his covenant by engaging in the business in the capacity of assistant manager of another person (1). But an agreement by a vendor, who is a medical practitioner on the sale of his medical practice, not to solicit any patient within a certain radius or otherwise directly or indirectly to enter into competition with the purchaser has been held to be broken, where he came within the defined area to attend a patient at his express request (2). The party seeking to enjoin the violation of mutual covenants must show that he has performed, or tendered performance of the covenants binding on himself (3).

Where it appears that the parties engaging in business with the party violating the agreement had notice of its terms, they may be enjoined from carrying it on, in connection with him. Third parties, however, will not be enjoined from receiving business aid from such person, nor from purchasing goods from him. As the injury is difficult to measure in all cases, only nominal damage need be shown (4).

Where the good will of a business is sold, without further povision, the vendor may set up a rival business, but he is not entitled to canvass, the customers of the old firm, and may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor or not to deal with the purchaser (5).

A contracts to sell to B for Rs. 1,000, the good will of a certain business unconnected with business premises, and further agrees not to carry on that business in Calcutta. B pays A the Rs. 1,000 but A carries on business in Calcutta. The Court cannot compel A to send his customers to B but B may obtain an injunction restraining A from carrying on the business in Calcutta (6). "It is proper to note however", says Dr. Banerjee (7) "that where the agreement has reference to the good will alone, unconnected with business premises, a court of equity refuses to enforce it *in specie*. For, what is the good will, but 'the probability that the old customers will resort to the old place, (8) and how can any Court insure this? Where, however, 'good will is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and good will' (9) the contract may be enforced". A contracts with B that in consideration of Rs. 1,000 to be paid to him by B on a day fixed, he will not set up a

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(1) *Dales* v. *Weaber*, 18 W. R. 993; *Jones* v. *Havens*, 4 Ch. D. 636; *Clark* v. *Watkins*, 9 Jur. N. S. 142.

(2) Kerr on Injunction p. 447 citing *Rogers* v. *Drury*, 57 L. J. Ch. 504; see also *Edmund son* v. *Render*, (1905) 2 Ch. 320; *Woodbridge* v. *Bellamy* (1911) 1 Ch. 341 (cases of solicitors); *Hadsley* v. *Dayer Smith*, (1914) A. C. 979 (case of a house-agent).

(3) Spelling on Injunction and other Extra-ordinary Remedies § 489.

(4) Pomeroy's Eq. Jur. § 1715.

(5) *Althen* v. *Vreeland* (N. J. Eq) 36 Atl. 479; *Trego* v. *Hunt*, (1896) A. C. 7; *Gillingham* v. *Beddow*, (1900) 2 Ch. 242; *Curl Brothers* v. *Webster*, (1 04) 1 Ch. 685; *Churton* v. *Douglas*, 28 L. J. Ch. 841; Illustration (*b*) to section 57 of Specific Relief Act.

(6) Iliustration (*a*) to section 57 of the Specific Relief Aet.

(7) Banerjee's T. L. L for 1906 p 152.

(8) *Per Lord Eldon* in *Crutwell* v. *Lye*, 17 Ves. 335, 346.

(9) Per *Kindersely* V. C. in *Dar bey*

certain business within a specified distance. B fails to pay the money. A cannot be restrained from carrying on the business within the specified distance (1).

Violation of contracts concerning immoveable property.—Since relief in equity is based upon the absence of adequate remedy for a violation at law, it is evident that the subject-matter, the terms and peculiar situation of the parties, will each and all receive consideration in determining whether the case is a proper one for equitable interference on the ground of the inadequacy of the legal remedy. It will be seen, that in some cases full proof of the results from a threatened breach must be made, and the Court must be clearly convinced from the proof that the injury will be irreparable in its nature; in other cases, the nature of the subject-matter of the contract will be alone sufficient for that purpose either without any or with very slight evidence. The same rule governs in passing upon an application for relief against the threatened violation of a contract or covenant, whether it be found in the form of a covenant running with the land in a deed, in a contract for the sale of land, or in a lease as in the case of trespass or waste; and it will generally be presumed that the violation of a contract the result of which will be injurious to the immoveable property is irreparable at law (2). This rule is observed strictly in England. There the construction of a contract being clear, it is not a question of damage, but the mere circumstance that the breach of a contract is threatened affords sufficient ground for the Court to interfere by injunction; and it seems the Court may so interfere whether the breach has or has not been actually committed, provided the defendant claims and insists on a right to do the act which constitutes such breach (3). In this case *Vice-chancellor Wood* said: "And I apprehend the court may so interfere, whether the defendant has or has not actually committed the breach, in respect of which the interference of the court is sought. For the case of a contract, it is enough if defendant claims and insists on a right to do the act, although he has not already done it *modo et forma*, as alleged. In such a cause I should have no difficulty in granting injunction." But in such a case, if the injunction would inflict serious loss on the covenantor, the court will not grant an injunction on an interlocutory application, but will direct the motion to stand over until the hearing of the cause, and will advance the cause (4). But there a clear distinction is taken between cases where the violation of a contract would directly affect the use and substance of the land, and the violation of such as are only incidentally connected with occupancy. Thus, it was held that an injunction would not be granted to restrain a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep on the farm a proper

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Whittaker, 4 Drew. 134, 140. Contracts for the sale of an attorney's business have been specifically enforced. *Whittaker* v. *Howe*, 3 Beav. 383; *Aubin* v. *Holt*, 2 K & J. 66.

(1) Specific Relief Act s. 57 illustration (*e*).

(2) Spelling on Injunctions and other Extraordinary Remedies § 469.

(3) *Tipping* v. *Echersley*, 2 K & J. 264.

(4) *Wells* v. *Attenborough*, 24 L. T. 312.

and sufficient stock of sheep, horses and cattle (1). It is a general rule that covenants restricting the user of land should be strictly construed (2). It is not competent for the court to import a covenant which does not arise by necessary implication from the language of the instrument (3). Injunction was granted to restrain the commissioners of Woods from building on part of the site of *Carlton Palace*, in violation of one of the terms of an agreement entered into by them with the plaintiff for a building lease of an adjoining part of the site (4). To warrant an injunction it is not necessary that the threatened act would be a violation of the express terms of the contract; it is sufficient if it would be a violation of its spirit and meaning (5). Accordingly where a party has covenanted not to erect a building within a certain distance of a boundary line, he may be enjoined from erecting a fence that will have the same effect of excluding light and air (6). But the implied terms of a contract, the violation of which will be prevented, must be such as follow naturally from a reasonable construction For this purpose, no covenants abridging the ordinary rights of a party outside the subject matter of the contract are implied (7).

Agreements in lease.—A tenant will be restrained from using the demised premises for any purpose which would be violation of covenants of his lease (8). Where a tenant has entered into a covenant which restricts him to a particular use of the demised premises, equity will restrain him from violating such covenant whether or not irreparable or serious injury would result from such violation (9). In order to entitle a landlord to an injunction against his tenant to prevent the doing of acts in violation of a contract or covenant, it is not necessary that the prohibited act amounts to waste. It is sufficient if it be directly contrary to the tenant's own covenant, or even in contravention of an agreement which may be inferred from the course of dealing between the parties (10). And equity will restrain in a proper case the breach of a covenant not to sell intoxicating liquors upon the granted premises in less

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(1) *Phipps* v. *Jackson*, 56 L. J. Ch. 550.

(2) *Kemp* v. *Bird*, 5 Ch. D 974 on appeal from 5 Ch. D. 549 ; *Brigg* v. *Thornton* (1904) 1 Ch. 386 ; *Wright* v. *Berry*, (1903) 19 T. L. R. 259 ; *Dott's Lease, In re* (1920) 1 Ch. 281 ; *Darby Motor Cab* v. *Crompton*, 31 T. L. R. 188.

(3) Kerr on Injunction p. 421.

(4) *Rankin* v. *Herkisson*. 4 Sim 13.

(5) Spelling on Injunction and other Extra ordinary Remedies § 477 ; see also *Rigby* v. *Great Wesiern Railway*, 14 M & W. 815 ; *James* v. *Cochrane*. 7 Exch. 170 : *Great Northern Ry.* v. *Harrison* 12 C. B. 576, 609 ; *Brooks* v. *Jennings*, L. R. 1 C. P. 476 ; *Hamlyn* v, *Wood* (1891) 2 Q. B. 494 ; *Douglas* v. *Baynes*, (1908) A. C. 482 ; *United State Shipping Board* v. *Durrell* & Co, 92 L. J. K. B. 1028.

(6) *Wright* v. *Evans*, 2 Abb. (N. Y.) Pr. N. S. 308.

(7) Spelling on Injunctions and other Extraordinary Remedies § 477.

(8) Vide p. 280 supra ; see also *Taylor* v. *Moysten* ; 23 Ch. D. 584. *Champman* v. *Mason*, (1910) 103 L. T. 390 ; *Kemp* v. *Sober*, 1 Sim N. S. 517=20 L. J. Ch. 602.

(9) *De Wilton* v. *Saxon*, 6 Ves. 106 ; *Att Gen.* v. *Sheffield Gas*. 3 De G. M. & G. 321 ; *Attman* v. *Royal Aquarium* 3 Ch. D. 228 ; *Hodson* v. *Coppard*, 29 Beav. 4 ; *Clemento* v. *Welles*. L. R. 1 Eq. 200 ; *Johnstone* v. *Hall*, 2 K. & J. 423 ; *Wickenden* v. *Webster*, 6 E. & B. 387 ; *Jarman* v. *Chapman*, 7 Ch. D. 271 ; *Parker* v. *Whyte*, 1 H. & M. 167 ; *Tubbs* v. *Esser*, 26 T. L. R. 149 ; *Rolls* v. *Miller* 27 Ch. D. 1 ; *Evans* v. *Davis*. 10 Ch, D. 747 ; *Coverage* v. *Carpenter*, (1910) 1 Ch. 262.

(10) Spelling on Inj. etc. § 498.

quantities than five gallons or to carry on a retail business as a chemist, druggist, and soda water manufacturer (1). In an action against an infant who had obtained a lease of a furnished house on an implied representation that he was of full age, held that the lease must be declared void, and possession given up, and that the defendant should be restrained by injunction from parting with the furniture ; but that he was not liable for use and occupation (2). And equity will enjoin in a proper case the abandonment of leased property by the lessee, and where the lessee of a road threatens to abandon its operation, in violation of the lease, the lessor will not be denied an injunction against abandonment because it will compel the performance of a series of acts involving the exercise of skill and judgment (3). The relief will be granted against an assignee of the lease when the covenant to use the premises in particular manner runs with the land as such assignee, who though not named in the lease, holds subject to its conditions (4). A lease contained a covenant by lessee and his assigns 'not to use, exercise, or carry on upon the demised premises, or permit or suffer any part thereof to be occupied by any person who shall use, occupy, or carry on therein, any noisesome or offensive trade' etc. E purchased an under-lease of the premises with notice of the covenant in the original lease, and made a further sub demise, containing a similar covenant to M. M, after being in occupation for some months, began to carry an offensive business on the premises. In an action by the original lessor, claiming an injunction against both E and M, *held* reversing *Kekewich J*, that no injunction ought to be granted against E, there being no evidence to show that E had authorized or sanctioned M to occupy the premises to carry on therein an offensive business ; and that E was not to be compelled by means of an injunction to bring an action of ejectment against M (5). Where the Kabuliat provided that a tenant would not be entitled to make any digging, tank, gift or mutation, a suit for injunction would lie against him if he attempts to make brick on the land (6). Where a land is let out for agricultural purposes generally, the erection of an indigo factory on a part of such land must render it unfit for the purposes of the tenancy, and the landlord would be entitled to sue for an injunction restraining the tenant from building such factory on the land (7). But on appeal from the above case to the Privy Council (8), the judgment

(1) *Sutton* v. *Head*, 86 Ky. 156 ; *Treacher* v. *Treacher* W. N. (1874) 4.

(2) *Lempriere* v. *Lange*, L. R, 12 Ch. D. 528.

(3) Spelling on Injunctions and other Extraordinary Remedies § 498 citing *Southern Ry* v. *Fraklin*, 32 S. E. 485.

(4) *Mayor* v. *Pattison*, 10 East. 136 ; *Clements* v. *Welles*, L. R. 1 Eq. 200.

(5) *Hall* v. *Ewin*, 36 W. R. 84 ; see also *Talk* v. *Moxhay*, 2 Ph. 774 ; *Haywood* v. *Brunswick*, 30 W. R. 290 ; *Austerbery* v. *Corporation of Oldham*, 33 W. R. 807 ; *Tod Heatley* v. *Bentham*, 37 W. R. 8.

(6) *Jogeschandra Roy* v. *Anandachandra Chowdhury*, 16 C W. N. 268 notes.

(7) *Surendra Narain Singh* v. *Hari Mohan*, 9 C. W. N. 87.

(8) *Hari Mohan Misser* v. *Surendra Narain Singh*, 11 C. W. N. 794 P. C.= 34 C. 718 ; see also *Mohini Mohan Misser* v. *Surendra Narain Singh*, 18 C. W. N. 1189 where it has been held that no suit lies for damages against a defendant for maliciously and without reasonable cause obtaining a perpetual injunction which has been subsequently dissolved on appeal.

of the High Court was reversed. Sir Arther Wilson in delivering the judgment said : "The law which the High Court fonnd to haye been violated by the District Judge's decision is thus stated :—'Where, as in this case, land has been let out for agricultural purposes generally, the erection of an indigo factory on a part of such land must render it unfit for the purpose of tenancy, because the purpose of tenancy being the cultivation of crops, that is agricultural purpose, the portion of the land built upon will evidently be unfit for such purposes.' That proposition of law is laid down broadly, without reference to the circumstances of individual cases ; without regard to the size of the holding, or of the area withdrawn from actual cultivation, or to the effect of such withdrawal upon the fitness of the holding, taken as a whole, for profitable cultivation." Where the condition of a mining lease is that the lessee would not remove the pillars of a coal mine, he may be restrained if he a$_{tt}$empts to remove the pillars (1).

Breach of agreement to devise Lands.—An agreement based upon a valid consideration whereby a party agrees to devise lands to another, may, if partly executed by such other party, be enforced by an injunction restraining the doing of that which would render performance impossible or without benefit. Thus, where plaintiff and defendant entered into a parol agreement by which defendant agreed to devise to plaintiff certain property, and upon the performance of which agreement defendant honestly and faithfully entered, and continued for several years, and afterwards defendant sold and was about to convey the property to another, and the plaintiff brought an action to enjoin such conveyance, it was held that the agreement was binding upon defendant, and plaintiff was entitled to the relief asked (2).

Gift—Injunction.—Where a gift of immoveable property requires registration for its validity, it is open to the donor to revoke the gift before its registration. If the donee refuses to han l back the document, the donor can obtain an injunction restraining the donee from registering the document (3).

Violation of contract to furnish watetr Gas. etc.,—"It needs no argument or authority to support the proposition that a violation of a contract to furnish a supply of water for use or consumption may inflict irreparable injury. The Courts of equity are extremely zealous in protecting riparian and water rights aginst infringement, and will in many instances grant preventive relief without proof of positive injury. On the same ground of preventing irreparable injury, an injunction lies to prevent a water works company from cutting off its water supply, where the consumer has offered to pay in advance the proper amount for the case of such water during the year, and the company claims a higher rate than is really true and exigible. And one who has a contract with a gas company to furnish him, free of charge, for twenty years,

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(1) *Taylor* v. *Mostyn*, 23 Ch. D. 584.

(2) Spelling on Injunctions and other Extraordinary Remedies § 503 citing *Ptugar.* v. *Pultz*, 44 N. J. 440

(3) *Subba Ram* v. *Venkata Subba'* 48 B. 435=26 Bom. L. R. 427=80 Ind. Cas. 477=1924 Bom. 434.

with gas for all ordinary purposes in his dwelling, including two street lamps in front of the house and a gas-log in the library, can have a temporary injunction against the company to prevent it from wholly cutting off his gas supply ; and the fact that the plaintiff has used the gas extravagantly is no reason for refusing the injunction, as it would be an irreparable injury to him to be deprived of it wholly (1)."

Breach of covenant by common carriers.—Where an express company had, under special contract, been for many years engaged in that business over the system of roads controlled by the defendant, and had built up a large and valuable business, and established valuable connections, all of which would be much depreciated if defendant should be allowed to refuse to further allow it to carry on such business over its line of road, it was held that for that an injunction restraining such action might be granted (2). And a temporary injunction will be granted to enjoin a rail-road company from charging an express company higher rates than are charged to other specified companies by the same rail road (3).

Mandatory Injunction and breaches of contract.—When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite act (4). Where necessary, a court of equity, in order to give effect to the remedy, and where simple restraint on the part of the defendant will not afford the relief to which the complainant is entitled will issue an injunction mandatory in form commanding the requisite things to be done (5). And the fact that a natural gas company has completed its wrongful act in turning off the flow of the gas from plaintiff's factory, will not prevent the issuance of a preliminary injunction mandatory in its offect, compelling it to restore the flow of the gas until the final hearing (6). In England the case of *Lane* v. *Newdigate* (7) was the first instance in which a mandatory injunction was granted against a breach of agreement (8). In that case an order specifically to repair the bank of a canal to stop gates, was refused, but, by injunction restraining defendant from impeding plaintiff from navigating etc., by continuing to keep back, etc., out of repair, etc., the effect of such former order was given (9). The lessees of a colliery having agreed to grant to the lessee of a neighbouring colliery, license to use a right

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(1) Spelling on Injunctions and other Extraordinary Remedies § 505 ; citing *Graves* v. *Kay City Gas Co.* 50 N. W. 283.

(2) *Dinsmore* v. *Louisville*, 2 Fed. Rep. 465.

(3) *Southern Express Co.* v. *Memphis*, 2 Mc. Crary, 570 ; Spelling on Injunctions and other Extraordinary Remedies § 505.

(4) Specific Relief Act s. 55.

(5) Spelling on Injunctions and other Extraordinary Remedies § 485.

(6) *Whiteman* v. *Fayette Fuel Gas Co*, 139 Pa. St. 492 ; Order 39, rr 1. 2 ; See pp 158. 159 supra.

(7) 10 Ves. 192.

(8) Kerr on Injunction p. 479.

(9) Now in England mandatory injunction is given in direct form, vide *Jackson* v. *Normandy*, (1899) 1 Ch. 439 n ; *Davies* v. *Gas Light*, (1909) 1 Ch. 259 ; *Att. Gen* v. *Grand Junction Canal Co.* (1909) 2 Ch. 516.

of way enjoyed by the former, and the owner of the first colliery having granted to the second lessee the same right of way during a term of years, and afterwards, by assignment from the first lessees, became possessed of the first colliery, and the right of way, an injunction was granted to restrain removing the materials, and destroying the way (1). It was stipulated by an agreement between the parties to the suit, that the plaintiff, his heirs and assigns, should have full and free permission "to use at all times the roads and ways in and through the defendant's estate." There were two roads traversing the defendant's estate at the further extremity of which, where his land terminated, certain existing obstructions were continued by the defendant, so that the plaintiff whilst he had the use of the roads over the defendant's estate, could not pass beyond it. The court granted an injunction to restrain the defendant from making and continuing the obstructions at the extremity of his land (2). The creation of a wooden trellis-work screen which is substantial, and intended to be permanant, is a breach of the lessee's covenant not to erect or build on the demised premises or on any part thereof any other building whatsoever except a stable or coach-house. A screen of this kind interfered with the access of light to a neighbouring house let by the lessor to another tenant, and irrespective of such interference it was held to be a breach of covenant not to do any thing which might be an annoyance to the tenant of the lessor, on the ground that a reasonable person, having regard to the ordinary use of such house for pleasureable enjoyment, would be annoyed by it. The court ordered the trellis-work screen to be pulled down (3). Where the lessee of a brickfield contrary to the covenants in his lease, caused the fall of one of the fences bounding the field by excavating the clay from under it: *Held* that a mandatory injunction in negative form should be granted to compel the restoration of the fence to its former condition (4). The plaintiffs were successors in title of the original lessors and the defendant was a successor in the title of the original lessee under a lease dated March 6th, 1886 by which premises were let for a term of eighty years at the yearly rent of £350. The lease contained a covenant not without the consent of the lessors, their successors and assigns to "cut or maim any of the principal walls or timbers of the building or commit or permit any waste or damage to the said building or to the floors or timbers thereof, or make or permit to be made any alteration in the elevation of the building or in the architectural decoration there of....." The defendant had installed (without the plaintiffs' consent) on the facade of the building an electric light advertisement set in a large iron frame work round the whole frontage of the building. The frame work was bolted to and supported by twelve T irons and eleven iron brackets, all of which were cemented into holes cut in the stone work of the wall of the building.

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(1) *New March* v. *Brandling*, 3 Swnanst. 99.

(2) *Philips* v. *Truby*, 8 Jur. N. S. 711 affirmed 8 Jur. (N. S.) 999.

(3) *Wood* v. *Cooper*, 63 L. J. Ch. 845; see also *Rankin* v. *Huskinson*, 4 Sim. 13.

(4) *Newton* v. *Nock*, 43 L. T. 197.

Twenty three holes had been cut for this purpose, each hole being about $2\frac{1}{4}$ inches square and 6 inches deep. The advertisement was let for advertising a make of gin, and the defendant received payments for its display. The advertisement had no connection with any business carried on by the defendant or his under-tenants on the premises :—*Held* that the fixing of the T irons and iron brackets in the stone work in this manner was a breach of the covenant in the lease and that the plaintiffs were entitled to a mandatory order for their removal (1). A building estate on which residential houses were intended to be built up was put up for sale in lots according to a general sale plan and subject to conditions of sale which provided that all the lots should be subject to certain restrictive covenants for the general benefits of the estate. The conveyances to the purchasers contained, amongst others, covenants to fence off the lots from the road, the fence to consist of a dwarf wall with iron palisading and gates either of wood or iron, and to maintain the same and no other kind of fence in repair, and also covenants that no "building" should be erected on the lots "for the carrying on of any noisy, noisesome offensive or dangerous trade or calling. A purchaser of two lots leased the same to a company for seven years for bill posting purposes, and the company erected along the boundary of the land where it adjoined a plot belonging to another purchaser a boundary of a permanent nature 156 feet long and 15 feet high, and covered the boarding with advertisements. The owner of this plot brought an action for a mandatory injunction for pulling down of the boarding :—*Held* that the boarding was a "fence" and that the erection of the same was a breach of the covenants as to fencing ; and that the boarding was within the covenant a "building" upon which the trade of bill posting was carried on, and that the same was an "offensive" trade in the sense that it was a legitimate ground of offence to the plaintiff and other residents on the estate, and that consequently the plaintiff was entitled to the injunction which he claimed (2).

Injunction in aid of specific performance.—Although on a bill for specific performance of an agreement to sell, the court will not in general restrain the owner from dealing with his property, since a different doctrine would operate to control the rights of ownership, although the agreement might be such as could not be performed yet under some circumstances the court will restrain the owner from so doing (3). Where there is a contract for the sale of land, a court of equity will restrain the owner of the land from dealing with it until a suit for specific performance has been disposed of, yet if there is serious question whether any contract exists, and the claim of

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(1) *London County Council*, v. *Hutter*, (1925) 1 Ch. 626=95 L. J. Ch. 1 ; *Joseph* v. *London County Council*, (1914) W. N. 205 distinguished.

(2) *Nursey* v. *Provincial Bills Posting Co*, 78 L. J. Ch. 539.

(3) Joyce on Injunctions p. 138 citing *Spiller* v. *Spiller*, 3 Sw. 556, 557 ; *Echliff* v. *Baldwin*, 16 Ves. 267 ; *Turner* v. *Wright*, 4 Beav. 40 ; *Curtis* v *Marquis of Buckingham*, 3 V. & B, 168.

a plaintiff for specific performance is doubtful, such a court will act upon the consideration of the comparative inconvenience which may arise from the granting or withholding the injunction, and from the consideration that the granting the injunction would, in case of the plaintiff ultimately failing, be more injurious to the vendor than the refusal of it would be to the purchaser, in the event of his ultimately succeeding (1). An injunction to restrain a breach of a contract operates to all intents and purposes as a decree for its specific performance (2). Where there is a plain breach of a clear contract a court of equity will decree specific performance and if necessary enjoin a breach if the remedy at law is not as full and complete as in equity (3). Except in a clear case of right and to prevent irreparable injury a preliminary injunction ought not to be granted to enforce specific performance of a contract. Where the rights of the parties to a contract are of a doubtful character and there are disputes in regard thereto which involve the very terms and obligations of the contract an injunction should not be granted until such rights are settled (4). And when a contract is so uncertain in its terms as not to be a subject of a decree for specific performance' an injunction in aid of a performance should not be granted (5). In the above case the *Vice-chancellor* said: "Before all things the court when asked to entertain an application for an injunction upon the footing that a specific performance may be decreed, ought to look for certainty in the terms of the agreement and for something clear and intelligible with which it can deal; and the court would expect to find in the terms of the agreement sought to be specifically performed such terms as this court could, by enforcing its own decree, direct in all respects to be specifically performed." When an agreement has been entered into for the sale of a house at a fixed price, and of the fixtures and furniture therein at a valuation by a person named by both parties, and he undertakes the valuation, but is refused permission by the vendor to enter the premises for that purpose, the court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed (6). Where serious injury will be inflicted upon the property which is the subject of an action for specific performance, a contract unless the defendant continues to act in a particular manner, which he can do with comparative little trouble and risk, but which the plaintiff cannot do at all, as where a colliery will be drowned unless the person in possession under an agreement for a lease continues to pump, the *interim* preservation of the property will be secured by the issue of

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(1) *Handly* v. *London Bank of Scotland* 3 De G. J. & S. 63; *Garret* v. *Banstead*, 13 W. R 878; *Preton* v *Luck*, 27 Ch. D. 497; *Munroe* v. *Wivanhoe and Brighting Sea Ry. Co*, 4 De G. J. & S. 723.

(2) *Denham* v. *Bradbord*, L. R. 5 Ch. 519; *Tillet* v. *Charing Cross Bridge*, 26 Beav. 419; *Raphael* v. *Thomes Valley Ry.* L. R. 2 Eq. 37; *Gregory* v. *Mighell*, 18 Ves. 328."

(3) *Great Northern Ry. Co.*, v. *Manchester Ry. Co.*, 5 De. G. & Sm. 138.

(4) H. C. Joyce on Injunction § 445.

(5) *South Yorkshire Ry. Co.*, v. *Great North Ry. Co.*, 1 Sm. & Gif 324, 345; H. C. Joyce on Injunctions § 445.

(6) *Smith* v. *Peters*, 44 L. J. Ch. 613.

a mandatory injunction restraining the defendant from ceasing to act in that particular matter—e. *g.* to pump out the colliery (1). But a vendor is not entitled to an injunction to restrain a purchaser from buying another estate on the ground that it will incapacitate him from completing his first purchase (2).

Agreement in restraint of marriage.—Every agreement in restraint of the marriage of any person, other than a minor is void (3). A Mahomedan wife obtained a declaration against her husband that she had ceased to be his wife by reason of the fact that she has exercised against him the option of puberty given by the Muhammadan Law. The husband appealed from the decree, and, during the pendency of the appeal, applied for a temporary injunction restraining certain relations of his wife, who were parties to a cross suit by the husband for restitution of conjugal rights which had been dismissed and was also subject of an appeal, from giving the woman away in marriage before the disposal of the appeals. *Held*, that the application was not maintainable (4). In an application for injunction to restrain a Hindoo woman from giving her minor daughter in marriage to a third party pending the decision of a suit brought by petitioner for specific performance of a contract of marriage between his son and defendant's daughter, held that Civil Procedure Code, 1859, s. 93 was never meant to apply to cases like this (5).

Miscellaneous contracts and Injunction.—The plaintiff's firm which admittedly owed a very large amount to the defendant's firm, sued for an injunction to restrain the latter from realizing the securities which it held by sale. *Held*, that pecuniary compensation would afford adequate relief and the suit for injunction should be dismissed (6). Where parties entitled to *brit jajmani* agree between themselves that the gifts made for certain number of days should be received by one, while those made for rest of the days of a month should be received by the other, and one of the parties interferes with the right of the other party to receive gifts according to the agreement, a perpetual injunction can be granted under s. 54 (e) against the interfering party to restrain it from so interfering (7).

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(1) *Strelley* v. *Pearson*, 49 L. J. Ch. 406=15 Ch. D. 113.

(2) *Syers* v. *Brighton Brewery Co*, 1 L. T. 560=13 W. R. 220.

(3) Section 26 of the Contract Act.

(4) *Mahomed Yamin* v. *Razia Begam*, 42 A. 134=54 Ind. Cas. 223.

(5) *Gunput* v. *Rajun*, 24 W. R. 207.

(6) *Soliappa Chetty* v. *Soliappa Chetty*, 11 Ind. Cas. 807.

(7) *Mansa Tewari* v. *Parmeswar Tewari*, 27 A. L. J. 754=116 Ind. Cas. 879=A. I. R. 1929 A. 327.

CHAPTER XV.

To Prevent or restrain the Commission of Torts.

Torts, Definition of—These terms are alike employed in their respective languages to denote, in a very general sense, acts which are violations of rights. They are however usually applied only to "wrongs independent of contract (1)." So they commonly signify acts which give rise to rights of action, being wrongful acts or injuries consisting in the infringement of rights created otherwise than by contract (2). According to *Dr. Bigelow* "a tort may be said to be, a breach of duty established by municipal law for which a suit for damages can be maintained ; or conversely, the infringement of a private right, or a public as a private right, established by municipal law (3)". One tort is as perfect as another ; and each tort differs from the others in its legal constituents. But they all have this in common, that there must be a duty paramount, or as we have already stated, established by municipal law ; and they all lead to an action for damages (4). Torts are divisible into three classes, according as they consist in the infringement of a *jus in rem*, or in the breach of a duty imposed by law on a person towards another person, or in the breach of a duty imposed by law on a person towards the public. The first class includes (*a*) torts to the body of a person—such a assaults, battery, nuisance ; or to his reputation—such as libel, slander, malicious prosecution ; or to his liberty—as in the case of false imprisonment and malicious arrest ; (*b*) torts to real property—such as ouster, trespass, nuisance, waste, subtraction, disturbance ; (*c*) torts to personal property consisting (*i*) in the unlawful taking of or detaining of or damages to corporeal personal property or chattels (*e. g.*, Replevin ; Detinue ; Trover) ; or (*ii*) in the infringement of a right to a patent, trade-mark, copyright etc ; (*d*) slander of title ; (*e*) depiivation of service and *consortium*. The second class includes deceit and fraud and negligence in the discharge of a private duty. So if a physician is guilty of negligence in treating a patient, he may be sued either for breach of contract or for tort. This kind of tort is called a tort arising out of contract, in opposition to a pure tort (*e. g.* an assault). The third class includes those cases in which special damage is caused to an individual by the breach of a duty to the public, whether the breach consists of malfeasance, nonfeasance or misfeasance. The principle instances of this class of torts fall under the heads of negligence and nuisance. Thus if a person does something, which is not only a public nuisance, but also causes special damage to an individual, he is liable to that individual for a tort. (5).

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(1) Holland's Jur. p. 319.
(2) Byrne's Law Dictionary.
(3) Bigelow's Law of Torts p 28.
(4) *Ibid.*
(5) Byrne's Law Dictionary.

Legal duty and domain of tort.—"The sphere of action of a citizen, in his relation to the law, is founded on his legal rights, privileges in the sense of permissions and duties. These legal rights, privileges, and duties constitute the relations which bind men together in the state, and so they form the law—the life blood of the state. What a citizen may lawfully do is determined by his legal rights and privileges ; what he must do is determined by his legal duties. These duties however correspond merely to the rights and privileges of others ; hence a man's rights and privileges, limited as they are by like rights and privileges in others, juristically express the extent of his sphere of action as a citizen under the municipal law. But it will be found important to consider duties independently, in any endeavour to state the law of torts : indeed it would be fairly out of the question to state the law adequately and clearly in the terms of legal right. (1)"

Legal duty.—Legal duty should be considered, not only because of its natural relation to legal right, but because of the course of the law. The law has had to look to infractions of right, to wrongs or breaches of duty, more directly than to rights, as the word "tort" itself implies. The law of torts has been worked out, not directly on the side of rights, not in terms even on the side of the violation of rights, but on the correlative side of duties (2). Legal duty is created by the presence of legal rights ; I owe legal duties to my neighbour in so far as I come or may come into contact with his legal rights. Legal duty, like the converse or obverse of legal right, is duty established by municipal law ; the term "legal" necessarily imports as much in both cases. Duty in the law of torts is of varying kinds, and there is no specific factor common to these various phases ; what would constitute specific duty in one case would not constitute it in another. Still the various kinds of duty involved in the different torts are capable of being grouped into some three classes. In (what is to appear as) the first and second of the three classes the breach of legal duty is committed directly and at once, or provisionally, by a wrongful act. The breach is direct or at once where nothing remains to be done to complete it ; it is provisional where it is not in itself complete, but requires something to be done by the other party. But in either case the thing complained of is always an act. In the third class of cases the breach of duty is never completed by the misconduct alone ; the breach is always provisional. The misconduct may consist in an act or an omission. Now, in what may be taken as the first of the three classes of breach of duty, a lawful act is done either by wrongful means or of malice ; "by means" being meant measures by which an act is done, by "malice" a certain state of mind in which an act is done. In the second class the act done is in itself unlawful. In the third, what may be called an Event has taken place,

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(1) Bigelow's Law of Torts p. 3.

(2) Bigelow on Torts p. 11.

which event was caused by negligence. Shortly, the three classes may be put thus :—(i) Lawful acts done by wrongful means or of malice. (ii) Unlawful acts. (iii) Events (loss) caused by negligence (1).

Tort and contract distinguished.—Tort is a term which is used to describe a wrong or a breach of duty committed by some person which is legally wrongful as regards some other person (2). A breach of contract is also a legal wrong (3). Every act which infringes a public right or private right of some other person affords a cause of action. Where the basis of such action is in substance the wrong done, the action has been regarded as founded on tort. Where the cause of action is based on a duty not embraced by the common law liability arising out of the relationship between the parties the action may be regarded as founded on contract (4). An action for torts is an action on facts, which constitute a tort, that is which constitute and are regarded as a breach of duty on the part of the tortfeasor, whether the relationship out of which the duty arises results from a contract or not (5); if, however, the relationship does not give rise to the duty which is broken, but it is necessary to refer the contract in order to establish such duty, then the action is said to be founded on contract (6). The duty in question, in cases of tort, is established by municipal law. But in contract the duty is commonly fixed by the parties in the terms of the agreement. Generally speaking this will serve to distinguish tort from contract. But this is not always the case ; it happens not infrequently that the parties to a contract leave terms to be supplied by the evidence of custom or by the law itself. In such cases a violation of the term so to be supplied might make a case of tort or of breach of contract, at the election of the injured party ; the duty being fixed by law. or what would come to much the same thing, by custom the duty would be paramount, and hence the breach could be treated as a tort. Thus if a common carrier at Liverpool were to contract with A to deliver at York wheat put into the carrier's hands, and failed to do so, he would be presumptively liable to A, as for a tort, or for, breach of contract, at A's election (7). Again tort contemplates the violation of a present right, while the right based on contract is one to the fulfilment of a promise made by some person (8).

Difference between Torts and Crimes.—"The distinction between those wrongs which are generically called 'torts' and those which are called 'crimes' says *Dr. Holland*, "may at first sight appear to be a fine one. The same set of circumstances will, in fact, from one point of view constitute a tort, while from another point of view they amount to a crime. In the case, for

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(1) Bigelow on the Law of Torts pp. 12-14.

(2) Halsbury Vol. 27 p. 464.

(3) *Allen* v. *Flood*, (1898) A C. 1 per *Lord Watson at* p. 96.

(4) Halsbury Vol. 27 p. 464 note, (*d*)

(5) *Defries* v. *Milne* (1913) 1 Ch. 98 C. A.

(6) Halsbury Vol. 27 p. 466.

(7) If the claim of the plaintiff is for a breach of some particular stipulation of a contract, as distinguished from a breach of duty arising out of a relationship established by contract, the action is founded on contract. Halsbury Vol. 27 p. 466.

(8) Woodroffe's Law of Injunction p. 285.

instance, of an assault, the right violated is that which every man has that his bodily safety shall be respected, and for the wrong done to this right the sufferer is entitled to get damages. But this is not all. The act of violence is a menace to the safety of society generally, and will therefore be punished by the state. So a libel is said to violate not only the right of an individual not to be defamed, but also the right of the state that no incentive shall be given to a breach of the peace. It is some times alleged by books of authority that the difference between a tort and a crime is a matter of procedure, the former being redressed by the civil, while the latter is punished by the criminal courts. But the distinction lies deeper, and is well expressed by Blackstone, who says that torts are an infringement or privation of the private, or civil rights belonging to individuals, considered as individuals ; crimes are a breach of public rights and duties which affect the whole community, considered as a community (1). The right which is violated by a tort is always a different right from that which is violated by a crime. The person of inherence in the former case is an individual, in the latter case is the state (2)." "The distinction between a tort and a crime" says *Mr. Justice Mookerjee* in *Amritalal Bose* v. *The Corporation of Calcutta* (3) "between a civil suit and a criminal proceeding, may be regarded as of an elementary character, and the same wrongful act sometimes gives rise to a civil as well as to a criminal liability. The purpose of the civil suit is to compensate the plaintiff for what he has unjustly suffered while the object of the criminal proceedings is punishment and the cure of what may be called a public wrong. A crime is thus a wrong which the Government deems injurious to the public at large and punishes through a judicial proceeding, instituted in its own name or on its behalf. The fundamental distinction between a tort and a crime cannot be ignored or rejected, and leads inevitably to the position that while in a civil suit for damages, however numerous the wrong-doers, the plaintiff is to be compensated for his loss only once, in a criminal proceeding, where each wrong-doer is as guilty as though the others were not guilty also, the full penalty must be inflicted on each precisely as if he had committed the crime unaided. Indeed, from the point of view of criminal jurisprudence, the circumstances that the wrong-doer had participants in the commission of the crime, sometimes make his position worse (4). In any event, where a crime has been committed jointly by two persons, the guilt of one is undoubtedly not mitigated, even though it may not be enhanced, from the fact that another may also be guilty. The essence of the matter is that the proceeding has been instituted not to indemnify a person to the extent of the loss he may have suffered from wrongful act, but to inflict punishment on the wrong-doer for an act which the government deems injurious to the public at large. From the point of view of principle, consequently, the rule

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(1) *Cf. Lord Lindley* in *Quinn* v. *Leatham* (1901) A. C. at p. 512.

(2) Holland's Jur. p. 320.

(3) 21 C. W. N. 1016 at p. 1030=44 C. 1025(F. B.)

(4) Vide Chapter VA of the Penal Code dealing with criminal conspiracy.

must be deemed established beyond question that all who participated in the commission of a crime are severally responsible to the state, as though crime has been committed by any one of them acting alone : there is *prima facie* no such thing as division of responsibility among the several participants in a crime."

The law of civil wrongs in British India is not codified.—"Civil wrongs are suffered every day in India" says *Sir Henry S. Maine* (1) "and though men's idea on the quantity of injury they have received may be vague, they are quite sufficiently conscious of being wronged somehow to invite the jurisdiction of courts of justice. The result is that, if the legislature does not legislate, the courts of justice will have to legislate, for, indeed, legislation is a process which perpetually goes on through some organ or another wherever there is a civilized government, and which cannot be stopped.". The position then is that questions relating to civil liability for damages for torts must be determined with reference to either the rules of English common law where they are shown to be applicable (2) and with reference to principles of justice, equity and good conscience in all other cases. The principle that, in all cases for which no specific statutory directions are given, Judges should act according to justice, equity and good conscience, was expressly formulated in section 93 of the Administration of Justice Regulation promulgated by the Governor-General in Council on the 5th July 1781. The rule was thereafter successively reproduced in section 21 of Reg. III of 1793, in section 24 of the Bengal Courts Act, 1871 and in section 37 of the Bengal Civil Courts Act, 1887 (3). Equity and good conscience has been generally interpreted to mean the rules of English law if found applicable to Indian society (4). In these circumstances when the law of torts has not been codified and cases of civil liability for damages have been left to be decided according to the rules of justice, equity and good conscience, it is not surprising to find that the law of civil wrongs as administered in British Indian courts has been practically taken in its entirety from the common law of England ; the only justice, equity and good conscience which judges steeped in the principles of English jurisprudence could and did administer in default of any other rule was so much of English law and usage as seemed reasonably applicable in this country (5). In *Sheo Ratan Singh* v. *Karan Singh* (6), the court observed : "The rule of justice, equity and good conscience is in

(1) Minute by Sir H. S. Maine dated 17th July, 1879 ; Codification in British India p. 217.

(2) *Mayor of Lyons* v. *E. I. Co*, 1 M. I. A. 175.

(3) For Madras and Bombay vide S. 16 of the Madras Civil Courts Act (III of 1873) ; *Chunilal* v. *Munishankar* 18 B. 616, 623.

(4) *Dadu* v. *Babaji*, 2 B. H. C. R. 338 ; *Shrivrao* v. *Pundlik*, 26 B. 437=4 Bom. L. R. 90 ; *Varden seth* v. *Luckputty*, 9 M. I. A. 304 ; *Waghela* v. *Maludin*, 14 I. A. 89=11 B. 551 ; *Maharaja of Vizianagram* v. *Raja Setrucherla* 13 M. L. J. 83 ; *Rambaksh* v. *Madusudan*, B. L. R. (F. B.) 675 (679) ; *Debnarayan* v. *Chunilal*, 17 C. W. N. 1143.

(5) *Satischandra* v. *Ram Dayal De*, 24 C. W. N. 982 (F. B).

(6) 84 Ind. Cas. 269=A. I. R. 1924 All. 857=22 A. L J. 788=46 A. 860, which was a case of contribution between tort-feasors.

general. no doubt considered to be identical with the rule of English law, but there are exceptions, and there is the high authority of *Lord Herschell* in *Palmer* v. *Wick* (1) for the view that the rule in *Merry weather* v. *Nixon* (2) is not founded on any principle of justice, equity, or even public policy which would justify its extension to the jurisprudence of other countries. *Lord Watson*, concurring, said that the merits of the rule were not such as to commend it to universal acceptation, and *Lord Halsbury* and *Lord Shaw* concurred in their opinion."

"But the legislation of Indian Judges have all the draw backs" says *Sir Henry S. Maine* (3) "of judicial legislation else where, and a great many more. As in other countries, it is legislation by a legislature which, from the nature of the case, is debarred from steadily keeping in view the standard of general expediency. As in other countries, it is haphazard, inordinately dilatory, and inordinately expensive, the cost of it falling almost exclusively on the litigants. In British India judicial legislation is, besides, in the long run, legislation by foreigners, who are under the thraldom of precedents and analogies belonging to a foreign law developed thousands of miles away, under a different climate, and for a different civilization. I look with dismay, therefore, on the indefinite postponement of a codified law of torts". "A good law of torts would be a great blessing to this country (4)." "This is in 1879 and towards the end of 1882, Sir Frederick Pollock was asked by the Government of India to prepare a draft Bill to codify the law of civil wrongs. The draft was provisionally completed in 1886 and was published with the consent of the secretary of state for India,. But the Government of India has not yet finally decided whether it is desirable to codify the law on this subject (4)."

Who can sue in respect of torts.—The existence of a tort implies the existence of a person injured, and the existence of property implies the existence of a person and of some legal right vested in such person, either of a corporeal or of an incorporeal nature, and where the thing owned is of a corporeal nature implies a relationship between the person and the thing owned. From each of these implications it follows that it is impossible that a tort should be completely defined by reference to the injury to a thing without reference to the person owning the thing (5). So every person who is affected by the commission of a tort can maintain an action therefor. An injunction also cannot be granted where the applicant has no personal interest in the matter (6) Generally speaking actions for tort, not harmful to property, are not assignable (7). So also most tort ceases with the death of either of the

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(1) (1894) A. C. 318.
(2) (1799) 8 T. R. 186.
(3) Minute by Sir H. S, Maine, dated 17th July 1879 p. 217.
(4) Codification in British India p. 218,
(5) Halsbury's law of England vol. 27 p. 473.
(6) Specific Relief Act s. 56 (Cl. k.)
(7) *Howard* v. *Crowther*, 8 M. & W. 601 ; *Drake* v. *Beckham*, 11 M. & W. 315 (319) ; *Prosser* v. *Edmunds*, 1 Y & C. 481.

parties to them, to carry liability (1). Both the origin and the justification of this rule are matters of doubt ; but no common law rule has been more steadily maintained, except as statute has affected it (2). It is to actions in form *ex delicto* that the maxim *actio personalis moritur cum persona* (3) is peculiarly applicable ; for as *Lord Abinger* observed in *Raymond* v. *Fitch* (4), this maxim "is not applied in the old authorities to causes of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another ; which later are annexed to the person, and die with the person except where the remedy is given to (or by) the personal representatives by the statute law.' And the general rule of the common law is, that if an injury were done either to the person or to the property of another for which unliquidated damages could be recovered in satisfaction, the action died with the person to whom or by whom, the wrong was done (5). In British India "an action may be maintained by the executors, administrators, or representatives, of any person deceased, for any wrong committed in the life time of such person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed with in one year before his death ; and the damages, when recovered, shall be part of the personal estate of such person (6)". But an action for defamation, either of private character or of a person in relation to his trade, comes to an end on the death of the plaintiff, but an action for the publication of a false and malicious statement, causing damages to the plaintiff's personal estate survives (7). So also no action lies for damages for breach of promise of marriage against the personal representatives of the promisor, unless in respect of special damage—that is actual loss to the temporal estate of the promisee, flowing directly from the breach, or which may reasonably be supposed to have been in the contemplation of both parties at the time of the promise as the probable result of the breach of it (8). An action by the registered owner of a trade-mark claiming an injunction restraining infringement and fraudulent limitation, and the usual consequential relief is not extinguished by the death of the plaintiff, but survives to his personal representative (9). "All demands whatever and all rights to prosecute or defend any action or special proceedings existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators ; except causes of action for defamation,

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(1) *Bowker* v. *Evans* 15 Q. B. D. 565.

(2) Bigelow on Torts p. 46. "Liability for tort may come to an end in a very different way from any capable of being stated in the terms of the cessation of duty ; *actio personalis moritor cum persona.*

(3) A personal right of action dies with the person.

(4) 2 Cr. M. & R. 588 (597).

(5) *Wheatby* v. *Lane* 1 Wms. Saund. 216 (a) ; Broom's Legal Maxim p. 685 ; See also *Whincup* v. *Hughes.* L. R. 6 C. P. 78 ; *Ferns* v. *Carr,* 28 Ch. D. 409.

(6) Section 1 of the Legal Representatives' Suits Act (XII of 1865).

(7) *Hatchard* v. *Mege,* 18 Q. B. D. 77.

(8) *Finlay* v. *Chirney,* 20 Q. B D. 494=57 L. J. Q B. 247.

(9) *Oakey* v. *Dalton,* 35 Ch. D. 700.

assault as defined in the India Penal Code (1), or other personal injuries not causing the death of the party ; and except also cases, where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory (2)."

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act neglect or default, is such as would (if death has not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party, who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime. Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused and shall be brought by and in the name of the executor, administrator, or representative of the person deceased ; and in every such action, the court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting all costs and expenses, including the cost not recovered from the defendant, shall be divided amongst the before mentiond parties, or any of them in such shares as the court by its judgment or decree shall direct (3)."

Where a road has been dedicated for the use of the public, the owner of the soil, over which the road runs, is entitled to exercise all rights of ownership so as not to interfere with the right of way, which exists in public. When the owner of such soil is responsible for keeping the road in order and in good repair he is entitled to institute a suit for damages and injunction against the destroyer of any work of improvement done to the road, with out proving special damage (4).

Who can be sued for Commission of Tort.—"The person who actually commits a tortious act is responsible for it, (5) notwithstanding that in committing it he was acting as agent for another person, unless the relation out of which the unaccomplished duty arises, is to the knowledge of the person suffering the wrong, a relation between him and the principal, and the agent is known by such person to be acting on behalf of the principal (6), or the act is committed by a servant or agent authorized by and acting for and on behalf of the Crown, or in some other way the act is such that the authority of the principal deprives it of its tortious character (7)." Put in fixing the liability on a person his capacity, function or personal qualification should be taken into consideration. Thus a person sought to be held liable for a tort

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(1) Law of Torts is not codified in British India.

(2) Section 306 of the Succession Act (XXXIX of 1925).

(3) Section 1 of the Fatal Accidents Act, (Act XIII of 1855) s. 1.

(4) *Maharaj Bahadur* v. *Poresh Nath*, 31 C. 839.

(5) *The Mentor*, (1799) 1 Ch. Rob. 179, 181.

(6) *The Tasmania*, 13 P. D. 110, 114.

(7) Halsbury Vol. 27 p. 477.

may at the time of the wrong alleged, have been holding some part of State, such as a judicial position, or he may have been under some disqualification or incapacity, putting him below the level of a full citizen, as where he was insane or under age, or he may have been an employer of the person immediately guilty. In regard to persons holding under the State, executive, legislative or judicial position, the answer is a simple one ; the case is one ordinarily of absolute privilege. No action for damages, can be maintained against a person for any thing said or done, for example, in the discharge of judicial duty (1), and so of things said or done by the executive or by a member of the legislature (2). The ground of immunity of the executive branch of government, of legislators, and of judges is plain. The places occupied by such persons are the great departments of the State, and the State could not carry on its functions if those sitting over its departments could be called before the court at the suit of every person aggrieved by their actions (3).

In regard to competency or capacity, it is to be observed that the breach of duty may be committed by any one having natural capacity. The law of tort affords a strong contrast in this particular both to the law of contracts and to the criminal law. Liability in contract depends, it is true, upon capacity to contract ; but want of such capacity may be either natural or artificial. One must be of sound mind and at least eighteen years of age to bind himself by contract (4). Liability under the criminal law depends also upon the existence of capacity to commit crime ; but want of these two may be artificial. A person must be of sound mind and at least seven years of age to be subject to punishment under the criminal law (5). An infant above the age of seven is liable for any tortious act committed by him, if such act is not directly founded on a contract upon which the infant cannot be sued but is not liable if such act is directly founded on such a contract (6). So within the age of seven and the age of eighteen there is a region of uncertainty, in which the courts, if called upon to act, must act according to the best light they may have in each particular case ; the question of capacity being a question of fact (7). A minor is not responsible for a tort committed by the manager of his estate, provided the tortious act was not in connection with the management of his estate (8).

There is a difficulty of another kind touching the liability of infant and of persons of unsound mind, namely, where what would be a tort in other cases, as for example a fraudulent representation, is the inducement to a contract. But the rule in regard to such cases is that there can be no liability in tort if to enforce an action of this kind would virtually fix upon the incompetent party liability for breach of contract (9). The case is or

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(1) Vide The Judicial Officer's Protection Act (XVIII of 1850).
(2) Bigelow in Torts p 29.
(3) Bigelow on Torts p. 30.
(4) Vide Indian Contrat Act s. 11.
(5) Vide Indian Penal Code Ss 82, 83 and 84.
(6) Halsbury Vol. 27 p. 478.
(7) Bige low's Law of Torts p. 31.
(8) *Maharaj* v. *Paresh*, 31 C. 839.
(9) *Fairhurst* v. *Liverpool Loan Assocn.*

may be quite different where the tort follows, but is not caused by the contract ; to enforce an action for tort in such a case would not be to enforce a contract, as for example to compel an infant to make good the loss of a horse which he has borrowed and then directly abused and killed (1).

A foreigner is liable for tort committed within the jurisdiction, but a foreign ambassador cannot be made liable against his will for a tortious act (2). So also foreign sovereigns cannot be sued against their will (3). An injunction cannot also be granted to interfere with the public duties of any department of the Government of India or the local Government, or with the sovereign acts of foreign Government (4). But statutory powers under an Act are to be exercised with ordinary care and skill and with some regard to the property and right of others (5). In the above case *Lord Macnaghten* said ; "It has been determined over and over again that if a person or a body of persons having statutory anthority for the construction of works, exceeds or abuses the powers conferred by the legislature, the remedy of a person injured in consequence is by action or suit, and, not by proceeding for compensation under the statute which has been so transgressed." Ordinarily before a suit can be instituted against the Secretary of State or a public officer a notice under section 80 of C. P. Code is necessary. In *Hari* v. *Secretary of State for India* (6), *Jenkins C. J.* said : "In this case no notice of suit has been given, but it is argued that as the remedy sought is an injunction, no notice was necessary. In support of this view the English cases of which *Flower* v. *Local Board of Lord Lyton* (7) is a type, were cited to us. It was further said that the words, in respect of an act purporting to be done by him in his official capacity, must be read not only with 'a public officer' but also with 'the said Secretary of State in Council.' In my opinion, the answer to this argument is that in this suit and in the circumstances of this case no injunction could be claimed against the Secretary of State. In illustration of the position of the Secretary of State in Council I may refer to the Judgment of *James L. J.* in *Kinlock* v. *Secretary of State for India* (8)." So where a suit is instituted against a public officer for an injunction to restrain the commission of an act not done, but threatened to be done, no notice is necessary (9). The mere fact that the plaintiff sues for an injunction and in the alternative for damages will not necessitate a notice to be given if the really substantive claim in the suit is the claim for injunction (10). But in *Nanak Chand* v. *Muhammad Afzal* (11), *Sadasiva Aiyar* said : "Then, as

(1) Bigelow on Torts p. 32 citing *Burnard* v. *Haggis*, 14 C. B. N. S. 45.
(2) Halsbury vol. 27 page 479.
(3) Halsbury vol. 1 page 18 : See also *Rogers* v. *Rajendra Dutt*, 8 M. I. A. 130, 131.
(4) Specific Relief Act s. 56 Cl. (d).
(5) *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai*, 27. B. 314 (352) P. C. =7 C. W N. 303.
(6) 27 B. 424 (450).
(7) 5 Ch. D. 347.
(8) 15 Ch. D. 1.
(9) *Ganoda Sundary* v. *Nalini Ranjan*, 36 C. 28 (39)=1 Ind. Cas. 514.
(10) *Naginlal* v. *Official Assignee*, 14 Bom. L. R. 1148=17 Ind. Cas. 876.
(11) 16 Ind. Cas. 947=37 M. 113=23 M. L. J. 181.

regards the question of hardship, if a suit against the public officer alone for an injunction could be brought without notice—a position on which I reserve my opinion—the fact that the plaintiff is prohibited from bringing a suit against the Secretary of State for India in Council without due notice cannot cause irreparable injury to plaintiff, for he could sue the public officer alone for his threatened act and obtain a temporary injunction and this will effectually prevent the threatened injury.....The legislature must be deemed to have been aware of the patent consideration and if they had intended to exclude suits against the Secretary of State for India claiming the relief of injunction from the necessity of notice, they would have put in an exception under the section itself stating that in cases of injunction or in cases where irreparable injury is likely to be caused if an injunction is not at once granted, the notice required by the first part of the section was unnecessary. I do not think that it is legitimate for the courts themselves to graft on such exceptions to the section (1)."

Remedies in cases of torts.—"Wherever a tortious act of a continuing nature which affects property, or which, if it does not affect property, is not merely criminal or illegal, is being committed or has been committed and a repetition of it is threatened the court has jurisdiction to grant an injunction on the application of any person aggrieved, and either before or after judgment has power to grant an injunction either upon or without terms as may be just, or may award damages in lieu of injunction (2)."

In granting injunctions to restrain torts, the estates and interests generally legal.—"The estates, interests, and primary rights" says *Prof, Pomeroy* "to be secured by injunctions of this kind are in most instances legal; and the injunctions themselves, as a class, are frequently described as those for the protection of legal rights and interests. So far as they do thus sustain and enforce legal rights, they are, of course, supplementary to or in lieu of the general remedies which courts of common law originally gave, and perhaps now give, by action, under the same circumstances. For this reason, the general test as stated in a former paragraph applies with special force. The inadequacy of the legal remedies is the criterion which determines the exercise of this preventive jurisdiction, and the criterion is enforced especially by the American Courts, with great strictness (3)."

Kinds and classes of Torts Restrained.—"The legal remedy is ordinarily considered as adequate in cases of torts to the person, and to property held by a legal title, and equity does not interfere. There are, however, certain species of torts, in respect to each of which, as a class, it is settled that the legal remedy is generally inadequate. so that equity will generally interfere to prevent the wrong by injunction, There are other species of torts, in

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(1) But see *Secretary of State* v. *Gajanan*, 35 B. 362 ; *Sakharam* v. *The Secretary of State*, 14 Bom. L. R. 353= 15 Ind. Cas. 539.

(2) Halsbury Vol 27 p. 490.

(3) Pomeroy's Eq. Jur. § 1346.

respect to each of which, as a class, the legal remedy is adequate, but may become inadequate, in individual instances from their particular circumstances, so that in those instances an injunction will be granted. In the kind of torts for which the legal remedy is generally inadequate, so that an injunction is a proper remedy, the title of the injured party must be clear, the injury real, and not merely temporary or transient. They are waste, nuisance, including interference with easements, servitudes, and similar rights, infringements of patents rights, of copy-rights, of trade marks, and other intangible property rights, the pecuniary value of which cannot be certainly estimated, such as literary property in manuscript writings and good will. In ordinary trespasses the injured party is left to his remedy of damages, but the circumstances of a trespass to property—especially to real property—may be such that the compensatory remedy is inadequate, and a court of equity will prevent the wrong by injunction (1)."

When injunction can be granted.—The grant of an injunction is not restricted to wrongs arising out of contract only, but relief can also be given in respect of an invasion of the rights of any person resting on tort (2). In the above case a decree was passed against the defendant No. 1 only and hence he alone is the appellant before the High Court He is a Chaudhuri of carts in the town of Bihar. The plaintiffs are the cart men and ply their business between the Rail Station and the shops of Mahajans. They alleged that the defendant interfered with their business on three days 11th, 12th and 13th of December 1917, claiming from them illegal demands of choudhuriana at the rate of 1 anna per cart. The plaintiffs' case was that the *choudhuriana* was never paid to the defendant and was illegal and, consequently, the interference was also unjustifiable. They accordingly brought the present suit for the loss suffered by them on account of interference by the defendant, and for granting a perpetual injunction against him restraining him from causing any obstruction or interference in the plaintiffs' business in future. In delivering the judgment of the court of appeal *Jwala Prosad J.* observed : "The learned Vakil, however contends that the plaintiffs were not entitled to a perpetual injunction against the defendant. This is based upon section 54 of the Specific Relief Act on the ground, principally, that the claim for injunction is not based upon any obligation existing in favour of the applicants. In other words, Mr. Ganguli contends that the claim for injunction must be based upon some contract. It is too late to propound such a proposition inasmuch as the grant of an injunction is not restricted to wrongs arising out of contracts only, but relief can also be given in respect of invasion of the rights of any person resting in tort only. The first two clauses of section 54 no doubt deal with wrongs *ex-contractu*, but the 3rd clause undoubtedly contemplates that a perpetual injunction can be granted irrespective of any contract, provided that there is an invasion or

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(1) Pomeroy's Eq. Jur. §§ 1346, 1888. 714.
(2) *Ritpal* v. *Raghubar*, 58 Ind. Cas.

threat of invasion on the plaintiffs' right to or enjoyment of any property. Perhaps, the attention of Mr. Ganguly was concentrated only to the first two clauses, for towards the conclusion of his argument, when his attention was invited to the last clause of section 54, he seemed to be lukewarm in his argument and but for the decision in the case of *Gur Pershad* v. *Khuda Baksh* (1), the point I think, would never have been raised by Mr. Ganguly. In that case a perpetual injunction restraining the defendants from taking *Chaudhuriana* dues from the plaintiff and from using force of any kind was disallowed. The reason for refusing an injunction, as stated in that judgment, is that no injunction could be granted 'restraining the defendant from receiving any payment which the plaintiff might make to him (the defendant) voluntarily, and it seemed to the court ,unnecessary to grant an injunction restraining him from doing what the penal law already makes punishable. Under the terms of the section, no doubt, voluntary payment of *chaudhuriana* cannot be restrained. But, in the present case, the plaintiffs seek to restrain the forcible demand of *chaudhuriana* and the illegitimate restraint caused to their business by the acts of the defendant. There is no reason why the defendant cannot be injuncted. If the learned Judge in the aforesaid case wanted to lay down a general law that an injunction can only be granted to prevent the breach of an obligation existing in favour of the applicant, I would respectfully differ with the view. The subject has been fully dealt with by Dr. Banerjee in his book (2), on Specific Relief Act and he has clearly shown from authorities that the relief in the nature of an injunction is not confined to wrongs arising out of a contract but is applicable to trespass upon the civil rights in the nature of tort, and that the tort complained of need not violate any right to property. This is clearly illustrated by the fact that perpetual injunctions are often granted restraining a person from making defamatory statements in any publication. Injunctions are also granted against the custody of infants, marrying infant wards of court, as well as against persons interfering with the rights connected with religious offices (3).

"I have been taken through a number of authorities on the subject, both English and Indian. Most of them do not appear to exactly apply to the present case though the principles decided therein are of great assistance in understanding the true scope and meaning of the chapter on Injunction in the Specific Relief Act. I am relieved from entering into the discussion of those cases, for it appears to me that the present case is governable by the observation

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(1) Ind. Cas. 687.

(2) "But where the defendant has committed or is threatening what the plaintiff alleges to be a breach of an obligation, or more briefly a wrong, the plaintiff may ask the court to direct the subject matter of the dispute to be maintained in *statu quo*, till the issue between the parties has been determined. . . A right of property may often have to be protected by means of an injunction, The protection here is against a wrong independent of contract, i. e. a tort." Banerjee's Specific Relief Act pp 630, 631.

(3) Vide *Soma Ballachariar* v. *Tiru Venkata Chariar*, 15 Ind. Cas. 409 ; *Jugal Kishore* v. *Lakshmandas*, 23 B. 659=1 Bom. L. R. 118 ; *Srinivasa* v. *Tiru Vengada*, 11. M. 450.

of *Jenkins C. J.* in the case of *Apaji Patil* v. *Apa* (1). After quoting section 54 of the Specific Relief Act, his lordship observes : 'It appears to us that where a legal right violated by another under colour of title, is established, the recurrence of violation cannot in ordinary cases be adequately met by damages, nor can those damages be satisfactorily ascertained.' In that case the defendant was interfering with the civil rights of the plaintiff to exercise his peaceful possession over his land. The view taken by the learned Chief Justice was followed in a later case of the same court in *Bai Samrat* v. *Sardarsang Hamabhai* (2). No doubt relief by way of perpetual injunction should be granted with caution and on weighing the probabilities and circumstances of each case and where, as in the present case, it is manifest from the pleadings in a case and the conduct of the defendant that, unless he be restrained by an order of the court, there will be danger of the invasion of the rights of the plaintiff, there is no reason why the injunction should not be granted. The defendant asserts in his written statement his right to claim the cess of *chaudhuriana* from the plaintiffs. The plaintiffs have proved that they are not liable for the same. There is, therefore, every reason to apprehend that the plaintiffs' rights would be invaded by the defendant in future. Even if damages were the adequate relief for the obstruction caused to plaintiffs on the present occasion there can be no assurance that it would be an adequate relief in any subsequent interference, and I am, therefore, of opinion that it is not possible in such a case to award adequate pecuniary compensation Therefore, the claim is not barred by section 56, clause (i) of the Specific Relief Act as is contended for by Mr. Ganguly and that it is absolutely necessary by means of a perpetual injunction to prevent the multiplicity of judicial proceedings. Therefore, the conditions required in both the clauses (d) and (e) are fulfilled in the present case and the order made by the courts below regarding the perpetual injunction against the defendant appears to be correct."

In *Millin* v. *White* (3), *Lopes L J.* said : "As I have already said, I think in order to maintain an action at common law actual damage must be made out ; but it is not necessary to shew that in an action for an injunction, it is sufficient to show that what has been done is likely to produce damag ." On appeal from the above case to the House of Lords (4), *Lord Herschell L C.* said : "My Lords, obviously to call for the exercise of that power it should be necessary to shew that there was an actionable wrong well laid, and if the statement only show a part of that which was necessary to make up a cause of action—that is to say, if special damage was necessary to the maintenance of the action, and that special damage was not shown—a tort in the eye of the law would not be disclosed, the case would not be within those provisions, and

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(1) 26 B. 735=4 Bom. L. R. 534.
(2) 12 Ind. Cas. 381=13 Bom. L. R. 905.
(3) *Mellin* v. *White*, (1894) 3 Ch. 276 (281) ; *Municipal Corporation* v. *Vasudeo* 6 Bom. L. R 8,9.
(4) *White* v. *Mellin*. (1895) A. C. 154, (163).

no injunction would be granted. I think therefore, for these reasons, that the plaintiff would not be entitled to an injunction, any more than he would be entitled to maintain an action unless he established all that was necessary to make out that a tort had been committed, and for the reasons which I have given, taking the *Western County Manure Company* v. *Lawes Chemical Manure Company* (1) to be good law, he has not brought himself within it."

Before an injunction can be granted, the plaintiff's case must disclose a breach, whether actual or threatened, by the defendant of some present legal right vested in the plaintiffs. Not having any legal right to *brit* vested in plaintiffs, they could not claim an injunction to restrain a threatened breach of that duty (2). An injunction is in its essence the grant of a mode of relief consequential upon an infringement of a legal right. It forms part of a decree made at a hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right or perpetually restrained from the commission of an act contrary to equity and good conscience (3).

Where the actual invasion of a right and other circumstances of the case show that the invasion is likely to continue, the proper remedy in such a case is injunction, under the Specific Relief Act, 1877. To say that the plaintiff ought to sue for damages every time that the right is invaded is to drive him to a multiplicity of suits. It is not necessary that any positive evidence should be let in by the plaintiff for the purpose of showing that the defendant intended invading the rights in the future also. That is a question which can be determined on the probabilities of the case, the surrounding circumstances, and by the light of the conduct of the defendant in the actual obstruction which he has caused in one year and with reference to the attitude which he adopts. In a suit for injunction the court can grant relief by way of damages (4)." Section 56 (i) of the Specific Relief Act prohibits an injunction being granted where there is any other remedy which would give equally efficacious relief (5).

It is open to the court to refuse an injunction where the state of things complained of is the outcome of the plaintiff's own conduct, and where he does not satisfy the court that his own acts and dealings in the matter have been fair and honest (6),

If the case is for the issue of injunctions where it is claimed that the danger to property is threatened, it will not do to say that a violation of the plaintiff's right may be the result ; the plaintiff must show that a violation will be the inevitable result ; that is, not in the sense of there being no possibility the other way, but in the sense that there must be such great possibility that, in

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(1) L. R. 9 Ex. 218.

(2) *Gurdas* v. *Bhag*, 11 Ind. Cas 231 = 143 P. W. R. 1911 = 216 P. L. R. 1911.

(3) *Arjun Sue* v. *Emperor*, 44 Ind. Cas 737 = 3 P. L. J. 136 = 19 Cr. L. J. 385.

(4) *Bal Samrat* v. *Sardar Sang* 13 Bom. L. R. 905 ; *Kaliandas* v. *Tulsidus*, 1 Bom L. R. 459 = 23 B. 786.

(5) *Bapu* v. *Gunajee*, 1 Bom. L. R. 210.

(6) *Seeni Chettiar* v. *Santhanathan*, 20 M. 58 (F. B.) = 6 M. L. J. 281 ; see also Cl. (j),

view of the ordinary men using ordinary sense, the injury would follow (1). When the plaintiff is out of possession and claims possession, courts will refuse to grant a temporary injunction unless the injury which is threatened is a material one which cannot be adequately compensated for by damages (2). In granting or withholding an injunction, courts exercise a judicial discretion and weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction if granted would inflict upon the defendant (3). The granting of an injunction is discretionary with the court, the crucial point for determination being whether or not the award of pecuniary compensation would give adequate relief. The principle is not necessarily restricted to crowded cities (4).

Where an act threatening danger to a person's land is such that injury will inevitably follow, a court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before the institution of the suit. And where actual injury has occurred subsequently to the filing of the plaint the plaint may be amended so as to show the nature and extent of the injury (5). In the above case, the plaintiff and the defendants are the owners of adjoining tenures. The plaint sets out that the defendants wantonly and with the intention of causing injury to the plaintiff dug a trench on the verge of the boundary of her tenure, 110 feet long and 8 or 9 feet deep, the depth being perpendicular downwards and sloping inwards towards the bottom in the direction of the plaintiff's land. It is further alleged that the defendants were still going on with the work. The relief asked for is a perpetual injunction prohibiting them from digging earth within a certain distance of the plaintiff's tenement, the filling up of the excavation, and in default a certain sum of money as the costs of filling it up. There was a further prayer for general relief. The defendants raised various objections to the plaintiff's suit. They asserted their right to dig as they pleased upon their own land and stated that the plaintiff is not entitled to an injunction. There was no direct denial of the particular acts alleged in the plaint, but stated that they were excavating a tank which had no slopes, although they intended to make them hereafter. The defendants also contended that the plaint disclosed no cause of action in as much as no injury was alleged to have resulted from the acts of the defendants. The court of first instance accepted as correct that view of law, and holding that until actual damage had ensued no cause of action could arise, dismissed the suit without deciding any of the other questions which arose in the case, although the plaintiff in the course of the trial represented to the court that, subsequent to the institution of the suit, injury had actually resulted from the

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(1) *Arjun Das* v. *Ganesh Das*, 172 P. W. R. 1913=308 P. L. R. 1913=21 Ind. Cas. 249.

(2) *Sewaram Singh* v. *Sardarni Maya Devi*, 80 Ind Cas. 727.

(3) *Krishnan Pillai* v. *Kila Sathammal*, 108 Ind Cas. 69=A. I. R. 1928 Mad. 810; *Macneil* v. *Debendra Nath*, A. I. R. 1928 Cal. 293.

(4) *Sohan Singh* v. *Jagat Singh*, A. I. R. 1928 Lah. 980.

(5) *Bindubasani* v. *Jahnabi*, 24 C. 260.

acts of the defendants by the subsidence of some of the plaintiff's land and evidence to that effect was given on appeal before the subordinate Judge. The appellate court reversed the decision of the court of the first instance and remanded the case, directing the court of first instance to allow an amendment of the plaint and decide the question already raised in the case and other questions that might arise after the amendment. Upon appeal to the High Court against this order of remand, *Macpherson* and *Hill JJ.* observed :

"If the Munsiff was right in holding that actual injury would alone give a cause of action, then he was right in dismissing the suit, because anything that happened subsequent to the institution of the suit could not supply a cause of action which did not exist before. In our opinion he was wrong in his view of the law. A suit for injunction may be a suit for preventive relief, and under section 54 of the Specific Relief Act, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. The same section provides that when a defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the Court may grant a perpetual injunction in certain specified cases. Illustration (*r*) attached to the same section indicates a case in which an injunction may be sued for to restrain a defendant from doing an act which threatens injury to the plaintiff's property, although no such injury has actually ensued. In the case of *Pattison* v. *Gilford* (1) the Master of the Rolls speaking of the principles upon which a Court of Equity interferes when an injunction is asked for, says : 'I take it that, in order to obtain an injunction, a plaintiff who complains, not that an act is an actual violation of his right, but that a threatened or intended act, if carried into effect, will be a violation of the right, must show that such will be an inevitable result. It will not do to say a violation of the right may be the result ; the plaintiff must show that a violation will be the inevitable result.' And then he proceeds to cite a case decided by *Lord Cottenham*, and another case in which the *Lord Chancellor* says : 'I consider this Court has jurisdiction by injunction to protect property from an act threatened which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as of right, but if the party applying is free from blame and promptly applies for relief, and shows that by the threatened wrong his property would be injured, that an action for damages would be no adequate redress, an injunction will be granted.' The facts of that case had, it is true, no analogy to the present case, but still the Master of the Rolls was dealing with the principle upon which relief is given against a threatened wrong, and the case is, we think, an authority that such a suit will lie when the threatened act is of such a character that it must inevitably result in injury—inevitably in the sense in which the Master of the Rolls says he uses the word, that is not in the sense of there being no possibility the other way, because courts of justice must

(1) L. R. 18 Eq. 259.

always act upon the theory of great probability being sufficient, but in the sense that there must be such a great probability, that, in view of the ordinary men, using ordinary sense, the injury would follow. The Munsiff, was therefore, we consider, wrong in holding that, as a matter of law, actual injury before suit must in every case be alleged and proved in order to maintain the suit, and that it is sufficient if it is alleged that the result of the act complained of must inevitably, in the sense we have stated, flow from it. Whether the case is one in which an injunction or any other relief should be granted, or what precise form the injunction should take, are questions the courts dealing with the facts must decide with reference to the provisions of sections 53 and 54 of the Specific Relief Act. It may be that the plaintiff is not entitled to the relief which she claims or to relief in the particular form in which she claimed it, but that would not make the suit unmaintainable. Now, no better proof of the inevitable consequence of an alleged act can be given than that the contemplated injury had actually occurred, and, we think it is quite competent for the plaintiff in this case to give evidence of that injury, although it had not occurred prior to the institution of the suit, and, for that purpose, and in order to give due notice to the defendants of the fact, which it is intended to prove, the plaint might properly be amended. We think that the order of remand is right, and that the plaintiff should be allowed to amend the plaint by inserting in it the nature and extent of the injury suffered. That is not an amendment inconsistent with the provisions, of the Code (1)."

CHAPTER XVI.

Injunction against Defamation, slander of titles, etc.,

Right to Reputation.—"A man has a right" says *Dr. Holland* "as against the world, to his good name ; that is to say, he has a right that the respect, so far as it is well-founded, which others feel for him shall not be diminished. The right is however subject to two limitations. First, there are certain trivial imputations which do not infringe it. Secondly, there are certain circumstances under which an imputation which would otherwise be wrongful is held to be justifiable. Since the right is only to respect so far as it is well-founded, it is obviously not infringed by a truthful imputation. It is innate, or common to all man and lasts still death (2)" A defamatory statement according to English law is a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned, or avoided, or which has a tendency to injure him in his office, profession or trade. Such a statement, if in writing, printing, or other permanent form is a libel ; if in spoken words or

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(1) For further elucidation on the subject vide pp. 79-84 *supra*.

(2) Holland's Jur. p. 176 ; *Rahim* v. *Bachcha*, 51 A. 509=A. I. R. 1929 All. 214.

significant gestures a slander (1). The distinction between libel and slander carries with it, many important consequences (2).

Distinction between libel and slander under the English law.—The distinction between slander and libel under the English law, making libel a crime as well as a tort, has its roots in the feudal age. Written defamation, in replying lampoon, was then a conspicuous and typical weapon of attack between great men ; while slander, though also then as now in use among men of high degree and sometimes punished as a crime, was common property for every body—it was the billingsgate of the lower classes, for whom no man cared, and the parties, high or low squared the account on the spot. How bitter and dangerous the libel of those coarser times may be seen in such a one as the Ballad of Richard of Almaign, lampooning the King's brother for cowardice at the battle of Lewis (1264) (3) One can well understand that libel then should have been held a crime. The (abolished) statute of *Scandalum Magnatum* was a direct expression of the law ; but the idea of danger in the written word itseif, by easy confusion, took root—did the line '*Vox emissa volat, littera scripta manet*' help the idea ?—and hence the law of libel. This has one justification in modern times, to wit, in the dangers of the press. As for the rest, the distinction in question, and other distinctions between slander and libel, are one of little importance ; people do not trouble the courts much, in the greater concerns of modern life, with petty causes of either kinds (4).

Libel in English law.—According to English law, a libel in the widest sense of the word, is published writing, picture or similar production, of such a nature as to immediately tend to occasion mischief to the public, or to injure the character of an individual. Hence libels are of two kinds, public and private, public libel is one which tends to produce evil consequences to society, because it is either, blasphemous or obscene or seditious. The publication of such a libel is misdemeanour. To this class also belong libels on the Houses of Parliament, which are contempts or breaches of privilege ; libels on courts of justice, or persons concerned in proceedings before courts, which are contempts of court ; and libels on foreign rulers, ambassadors, etc. Private libels are of two kinds. A defamatory libel or a libel on the character of an individual, is a false and malicious writing, picture or the like, published concerning a certain person, and which either brings him within the danger of the law by accusing him of a crime, or has a tendency to injure him in his profession or calling, or by holding him up to scorn, ridicule, hatred or execration, impairs him in the enjoyment of general society, or by blackening the memory of one who is dead, tends to provoke a breach of the peace. A defamatory libel is a civil injury, giving rise to right of action. It is also a misdemeanour, and maks the offender punishable criminally by fine and imprisonment (5).

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(1) Fraser's Libel and Slander p. 1.
(2) Ibid.
(3) Law Quarterly Review, July 1902 p. 261.
(4) Bigelow on Law of Torts p. 149.
(5) Byrne's Law Dictionary.

Defamatory language is such language as injures or tends to injure a man's reputation. The test of the defamatory nature of any given language is its tendency to excite against the plaintiff feelings of hatred, contempt, ridicule, fear, dislike or disesteem (1).

Slander in English law.—A false and malicious statement concerning a person made by word of mouth is according to English law a slander, giving rise to a right of action for damages ; (*i*) if it imputes to the plaintiff the commission of a crime for which a corporeal punishment may be inflicted, or the having some contagious disorder which may exclude him from society, or has reference to his trade, office, or profession or (Slander of Women Act 1891) if it imputes unchastity or adultery to any plaintiff being a woman or girl ; or (*ii*) if it has caused him special damage. The first kind is called slander *per se* and the latter kind is called slander by reason of special damage. Thus, if one man falsely and maliciouly says of another that he is a thief or a swindler, or a leper, or that being a lawyer, he is a rogue, this is slander *pers se*. In the absence of special damage, words imputing unchastity to a man are not actionable, unless it is averred or unless the innuendo is that the misconduct in question was committed in the course of professional duties or under colour of an office. In the case of words imputing unchastity to a woman, the costs are as the costs in other actions, if there has been special damage, but if they are actionable only under the Act of 1891, then the Act provides that the plaintiff can recover no more costs than damages unless the judge certifies that there was reasonable cause for the action. Mere words of abuse are not actionable. In the class of slander on a person with reference to his occupation may also be included what is called slander of quality of goods namely, a false and malicious statement throwing discredit on the commodity in which the party deals, as where a man said of a trader : "He hath nothing but rotten goods in his shop (2)." So slander according to English law is a civil wrong only, though the words may happen to come within the criminal law as being blasphemous, seditious, or obscene, or as being in solicitation to commit a crime, or as being a contempt of court (3). "No action for slander will lie without proof of special damage, except (*i*) where the words charge the plaintiff with having committed a criminal offence which is punishable corporally (4) ; or (*ii*) where they impute that he has a contagious disease of a particular kind ; or (*iii*) where they are spoken of him in relation to his office, profession, or trade (5) or (*iv*) where they impute unchastity or adultery to any woman or girl (6).

Defamation according to Englisn law.—Defamation is the act of maliciously making a false and disparaging statement concerning a person, by 'disparaging' is meant that the statement is calculated to expose him to

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(1) *Harakh Chand* v. *Ganga Prasad*, 86 Ind, Cas. 922=23 A. L. J. 151=47 A. 391.

(2) Byrne's Law Dictionary.

(3) Fraser's libel and Slander p. 2

(4) *Webb* v. *Beavan*, 11 Q. B. D. 609.

(5) *Jones* v. *Jones* (1916) A. C. 481.

(6) Stat 54 & 55 Vict. C. 51 s. 1.

contempt, ridicule or public hatred, or to injure his character or credit, or to cause him to be feared or avoided or the like. Defamation is either libel or slander (1).

Privilege according to English law.—The most important of the modes in which a defamatory statement may be justified is by showing that it is privileged (2). The principal instances of privileged statements are those made between a solicitor or counsel and the client ; by a witness in the course of his examination, or a counsel in his speech ; those made where it is the duty of the person making it to do so, *e.g.*, where a master is giving the character of a servant, or where the matter is of public interest ; this last is sometimes called privilege by reason of the occasion : thus, statements made in the course of legal proceedings and parliamentary debates are privileged, as also are fair reports or comments on such proceedings, and fair criticisms on literary publications and works of art. The privilege is said to be absolute where the intention of the speaker or writer is immaterial (as in the case of judges, members of Parliament, etc.,) or qualified, when it does not excuse malice in fact, as in the case of statements made by persons in the discharge of some public or private duty, or in the conduct of his own affairs (3). Three elements are necessary to make the defence of a qualified privilege good, *i e.*, the occasion must be fit, the matter must have reference to the occasion and it must be published from right motives (4).

Malice in English law—A malice under the English law will be *presumed* where there is no legal justification. "If I traduce a man" said *Mr. Justice Bayley* "Whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done out of malice, because it is wrongful and intentional (5)." "Malice" said the learned judge in the same case, "in common acceptation, means ill-will against a person ; but in its legal sense, it means a wrongful act done intentionally without just cause or excuse."

Scope of Malice in defamation.—It has already been stated that there are two kinds of privilege according to the laws of England, absolute privilege and qualified privilege. Where the occasion is one of absolute privilege no action for defamation lies against the person making the defamatory statement, however untrue aud malicious the statements may have been. But where the occasion is one of qualified privilege, proof of actual malice or malice in fact, has the effect of rebutting the *prima facie* protection afforded by such an occasion. Of course even in such a case the burden of proving actual malice on the part of the defendant lies on the plaintiff (6). "If the occasion is privileged",

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(1) Byrne's law Dictionary.
(2) Holland Jur. p. 176.
(3) Byrne's Law Dictionary.
(4) *Kishori* v. *Musa*, 9 O & A. L. R. 302.
(5) *Bromage* v. *Prosser*. 4 B. & C. 255 ; *Gidney* v. *Anglo Indian Association*. A. I. R. 1930 Rang. 177=8 Rang. 250.
(6) *Somerville* v. *Hawkins*, 10 C. B. 583; *Taylor* v. *Hawkin's*, 16 Q. B. D. 308 ; *Jenoure* v. *Delmege*. (1891) A. C. 73 ; *Aberdeens* v. *Macley*, (1893) 9 T. L. R. 539.

said *Lindley L. J.* in *Stuart* v. *Bell* (1) "the plaintiff must prove malice in fact; the burden of proving this is on him, as was settled in *Clark* v. *Molyneux* (2). Malice in fact is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or, in the words of *Brett L. J.* (3)." "It lies on the party" says *Lord Campbell L. C.* in *Dickson* v. *The Earl of Wilton* (4) "who would deprive the other party of his privilege to show what the law calls 'malice.' But by that term is meant, not only spite, for any indirect motive other than a sense of duty, is what the law calls 'malice'." In *Royal Aquarium* v. *Parkison* (5), *Lord Esher M. R.* said: "Then comes the question whether this was a privileged occasion. Where, as in this case, a body of persons are engaged in the performance of the duty imposed upon them, of deciding a matter of public administration, which interests not themselves, but the parties concerned and the public, it seems to me clear that the occasion is privileged. Therefore, though what is said amounts to a slander, it is privileged, provided the person who utters it is acting *bona fide*, in the sense that he is using the privileged occasion for the proper purpose and is not abusing it. It is sometimes said that he must be acting *bona fide* and not maliciously; but I do not think that that way of expressing the rule is quite exhaustive or correct. I think the question is whether he is using the occasion honestly or abusing it. If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion. The jury here appear to have thought that the defendant said what was false knowing it to be false. I cannot agree with that view of the case. If the case depended on a finding to that effect, I should be very loathe to find it. But there is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held by a jury to have abused the occasion, and in that sense to have spoken maliciously. If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion. Therefore the question seems to me to be whether there is evidence of such a state of mind on the part of the defendant. It has been said that anger would be such a state of mind, but I think that gross and unreasoning prejudice, not only with regard to particular people, but with regard to a subject matter in question, would have the same effect. If a person charged with the duty of dealing with other people's rights and interests has allowed his mind to fall into such a state of unreasoning prejudice in regard to the subject-matter that he was reckless whether what he stated was true or false,

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(1) (1891) 2 Q. B. 341 at p. 351.
(2) 3 Q. B. D. 237; see also *Narsingha* v. *Kasim*, 9 Ind. Cas. 279.
(3) In *Clark* v. *Molyneux*, 3 Q. B. D. 341 at p. 347.
(4) 1 F & F. 419=115 R. R. 926.
(5) (1892) 1 Q. B. 431.

there would be evidence upon which a jury might say that he abused the occasion." In the same cause *Lopes L. J.* said : "The slanderous words complained of were uttered in the course of a debate with regard to the propriety of granting the plaintiffs a licence for music and dancing. The occasion was privileged, and the learned judge so held. Not only must the occasion create the privilege, but the occasion must be made use of *bona fide* and without malice. The defendant is, only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose. He is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive. This casts upon the plaintiffs the burden of proving express malice or malice in fact. If it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it not stopping or taking the trouble to ascertain whether it is true or not—stated it recklessly by reason of his anger or other indirect motive—the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive." So the word 'malice' in the legal use of that term, is not limited to the hostility of feeling, but by virtue of its etymological origin, extends to any state of the mind, which is wrong or faulty (whether evinced in action by excess or defect) such as would be unjustifiable in the circumstances, and incompatible with thoroughly innocent intention (1).

If the defendant has failed to prove that he made the statement on a privileged occasion honestly, the plaintiff is not called upon to prove actual malice and a privilege which affords a ground of defence can only arise either from the nature of the publication or from relation between the parties (2). If the statement is not made on privileged occasion, the law implies malice if the words are defamatory and untrue and the plaintiff is entitled to damages without any proof of express malice (3). In *William Irwin* v. *Donald James Reed* (4). *Mr Justice Mokerjee* said : "In the case before us, we have already held that there was needlessly extensive publication of the allegations made by the defendant. [*Gilpin* v. *Flower* (5)] the language used was also needlessly violent, [*Wright* v. *Woadgate* (6), *Oddy* v. *Panlet* (7), *Spill* v. *Moule* (8), *Edmondson* v. *Birch* (9) *Nevil* v. *Fine Arts Co* (10) *Laughton* v. *Bishop of Sodar* (11) and *Adam* v. *Ward* (12), the statements were contrary to the facts and the Defendants has persisted in his allegations even after

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(1) *Emperor* v. *Abdool*, 9 Bom. L. R. 230=31 B. 293.

(2) *Mahomed* v. *Bishunath*, 26 A. L. J. 760=A. I. R. 1928 All 318.

(3) *Ogilvie* v. *Punjab Akhbarat*, 117 Ind. Cas. 90=A. I. R. 1929 Lah 561 ; see *Rahim Buksh* v. *Bachha Lal*, 51 A. 509=A. I. R. 1929 All. 214=27 A. L. J. 303.

(4) 48 C. 304=25 C. W. N. 150.

(5) 9 Exch. 615.

(6) 2 C. M. & R. 573.

(7) 4 F. & F. 1010.

(8) L. R. 4 Ex. 239.

(9) (1907) 1 K. B. 381.

(10) (1895) 2 Q B. 156, 170 ; (1897) A. C. 68.

(11) L. R. 4 P. C. 495

(12) (1917) A. C. 309, 330.

he had been assured by *Mr. Norman* and *Mr. Hill* that the charge he had brought forward against the plaintiff was unfounded [*Warwick* v. *Foulkes* (1), and *Simpson* v. *Robinson* (2)]. Some of these circumstances taken individually might not have been conclusive, but estimating their cumulative effect, we are not prepared to dissent from the view that the statements were made maliciously in the sense explained above and that the plea of privilege cannot be sustained.''

Publication.—No action for libel or slander is maintainable unless the same be communicated to a third person by the defendant. "If the statement is sent straight to the person" said *Lord Esher M. R*, in *Pullman* v. *Hill & Co* (3) "of whom it is written, that is no publication of it, for you cannot publish a libel of a man to himself (4). If a letter is not communicated to any one but the person to whom it is written, there is no publication of it." But it would be publication if the writer of the statemant shows it to any other person than the person defamed (5). But when libel is written in a postcard, the presumption is that it has been published (6). Put even in such a case it is open to the defendant to establish—although it is very difficult to give proof of it--that the postcard was never read by any one else (7). But where the libel is sent to the person defamed by a telegram, it is necessrily communicated to all the clerks through whose hands it passes (8). Although according to the common law husband and wife are one person, yet for the purpose, of publication of a libel they are essentially distinct and different persons and as such sending a letter to the wife containing defamatory statements as regards her husband is sufficient publication (9). Where a libel is made through a news paper, the sale of each copy of the newspaper is a *prima facie* publication thereof (10).

Special damage.—Special damage means actual damage (11) or the loss of some definite temporal advantage. Neither the possibility of actual damage (11) nor mental pain or distress or bodily illness can be considered as special damage. The risk of temporal loss is not the same as temporal loss (12). "The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries. In all actions, accordingly, on the case, where the damage actually decreed is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which the acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As

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(1) 12 M. & W. 508.
(2) 12 Q. B. 511.
(3) (1891) 1 Q. B. 524 at p. 527.
(4) *Barrow* v. *Lewellin*, Hob. 62 ; *Queen Empress* v. *Sadasiv*, 18 B. 205 ; *Biswanath* v. *Keshab*, 30 C. 402.
(5) *Pullman* v. *Hill*, (1891) 1 Q. B. 524 ; *Baxsius* v. *Gobbet*, (1894) 1 Q. B. 842 ; *Gordon* v. *Street*, 69 L. J. Q. B. 45.
(6) *Robinson* v. *Jones*, 4 L. R. Ir. 391 ; *Queen* v. *Vidya Sankar*, 6 M. 38.
(7) *Huth* v. *Huth*, (1915) 3 K. B. 32.
(8) *Williamson* v. *Freer* L. R. 9 C. P. 393.
(9) *Wenman* v. *Ash*, 13 C. B. 836 ; *Jones* v. *Williams*, 1. T. L. R. 572.
(10) *Duke of Burnswick* v. *Hurmer* 19 L. J. Q. B. 20.
(11) *West* v. *West*, 27 T. L. R. 478,
(12) *Chamberlain* v. *Boyd*, 11 Q. B. D. 407.

much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done (1)".

Defence to action for libel or slander.—In an action for libel or slander a defendant may plead (i) Privilege, which may be either (a) absolute or (b) qualified ; (ii) Fair comment ; (iii) Justification (iv) Accord and satisfaction and (v) Apology.

Fair Comment.—"It is not correct to say" said *Lord Blackburn* "as some writers do, that *bona fide* comments on matters of public interest come under qualified privilege (2)." The liberty of the Press in his respect is no greater and no less than the liberty of every subject (3). In *Arnold* v. *King Emperor* (4) *Lord Shaw* observed : "Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful ; but the range of his assertions ; his criticism, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position (5)." "Fair comment does not negative defamation, but establishes a defence to an action based on defamation (6)". "It is precisely where the criticism would otherwise be actionable as a libel that the defence of fair comment comes in (7)." Honest belief in the truth of the statement does not make the comment fair (8). "Every latitude must be given" said *Lord Esher M. R.* in *Merivale* v. *Casson* (9) "to opinion and to prejudice, and then an ordinary set of man with ordinary judgment must say whether any fair man would have made such a comment. Mere exaggeration or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudicial the writer, it may still be within the limit" The comment must be such that a fair mind would use under the circumstances (10). "Whether the criticism be upon a literary production or the conduct of a public man, it is for the jury, I think, to find whether the imputation based

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(1) *Ratcliffe* v. *Evans*, (1892) 2 Q. B. 524.

(2) *Campbell* v. *Spottiswood*, 3 B & S, 769 ; see also *Naganath* v. *Subramania*, 40 Ind. Cas. 126=32 M. L. J. 392=21 M. L. T. 324.

(3) *Reg* v. *Gray*, (1900) 2 Q B. 36 (40)

(4) 83 L. J. P. C. 299=18 C. W N. 785=41 I. A. 149=41 C. 1023 (P. C).

(5) See also *Neville* v. *Dominion of Canada News Co.* (1915) 3 K. B. 561=84 L. J. K. B. 2105.

(6) *Peter Walker* v. *Hodgson*, (1909) 1 K. B. 239.

(7) *Per Lord Loreburn* in *Dakhyl* v. *Labouchere*, (1908) 2 K. B. 325 (327).

(8) *Campbell* v. *Spottishwood*, 32 L. J, Q B. 185.

(9) 20 Q. B. D, 275. 280, 281.

(10) *Joyut* v. *Cycle Trade Cycling Co.*. (1904) 2 K. B. 292 (294)

upon facts truly stated does or does not honestly represent the opinion of the person who gives expression to it and was not without foundation (1)."

"It was disputed" says *Cockburn C. J.* in *Seymour* v. *Butterworth* (2) "that the public conduct of a public man might be discussed with fullest freedom, it might be made the subject of hostile criticism and of hostile animadversions, provided the language of the writer was kept within the limits of an honest intention to discharge a public duty, and was not made a means of promulgating slanderous and malicious observations."

In *Ramkrishna Pillai* v. *Kamna Kora Menon* (3), *Mr. Justice Wallis J.* said: "As I have already said, there can be no doubt that fair comments upon any matter of public interest in which are included the publications in a news paper are protected publications in the absence of malice. Whether they should properly be called privileged or not has been the subject of discussion, but as it was laid down in *Merivale* v. *Carson* (4) and *Thomas* v. *Bradbury Agnew Co. Ltd.* (5) by *Collins M. R.* the question whether you call such publications of comment privileged or not is of no practical consequence." In *Campbell* v. *Spottiswood* (5) *Cockburn C. J.* said: "It is said that it is for the interest of society that the public conduct of men should be criticized without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if it were to sanction attacks upon them, destructive of their honour and character, and made without any foundation. I think, (now these are important words), the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadverson, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest but also well founded, an action is not maintainable." In *Joynt* v. *Cycle Trade Publishing Co.* (7) *Kennedy J.* said: "The comment must not mis-state facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further it must not convey imputations of an evil sort, except so far as the facts, truly stated warrant the imputation (8)."

In the course of public discussion on matters of public interest proceeding in the press from day to day, it is too much to expect that a writer in each article should set out all the facts upon which his comment is based, including admitted facts which are within the knowledge of every one interested in the question (9).

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(1) *Per Buckley L. J.* in *Hunt* v. *Star News Paper Co. Ltd.* (1908) 2 K. B. 319, 323, 324.
(2) 3 F & F. at p. 376.
(3) 21 Ind. Cas. 625=25 M L J. 475.
(4) 20 Q. B. D. 275.
(5) (1906) 2 K. B. 667.
(6) 3 B & S. 769 at p. 777.
(7) (1904) 2 K. B. 292.
(8) Cited with approval by *Cozens Hardly* in *Hunt* v. *Star News Paper* (1908) 2 K. B. 309.
(9) *Madras Times Printing* v. *Rogers*, 32 Ind. Cas. 498=30 M. L. J. 294=(1916) M. W. N. 267.

Where a journalist is found to comment on public questions with care, reason and judgment, he is not unnecessarily deprived of his privilege merely because there are slight unimportant deviations from absolute accuracy of statement, where those deviations do not affect the general fairness of the comment. The articles must be considered rather in their entirety than by separate insistence on isolated passages, and the court must decide what impressions would be produced on the mind of an unprejudiced reader, who knowing nothing of the matter before, read the articles straight through. Comment to be fair must be comment on facts truly stated, though later they may turn out not to be true at all. Fair comment implies a much greater latitude than drawing of inevitable inferences. All that is required is that the inference from facts truly stated should be fair, that is, one possibly out of many equally or almost equally fair inferences (1),

Absolute privilege.—"The real doctrine of what is called 'absolute privilege' is that in the public interest it is not desirable to enquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I shall call it rather of a right of the public—the privilege is to be exempt from all inquiry as to malice: that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants, should be perfectly free and independent, and to secure their independence, that their acts and words should not be brought before tribunals for enquiry into them merely on the allegation that they are malicious (2)."

Statement made in judicial proceedings.—"The authorities establish beyond all question this, that neither party, witness, counsel, jury or judge can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies whether against judges, counsels, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognized by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed (3)" In the same cause at p. 442 *Lord Esher M. R.* said: "It is true that, in respect of statements made in the course of proceedings before a Court of Justice, whether by judges, counsels, or witnesses, there is an absolute immunity from liability to an action, the ground of that rule is public policy." So far as criminal liability is concerned a member of a bar in this country has no absolute privilege. An advocate who makes defamatory statement in the conduct of a case has no wider protection than a layman; that is to say he has to bring his case within the

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(1) *Surajmal* v. *Horniman*, 47 Ind. Cas. 449=20 Bom. L R. 185.

(2) *Per Channel J.* in *Bottomley* v. *Brougham* (1908) I K. B. 584, see also *Burr* v. *Smith* (1909) 2 K. B. 306, 310. 311.

(3) *Per Lopes L. J.* in *Royal Aquarian* v. *Parkinson* (1892) 1 Q B. 431 (451).

terms of exception 9 to s. 499 of the Indian Penal Code and under s. 105 of the Evidence Act ; the burden of proof would normally be with him (1). But if a party to a judicial proceeding is sued in a Civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his liability in the absence of statutory rules applicable to the subject must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the correspondent relevant rules of the common law of England (2).

Justification.—In an action for libel or slander the defendant can take up the plea that the statement complained of are true in substance and in fact. The rule is well illustrated by *Littledale J* when he said, "the law will not permit a man to recover damages in respect of an injury to character which he either does not or ought not to possess (3)." To prove the truth of a slanderous imputation is a complete answer to the slandered person's claim for damages (4). But according to the Indian Penal Code, simple proof of the truth of the slanderous statement is not sufficient justification to avoid criminal liability (5). In addition to this it must be for the benefit of the public good (6). In order to avoid civil liability it must be proved that the whole of the statement is substantially true in fact (7). There must not be any exaggeration of the truth, otherwise it would not be a justification (8). Where a defendant in a libel suit wishes to plead justification on account of the truth of the matters alleged in the libel, he must do so specifically and distinctly (9).

Whether distinction between slander and libel should be observed in India.—In the case of *Parvati* v. *Mannas* (10), *Turner C. J.* sitting with *Muthuswami Ayar J.* condemned the distinction which exists under the English law between slander and libel. He thus expressed himself : "The difference between the extent of the publication of defamatory terms, according as to whether they are committed to print or uttered orally, is in reality accidental. Defamatory matter, when written, is frequently addressed only to a single person ; when printed, its publication may be arrested immediately. The publication of a defamatory imputation in a news-paper circulated extensively in a place where the person defamed is unknown may cause him far less injury, whether pecuniary or sentimental, than its publication orally in the neighbour-

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(1) *Tulsidas Auchnal* v. *Billimoria*, 34 Bom L. R. 910=139 Ind. Cas. 275= 33 Cr. L. J. 740=A. I. R. 1932 Bom. 490 ; see also *Satish Chandra* v. *Ram Doyal*, 24 C. W. N. 982 (F. B.)

(2) *Satis Chandra* v. *Ram Doyal*, 24 C. W. N. 982 (F. B.).

(3) *M' Pherson* v. *Daniels*, 10 B. & C. at p 272.

(4) *Changee Ram* v. *Raya*, 23 Ind. Cas. 3=7 L. B. R. 86.

(5) Vide Exception 1, to section 499 ; see also 2 Ind Cas. 775.

(6) Ibid.

(7) *Ingram* v. *Lawson*, 5 Bing. N. G. 66 ; *Edsall* v. *Rusell*, 4 M. & G. 66.

(8) *Clarkson* v. *Lawsan* 6 Bing. 266

(9) *Ajit Singh* v. *Radha Kissen* A. I. R. (1931) Lah 246=32 P. L. R. 772.

(10) 8 M. 175.

hood in which he resides, to his acquaintances or to persons who can influence his advancement in life. In this country we are not bound to adopt the rules regulating compensation for injuries which are recognised by the English Courts, though it has been the practice of Judges in British India to regard the decisions of the English Courts with the highest respect as embodying the wisdom and experience of a judiciary, whose reputation is second to none for independence and ability. But the distinction drawn by the English law between written or printed and oral slander, which is said to have had its origin in the circumstances that the most frequent instances of oral slander were at one time punishable by Ecclesisastical courts (2 Salked 694) has been condemned by many eminent English lawyers. *Mr. Starkie* observes that the distinction 'must be regarded as an absolute peremptory rule not founded in any obvious reason or principle.' In *Roberts* v. *Roberts* (1) *Cockburn C. J.* and *Crompton* and *Blackburn L. J.* pronounced the law of England unsatisfactory and regretted they were bound by it. In *Lynch* v. *Knight* (2), the *Lord Chancellor Campbell* expressed the same views, and *Lord Brougham*, in the same case declared that the English law was in this respect not only unsatisfactory but barbarous. The Indian law commission, of which *Lord Macaulay* was a member, in its report on the proposed Penal Code, demonstrated that the English law regarding defamation was inconsistent and unreasonable (Introductory Report, note p. 7, *Macaulay's Works* p. 546). The civil law does not recognise the distinction, nor does the law of Scotland, and the recommendations of *Lord Macaulay's* commission were approved and accepted by the British Indian Legislature (3). We therefore, feel justified in giving effect to our conclusion that the rule we are considering is not founded on natural justice and should not be imported into the law of British India (4)" But the majority of the Full Bench in the above case held that mere use of abusive and insulting language, such as *sala*, *haramzada*, *soor*, *baper beta*, apart from defamation, is not actionable irrespective of any special damage (5). But in a later case of *Shoobhagee kheri* v. *Bokhori Ram* (6), Mr. *Justice Mukherjee* supported the distinction between libel and slander as it obtained in England. In delivering the judgment he said : "A libel is a malicious defamation, expressed either by writing, or printing, or by signs, pictures, effigies or the like, tending to blacken the memory or reputation, or publish the natural or alleged defects of one who is alive, and thereby expose him to public hatred, contempt, ridicule or obloquy, or to cause him to be shunned or avoided or to injure him in his office, business or occupation (7)".....As was observed by *Mr. Justice Story* in *Dexter* v. *Spear* (8), any publication the tendency of which is to degrade and injure another person, or bring him into contempt, hatred

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(1) 33 L. J. Q. B. 249.
(2) 9 H. L. C. 577 (594).
(3) Vide the Indian Penal Code s. 499.
(4) Cited with approval by *Ghose, J* (disenting) in *Girish Chandra* v. *Jatadhari* 26 C. 653 F. B.
(5) *Girish Chandra* v. *Jatadari*, 26 C. 653.
(6) 4 C. L. J 390 (395).
(7) American and English Encyclopedia of law, Vol XVIII, p. 861.
(8) 4 Mason, 115.

or ridicule, or which accuses him of a crime punishable by or of an act odious and disgraceful in a society, is a libel.....The next question which requires consideration is whether the defamatory words are actionable without proof of special damage. The learned vakil for the respondents contended that proof of special damages is necessary, and he placed considerable reliance upon the decisions of this court in *Girish Chandra* v. *Jatadhari* (1) and *Bhooni Money* v. *Natobar* (2). The cases refered to, however, are clearly distinguishable, as they were both cases of slander. As was observed by *Campbell C. J.* in *Foster* v. *Scripps* (3), the authorities holding that specific oral words are not actionable without proof of special damage, have no necessary bearing on actionable character of the same and similar words in writing. With regard to that species of defamation, which is effected by writing or printing, and which is technically described as libel, although the rules applicable to it are in general the same as would apply to verbal defamation or slander, yet, in other respects it is treated with sterner rigour than the latter. It is well settled that an action may be maintained for the publication of written words, when it could not be maintained for the publication of the same words, by mere oral disclosure. Thus, oral words which tend to disgrace the person of whom they are spoken and which do not impute the commission of a crime, may not be actionable without proof of special damage, whereas written words, the manifest tendency of which is seriously to hurt another's reputation, are actionable without proof of special damage. This distinction was well expressed and explained in *Watson* v *Trask* (4) in which *Wright J.* observed as follows : 'whatever charge will sustain a suit for slander, where the words are merely spoken, will sustain a suit for libel if they are written or printed or published ; and it will be seen at one glance that many charges, which if merely spoken of another would not sustain a suit for slander will, if written or printed or published, sustain a suit for libel because of their being embodied in a more permanent and enduring form, of the increased deliberation and malignity of their publication and of their tendency to provoke breaches of the public peace.' I am not unmindful that this distinction between the actionable quality of oral and written words has been critised by eminent judges, including *Sir James Manesfield C. J.* [*Thorley* v. *Lord Kerry* (5), *Lynch* v. *Knight* (6), *Roberts* v. *Roberts* (7), *Alexander* v. *Jenkins* (8), *Parvathi* v. *Mannar* (9)]. But the distinction does not appear to be based on an intelligible reason, namely, that written words are necessarily attended with deliberation, and their publication is more calculated to produce permanent mischief than oral words ; and at any rate, the distinction is firmly imbedded in the law of libel and slander and is universally recognised.

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(1) 26 C. 653 (F. B.)
(2) 28 C. 452.
(3) 33 Am. Rep. 403.
(4) 27 Am. Dec. 271.
(5) 4 Taunt. 335.
(6) 9 H. L. C. 577.
(7) 33 L. J. Q. B. 249.
(8) (1892) 1 Q. B. 797.
(9) 8 M. 175.

No doubt, in order to sustain an action for written defamation, it has to be proved that the tendency and effect of the language used is to defame or degrade the plaintiff, or to render him odious and contemptible (1). But once the defamatory character is established, it is not necessary to prove special damage (2)."

In *Bhooni Money Dassee* v. *Natobor Biswas* (3) *Harington J.* observed: "There is no instance in English law, in which an action on the case for mental distress caused by a criminal or tortious act will lie. The English law on the subject was laid down in the House of Lords by *Lord Wensley dale* in these words: 'Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone: See *Lynch* v. *Knight* (4) and that statement, since the Full Bench case (5), to which I have referred. The next question, namely, whether defamatory words imputing unchastity to a woman are actionable in this country without proof of special damage was left open by the Full Bench case, to which I have referred. Under the law of England as it stood prior to 1891, such words would not have been actionable without proof of special damage. Is that law to be applied in this country? It is stated in *Morley's Digest* Vol. I p. xxii, that the Common Law of England, as it prevailed in 1726, is the law administered by the Supreme Courts, and that statement is treated as correct by *Lord Kingsdown* in the case of the *Advocate General of Bengal* v. *Ranee Surnomoyee Dassee* (6), in which he observes that "the English law, civil and criminal, has been usually considered to have been made applicable to natives, within the limits of Calcutta, in the year 1726 by the Charter 13 Geo. I.' This must be taken subject to certain limitations; many provisions of the English Law, as for example that under which bigamy is a felony, were obviously unsuitable to the natures of this country and were therefore not introduced But there is nothing unreasonable, having regard to customs of this country, in holding that, that part of the common Law of England which gave a person injured by the slanderous words the right to recover damages in an action has been introduced. In my opinion it is by virtue of the Common Law of England introduced into Calcutta by the Charter of 1726 that the action is maintainable. (7)" But this decision was not followed in later cases. In a recent Madras case, it has been held that the rule of English Common Law that spoken words imputing unchastity to a woman are not actionable without proof of special damage owes its origin to conditions peculiar to England and rests on the most artificial distinctions. It is not applicable to India and a claim for damages by a Hindu

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(1) *Hirshfield* v. *Fort*, 29 Am. St. Rep. 660.

(2) See also *Jogeswar* v. *Dinaram*, 3 C. L. J. 140; *Sukan Teli* v. *Bipal Teli*, 4 C. L. J. 388.

(3) 28 C. 452 a case, the cause of action in which arose without the jurisdiction of the original side of the Calcutta High Court.

(4) 9 H. L. C. 577, 598.

(5) *Girish Cunder* v. *Jatadhari*, 26 C. 653.

(6) 9 M. I. A. 387, 426.

(7) See also *Girwar Singh* v. *Siraman Singh*, 9 C. W. N. 847=2 C. L. J. 396=32 C. 1060.

woman in respect of an allegation of unchastity is sustainable on the original side of the High Court without proof of special damage (1).

It has been held by the *Allahabad High Court* that the artificial rule in England whereby suits for oral defamation are restricted to three classes, *viz.*, where the words impute the commission of a criminal offence, where they impute being subject to contagious disease and where they carry a charge of misconduct in business, does not prevail in India, and in this country the language used by the defendant imputing moral misconduct to the plaintiff is actionable. But in the absence of proof of substantial loss having resulted from such language the plaintiff can get only nominal damages (2). In a very recent case of the same High Court, the Court observed: "The law in British India relating to civil liability in actions founded upon tort has not been settled by legislature. The English Common law of tort is not applicable to India in its entirety and the rule of English common law as enunciated or recognised by English Courts ought not to be applied to this country with inflexibility without regard to the dissimilarity in the two countries with reference to their customs and usages, the state of society and the conditions of things to be found therein. The common law of England has rarely been applied in deciding cases relating to slander outside the presidency towns. In the absence of any statutory provision, suits for damages founded upon tort and more specially which are based upon slander have to be decided according to the principles of justice, equity and good conscience and in the light of judicial principles to be found in the decisions of English Judges and recognised jurists, which are broad-based upon human nature and common experience of mankind. The distinction between slander being actionable *per se* in certain cases and not being actionable in other cases without proof of special damage, has not been recognised or followed with unanimity by the Indian High Courts. As a principle of equity, every man is entitled to have his reputation preserved in tact, and any words calculated to infringe this right afford a good cause of action (3).

In a Full Bench case of the Calcutta High Court (4) *Mr. Justice Mookerjee* in delivering the judgment of the Full Bench observed: "Before we examine these decisions, it is necessary to emphasise that in this country, questions of civil liability for damages for defamation and questions of liability to criminal prosecution for defamation do not, for purpose of adjudication, stand on the same basis (5); as regards the former we have no codified law; as regards the

(1) *Narayan Sha* v. *Kannama bai*, 55 M. 727=62 M. L. J. 608=A. I. R. 1932 Mad. 445; see also *Hirabai* v. *Dinshaw*, 51 B. 167=98 Ind. Cas. 949=28 Bom. L. R. 1334=A. I. R. 1927 Bom. 22.

(2) *Sagar Ram* v. *Badu Ram*, 1 A. L. J. 102.

(3) *Rahim Bux* v. *Bachha Lal*, A. I. R. 1929 All. 214=51 A. 509=27 A. L. J. 303; see also *Dawan Singh* v. *Mohip Singh*. 10 A. 425; *Ajudhia Pershad* v. *Shibbu Mal*, 27 P. R. 1889; *Gaya Din* v. *Mahabir*, 95 Ind. Cas. 90=A. I. R. 1926 Oudh. 363=9 O. W. N. 443.

(4) *Satish Chandra Chuckerburtty* v. *Ram Dayal De*, 24 C. W. N. 982=48 C. 388=59 Ind. Cas. 143.

(5) See also *Mahomed* v. *Bisha*, 26 A. L. J. 760=A. I. R. 1928 All. 316.

latter, the relevant provisions are embodied in the Indian Penal Code This fundamental distinction, as will presently appear, has not always been borne in mind. The position then is that questions relating to civil liability for damages for defamation must be determined with reference to either the rules of English common law where they are shown to be applicable (1) and with reference to principles of justice, equity and good conscience in all other cases. The principle that, in all cases for which no specific statutory directions are given, Judges should act according to justice, equity and good conscience, was expressly formulated in section 93 of the Administration of Justice Regulation promulgated by the Governor General in Council on the 5th July 1781. The rule was thereafter necessarily reproduced in section 21 of Reg. III of 1793, in section 24 of the Bengal Civil Courts Act, 1871, and in section 37 of the Bengal Civil Courts Act, 1887. Now, the decision of a case according to the principles of justice, equity and good conscience has generally meant decision according to the principles of English Law applicable to a similar state of circumstances. This was justified in *Dada* v. *Babaji* (2) mentioned by *Jenkins C. J.* in *Shrivrao* v. *Pundlik* (3) on the authority of the judgment of the Judicial Committee in *Vardenseth* v. *Luckputty* (4), but it is doubtful, whether the judicial committee really intended to enunciate the comprehensive rule attributed to their decision. *Lord Hobhouse*, however in a later case of *Waghela* v. *Masludin* (5) stated that 'equity and good conscience' had been 'generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances.' See also *Maharaja of Vizianagram* v. *Raja Setrucherla* (6). In this connection, reference may be made to the observation of *Sir Barnes Peacock C. J.* in *Rambuksh* v. *Madhusudan* (7) that where rights of parties were determined according to the general principles ..of equity and justice, this must be done without any distinction, as in England, between that partial justice which is administered in the courts of law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of Equity. This was adopted by *Jenkins C. J.* in *Debnarayan* v. *Chunilal* (8). In these circumstances, when the law of torts has not been codified and cases of civil liability for damages have been left to be decided according to rules of justice, equity and good conscience, it is not surprising to find that the law of civil wrongs as administered in British Indian Courts has been practically taken in its entirety from the common law of England, the only justice, equity and good conscience which Judges steeped in the principles of English jurisprudence could and did administer in default of any other rule was so much of English law and usage as seemed reasonably applicable in this country. A familiar illustration of this is afforded by the judgment of the Judicial Committee in the case of *Gonesh*

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(1) *Mayor of Lyons* v. *E. I. Co.*, 1 M. I. A. 175.
(2) 2 B. H. C. R. 338.
(3) 26 B. 437=4 Bom. L. R. 90.
(4) 9 M. I. A. 303.
(5) L. R. 14 I. A. 89=11 B. 551.
(6) 13 M. L. J 83.
(7) B. L. R. (F. B.) 675, (679).
(8) 41 C, 137=17 C. W. N. 1143=18 C. L. J. 603.

Dutt Sing v *Mugneeram Choury* (1), where the principles that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding was enunciated in the following terms in affirmance of the decision of this court in *Mugneeram* v. *Gonesh Dutt* (2): 'Their Lordships hold this maxim which certainly has been recognised by all the courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harrassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury'. This, in the absence of legislation on the subject of civil wrongs, is, if we may say so without impropriety a perfectly legitimate process; but if we were to read into the provisions of the Indian Penal Code an exception which finds no place therein...the operation would in essence be legislation in the guise of judicial interpretation...We may add that no question has been, or indeed, could be raised as to the prerogative and power of the legislature to discard the principles of the common law, wholly or partially, and, in its enactments, to embody other rules which it prefers [see the observations of *Lord Atkinson* in *Rodriguez* v. *Speyer Bros* (3), where the reason for the rule of immunity of Judges, Advocates and witnesses is lucidly stated.]"

In default of special legislation, the Indian courts are to apply the rules of equity and good conscience which include the common law. So the English common law should be applied to Indian cases of defamation (4). The difference between a criminal case and a civil suit founded upon libel is a difference not merely in form but is one of substance (5). So suits for damages founded upon tort or more specially those upon slanders have to be decided according to the principles of justice, equity and good conscience and in the light of judicial principles laid down by eminent English Judges and recognised jurists (6). The liability of the defendant in a civil suit for damages for defamation in respect of statements made by him as witness or accused in a prior judicial proceeding must be determined in the absence of specific statutory provisions by the rules of justice, equity and good conscience, which have been understood to be the rule of the English Common Law (7). The rule of English law as regards immunity of counsel for words uttered in the course of administration of the law is also applicable in India as a principle of justice, equity and good conscience (8).

Jurisdiction of English Courts to grant injunction in cases of slander and libel.—Before the passing of the Judicature Act, the Court of Chancery had no jurisdiction to enjoin libellous, immoral, and indecent publi-

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(1) 11 B. L. R. 321 = 17 W. R. 283.
(2) 5 W. R. 134.
(3) (1919) App. Cas. 59.
(4) *Ram Kirat* v. *Bisesswar*, 11 Pat. 693.
(5) *Mahomed Samiullah* v. *Bishun Nath*, 26 A. L. J, 760 = A. I. R. 1928 All. 316.
(6) *Rahim Baksh* v. *Bachha Lal*, 51 A. 509 = A. I. R. 1929 All. 214.
(7) *Ma Mya Sewe* v. *Maung Maung* 2 Rang. 333 = 1925 Rang. 15.
(8) *Jagat Mohan* v. *Kalipada*, 66 Ind, Cas. 861 = 3 Pat. L. T. 276.

cations merely because they are such, deeming the legal remedies by civil actions for damages and criminal prosecutions adequate to afford relief and remedies (1). "Prior to the Common Law Procedure Act, 1854" says *Lord Coleridge C. J.* in *Bonnard* v. *Perryman* (2) "neither Courts of Law nor Courts of Equity could issue injunctions in such a case as this (3): nor Courts of Equity, because cases of libel could not come before them (4); nor Courts of Law, because prior to 1854 they could not issue injunctions, at all. But the 79th and 82nd sections of the Common Law Procedure Act, 1854, undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation. This power was, by the Judicature Act, 1873, conferred upon the Chancery Division of the High Court, representing the old Courts of Equity. Nevertheless, although the power had existed since 1854, there is no reported instance of its exercise by a Court of Common Law till *Saxby* v. *Easter brook* (5) which was decided in 1878. In that case the injunction was not applied for, nor, of course, granted, till after the verdict and judgment had ascertained the publication to be a libel. That case was acquiesced in; and about the same time the Chancery Division began, and it has since continued, to assert the jurisdiction, which has been questioned before us, of granting injunctions on the interlocutory application of one of the parties to an action for libel. *Sir George Jessel* in *Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (6) distinctly asserted the jurisdiction, and it was considered and established in an elaborate judgment of this Court in *Liverpool Household Stores Association* v. *Smith* (7) in which *Lord Justice Cotton*, affirming indeed the refusal of *Mr. Justice Kekewich* to issue the injunction prayed for in that case, asserted the jurisdiction in plain language, and went on to explain the principles on which, in his opinion, the jurisdiction should be exercised. There have been other examples, but these are sufficient; and we do not doubt, upon the true construction of the statute and upon authority, that as matter of jurisdiction *Mr. Justice North's* (8) order might lawfully be made.

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(1) *Southey* v. *Sherwood*, 2 Meriv. 435; *Gee* v. *Pritchard*. 2 Swanst, 413; *Walcot* v. *Walker*. 7 Ves 1; *Sceley* v. *Fisher*. 11 Sim. 581; *Hime* v *Dale*, 2 Camp. 27: *Clark* v. *Freeman*, 11 Beav. 112; Spelling on Injunctions etc. § 886.

(2) (1891) 2 Ch. 269 (283). *Lord Esher M. R, and Lindley, Bowen and Lopes, L. JJ.* concurred with *Coleridge C. J.*

(3) The question before their Lordships was "is there jurisdiction in the Supreme Court to issue an injunction to restrain the publication of an alleged libel, either at all, or before the libel has been adjudged to be such?"

(4) Before the Judicature Act the Court of Chancery had no jurisdiction to restrain the publication of a libel. *Prudential Assurance Co.* v. *Knott*, 10 Ch. 142.

(5) 3 C. P. D. 339.

(6) 20 Ch. D. 501.

(7) 37 Ch. D. 170.

(8) Mr. Justice North decided the case in the Court of first instance and granted the interlocutory injunction restraining the defendant Perrynam, his servants and agents, until trial or further order from selling, circulating, or delivering or communicating to any person or persons, or permitting to be sold or circulated, or delivered or communicated, to any person or persons, any copy of the Financial Observer and Mining Herald of the 7th February 1891, containing the article headed *Flecter Mills, Providence, Rhode Island.*

But it is obvious that the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individual, should possess, and indeed, they should exercise without impediment, so long as no wrongful act is done ; and, unless an alleged libel is untrue, there is no wrong committed ; but on the contrary, often a very wholesome act is performed on the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed ; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and wisely with the granting of *interim* injunctions. We entirely approve of, and desire to adopt as our own, the language of *Lord Esher M. R.* in *Coulson* v. *Coulson* (1). 'To justify the Court in granting an *interim* injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable'. In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the Defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded ; nor can we tell what may be the damages recoverable. Moreover, the decision at the hearing may turn upon the question of the general character of the Plaintiffs ; and this is a point which can rarely be investigated satisfactorily upon affidavit before the trial,—on which further it is not desirable that the Court should express an opinion before the trial. Otherwise, an injunction might be granted before the trial in a case in which at the trial nothing but nominal damages, if so much, could be maintained. Upon the whole we think, with great deference to *Mr. Justice North*, that it is wiser in this case, as it generally and in all but exceptional cases must be, to abstain from interference until the trial and determination of the plea of justification." In the same case *Kay L. J.* said : "I agree with all the members of the court that, since the passing of the Common Law Procedure Act, 1855, by sections 79, 81 and 82 of that Act, the Courts of Common Law had, and by sections 16 and 25, sub-sections 8 of the Judicature Act, 1873, the High Court of Justice now has, undoubted jurisdiction to grant injunctions at or before the trial in actions of libel. I also agree that in such actions this jurisdiction should before trial be very cautiously exercised, especially because

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(1) 3 T. L. R. 846.

the questions of libel or no libel, and of the validity of a justification, if pleaded, are eminently matters to be determined by the verdit of a jury (1)."

In *Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (2), *Sir George Jessel* said: "The result, therefore, is that there is jurisdiction in a proper case upon interlocutory application to restrain the further publication of a libel. What I have said is confirmed by *Beddow* v. *Beddow* (3), *Shaw* v. *Earl of Jersey* (4) and *Day* v. *Browrigg* (5). But the question as to whether the jurisdiction though existing has been properly exercised is quite different. It is a jurisdiction which must be very carefully exercised. No doubt there are cases in which it would be quite proper to exercise it, as, for instance, the case of an atrocious libel wholly unjustified in inflicting the most serious injury on the Plaintiff. But on the other hand, where there is a case to try, and no immediate injury to be expected from the further publication of the libel, it could be very dangerous to restrain it by interlocutory injunction." Then dealing on the facts of the case, he said: "The injunction is to restrain future publication. Now the circular in question has been issued to all the share-holders; there is no allegation either on the writ or the statement of claim, or the affidavit of any intention on the part of the defendant to issue any more circulars, nor can I infer such intention, because it is alleged that he has issued the circular to the share-holders. There is no grounds, therefore, for interference. The act is passed, the mischief has been done, if mischief there is, and there is no ground for the intervention of the court before the trial."

In *Manson* v *Tussauds* (6), *Lopes L. J.* said: Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures, may constitute a libel. The plaintiff's case, therefore, is libel, and this application for an interlocutory injunction must be determined upon the principles which are applicable to the granting of injunction in cases of libel. The Court of Chancery could grant no injunction in such a case, because it could not try a libel. Neither could Courts of Common Law until the Comman Law Procedure Act of 1854, because they had no power to grant injunctions. Whether they had any power to grant an interlocutory injunction after 1854 is I think doubtful. As a matter of practice they never did. The first instance of exercising the power of granting an injunction in libel was *Saxby* v. *Easter brook* (7) in 1878, and that after trial. The Judicature Act of 1873, s 25, subsection 8, confers a larger jurisdiction to grant injunctions than existed before. It says, 'A mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just

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(1) It should be borne in mind that in British India no such difficulty arises, because here the court decides both the question of fact and the question of law.

(2) 20 Ch. D. 501.

(3) 9 Ch. D. 89.

(4) 4 C. P. D. 120, 359.

(5) 10 Ch. D. 294.

(6) (1894) 1 Q. B. 692, 693.

(7) 3 C. P. D. 339.

or convenient that such order should be made.' It is upon this section that the plaintiff rests his case. It is not necessary to consider cases that occurred before the coming into operation of the Judicature Acts. *Coulson* v. *Coulson* (1) was decided in 1887, and contains a judgment of the present Master of the Rolls which underlies every subsequent decision on the subject. It is reported in the Times Law Reports for 1887, and at p. 846 the Master of the Rolls (*Lord Esher*) says that "it could not be denied that the court had jurisdiction to grant an *interim* injunction before trial. It was, however, a most delicate jurisdiction to exercise, because, though Fox's Act only applied to indictment and informations for libel, the practice under that Act had been followed in civil actions for libel, that the question of libel or no libel was for the jury. It was for the jury and not for the court to construe the document and to say whether it was a libel or not. To justify the court in granting an *interim* injunction it must come to a decision upon the question of libel or no libel before the jury decided whether it was a libel or not. Therefore, the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable. The court must also be satisfied that in all probability the alleged libel was untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant. It followed from those three rules that the court could only on the rarest occasions exercise the jurisdiction. In the same year the case, *Liverpool Household Stores Association* v. *Smith* (2) came before the late *Cotton L. J.* and myself in this court, and *Coulson* v. *Coulson* (1) was followed and approved. The matter of restraining libels on interlocutory motions for injunction was thought of such importance that the question was in *Bonnard* v. *Perryman* (3), argued before the full court of Appeal, and *Lord Coleridge*. in delivering the considered judgment of the court, said: 'We entirely approve of, and desire to adopt as our view, the language of *Lord Esher* in *Coulson* v. *Coulson* (1). To justify the court in granting an injunction it must come to a decision upon the question of libel or no libel before the jury have decided whether if was a libel or not. Therefore the jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases, where any jury (4) would say that the matter complained of was libellous and where, if the jury did not so find, the court would set aside the verdict as unreasonable.' I cannot help thinking that a principle was laid down in this case applicable to all libels without limitation. Comment has been made on the words 'in the clearest cases', and it has been asked what those words mean. I think the criticism would be well founded, and they might be complained of as indefinite, if they had not been in my judgment

(1) 3 T. L. R. 346.
(2) 37 Ch. D. 170.
(3) (1891) 2 Ch. 269.

(4) The jury trial not being in force in British India in civil cases, this observation hasno force in this country.

explained in the most exhaustive way by what follows, *viz.*, 'where any jury would say the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable.' This is the rule by which we are bound, and I ask myself, if the jury found a verdict for the defendant, in this case, would the court set it aside as unreasonable (1). ?

"So in order to justify the court to exercise its jurisdiction the plaintiff must file his petition with promptness (2) ; he must also prove that the defendant intends to continue the publication complained of (3) and that there is "such immediate and pressing injury to person or property threatened by the defendants proceedings as to make it desirable that the court should interfere (4)." (5)

Jurisdiction to grant injunction in cases of slander and libel by Indian Courts.—Before the passing of the Specific Relief Act (I of 1877), it has been held that the Court will not grant an injunction to restrain the publication of a libel (6). In delivering the judgment in the above case, *Green J.* said : "Had the present been simply an application to restrain by injunction the publication, or further publication, of matter alleged to be defamatory, there can be no question that on the authorities it is one which cannot be sustained, and the learned counsel for the plaintiff has fully admitted this. It is true that in the cases of The *Spring head Spinning Company* v. *Riley* (7) and *Dixon* v. *Holden* (8), *Vice-Chancellor Mallins* granted an injunction when in the first-named case the defendants had by placards and advertisements sought to deter workmen from taking employment with the plaintiff, and in the latter case where the defendant (who was a solicitor for a bankrupt firm of *Dixon Brothers*, consisting, as the plaintiff alleged, of one *Hugh Dixon* and one *Lancelot Dixon*) had intimated his intention to publish an advertisement containing an allegation that the plaintiff, William Dixon, was a partner of the firm of Dixon Brothers, though the defendant, as the plaintiff by his bill alleged, was well aware that the plaintiff was never a partner, and never had any interest in that firm. In the last-named case the Vice Chancellor did not grant the injunction, as being an injunction against the publication of a libel merely, but by way of a protection of the commercial character and credit of a merchant as being in the nature of an injury to property. In the case, however, of the *Prudential Life Assurance Company* v. *Knott* (9) before the Lord Chancellor and Lord Justices, the decision of *Vice-Chancellor Mallins* in these two cases was distinctly disapproved of, and these cases may be treated as having no authority, and the Court of Appeal affirmed the

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(1) *Collard* v. *Marshall*, (1892) 1 Ch. 571.

(2) *Munson* v. *Tassands* (1894) 1 Q. B. 671.

(3) *Quastz Hill* v. *Beall*, 20 Ch. D, at pp. 508, 509.

(4) *Per North J.* in *Salomons* v. *Knight* (1891) 2 Ch. at p. 297.

(5) Fraser on Slander and Libel p. 291,

(6) *Shepherd* v. *The Trustees of the Port of Bombay*, 1 B. 132, 477.

(7) L. R. 6 Eq. 551.

(8) L. R. V. Eq. 488.

(9) L. R. 10 Ch. A. pp. 142.

principle that an injunction will not be granted to restrain the publication of injurious statements, even though distinctly affecting complainants in respect of their trade and business. The *Lord Chancellor* says : 'If, on the other hand, these comments do not amount to a libel, then, as I have always understood, it is clearly settled that the Court of Chancery has no jurisdiction to restrain the publication merely because it is a libel. There are publications which the Court of Chancery will restrain, and those publications as to which there is a foundation for the jurisdiction for the Court of Chancery to restrain them, will not be restrained the less because they happen to be libellous.' The class of cases which the *Lord Chancellor* may probably have had in his mind when he speaks of publications, as to which there is a foundation for the jurisdiction of the Court of Chancery to restrain, are such as where papers, documents, copies of books, etc., have come into the possession or knowledge of solicitors, agents, accountants, merchants, clerks etc., in the course of their employment. The publication of such documents the Court will restrain, as being a breach or abuse of the confidential relation by which the power of publication or communication has come to the person sought to be restrained. In such cases as the foregoing there is, as the *Lord Chancellor* says, a foundation of jurisdiction to restrain publication, which jurisdiction will not be the less exercised by reason that the matter to be published may also be libellous. It is not, however, as I have mentioned, on the ground of any alleged jurisdiction of this Court to restrain by injunction the publication of libels as such that the learned counsel for the plaintiff attempts to sustain his application." In the same case it has been further held that the Court will not grant injunction to restrain, at the suit of an individual, an act of a corporate body, on the ground of such act being *ultra vires*, except where such individual has been damaged by such an act in his rights of ownership, commodity or easement. It has also been held that there is no authority for the proposition that an individual is entitled to protection by way of injunction against the act of a corporation, though in excess of their powers, which affects that individual's character and reputation, whether, private, professional, or commercial, which he would not have been entitled to, had the act complained of been committed by an individual defendant, on the ground that the act in question was one which the corporation had no power to do under the instrument of incorporation.

But since the passing of the Specific Relief Act, the whole aspect of the subject has been changed. Under section 55 of the Act, the following illustration has been appended : "A threatens to publish statement concerning B, which would be punishable under Chapter XXI of the Indian Penal Code (1). The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property (2)". From the illustration

(1) Chapter on Defamation.

(2) Illustration (e). It is difficult to conceive why illustration (e) has been appended to section 55. The proper place of this illustration is under section 54. The same remark is applicable to illustration (f). Mr. Collet is of opinion that these two illustrations are probably

it appears that the framers of the Act were under the impression that civil and criminal liability as regards defamation are the same in British India (1). The law relating to wrongs was not then codified in British India, but everybody felt that to be a distinct gap in the Indian Legislation. "A good law of torts" said *Sir James Fitz James Stephen* (2) "would be a great blessing to this country It would enable the legislature to curtail very greatly many of the provisions of the Penal Code, which are at present called into play on the most trifling occasions to gratify private malice. The provisions on defamation, for instance, clearly ought to belong to the law of wrong and not to the law of crimes." But now the question is whether when the defendant threatens to publish a statement which is punishable under chapter XXI of the Indian Penal Code, but which is not a civil wrong the Court can grant injunction to restrain the publication. The answer to the question is obviously in the affirmative. A perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication (3). Section XXI of the Indian Penal Code contains sections 499 to 502.

Defamation according to the Indian Penal Code (s. 499).—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted to defame that person.

Explanation (1)—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation (2)—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation (3)—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation (4)—No imputation is said to harm a person's reputation, unless that imputation, directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful (4).

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annexed to section 55 because of the use made of them in illustration (g). But in illustration (g) illustrations of sections 54 have also been used, so this cannot be considered as a valid reason. These are oversights pure and simple.

(1) See also *Abdul Hakim* v. *Tej Chandra* 3A. 815, which is considered no longer as good law.

(2) Gazette of India, Supplement 4th May, 1772.

(3) Vide s. 54 of the Specific Relief Act.

(4) *Illustrations* : (a) A says ; Z is an honest man, he never stole B's watch, intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it falls within one of the exceptions.

First Exception—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good, is a question of fact.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further (1).

Fourth Exception.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further (2).

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author, so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public (3).

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions. (c) A draws a picture of Z running away with B's watch intending it to believed that Z stole B's watch. This is defamation unless it fall within one of the exceptions.

(1) *Illustration* : 'It is not defamaton in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such a meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situations in the efficient discharge of the duties of which the public is interested.

(2) *Illusrattions.* "(a).' "A says—"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, in as much as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further." (b) "But, if A says, I do not believe what Z asserted at that trial, because I know him to be a man without veracity." A is not within this exception, in as much as the opinion which he expresses of Z's character is an opinion not founded on Z's conduct as a witness."

(3) *Illustrations* : (a) A person who publishes a book, submits that book to the judgment of the public. (b) A person who makes a speech in public, submits

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates (1).

Eighth Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation (2).

Ninth Exception—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good (3).

Tenth Exception—It is not defamation to convey a caution, in good faith, to one person against another, provided such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Punishment for defamation.—Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years or with fine, or with both (4).

Printing or engraving matter known to be defamatory.—Whoever puts or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine or with both (5).

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that speech to the judgment of the public. (c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public. (d) A says of a book published by Z, "Z's book is foolish, Z must be a weak man. Z's book is indecent ; Z must be a man of impure mind." A is within this exception if he says this in good faith, in as much as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further. (e) But if A says, "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine". A is not within the exception, in as much as the opinion which he expresses of Z's character is an opinion not founded on Z's book."

(1) *Illustration*—"A Judge censuring in good faith the conduct of a witness, or of an officer of the Court ; a head of a department censuring in good faith those who are under his orders ; a parent censuring in good faith a child in the presence of other children ; a schoolmaster whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils ; a master censuring a servant in good faith for remissness in service ; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception."

(2) *Illustration*—If A in good-faith accuses Z before a Magistrate : if A in good faith complains of the conduct of Z, a servant, to Z's master ; if A in good-faith complains of the conduct of Z, a child, to Z's father—A is with this exception.

(3) *Illustrations* (*a*)—A, a shop-keeper, says to B, who manages his business,—"sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty.', A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(*b*) A, a Magistrate, in making a report to his superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception."

(4) Vide Section 500 of I. P. Code.

(5) Vide Section 501 of I. P. Code.

Sale of printed or engraved substance containing defamatory matter.—Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both (1).

Difference between English and Indian law.—There is a marked difference between criminal liability for defamation under the English law and under the Indian law, arising from the fact that the English criminal law when dealing with defamation had mainly to consider whether the defamation is such as would result in a breach of the peace and not the question whether the person was aggrieved by the statement made ; and here the defamation consists in its tendency to cause that description of harm which is felt by a person who knows himself to be the object of the unfavourable sentiments to his fellow creatures and in those inconveniences to which a person who is the object of such unfavourable sentiments is exposed (2). In *Reg* v. *Holbrook* (3), *Lush J* said : "Libel on individual is and has always been regarded as both a civil injury and a criminal offence. The person libelled may pursue his remedy for damages or prefer an indictment, or by leave of the court a criminal information, or he may both sue for damages and indict. It is ranked amongst criminal offences because of its supposed tendency to *arouse angry passions, provoke revenge, and thus endanger the public peace.*' In *Rex* v.—(4). *Lord Coleridge* said : 'There ought to be some public interest concerned, something affecting the crown or the guardians of the public peace (likely to be broken by the alleged libel), to justify the recourse by a private person to a criminal remedy by way of indictment. If, either by reason of the continued repetition or infamous character of the libel, breach of the peace is likely to ensue, then the libeller should be indicted."

Slander of title.—Slander of title is a false and malicious statement, whether by word of mouth or in writing, with reference to a person's title to some right or property belonging to him, as where a person alleges that the plaintiff has a defective title to land, or to a patent (5). Slander of title was the name originally of an action for sale and disparaging representations in regard to the plaintiff's title to land : but in recent times the action and name have been extended to false and disparaging statements in regard to property of every kind, and that too whether the statements relate to title or to quality (6). The only real connection the action has with actions for slander (or libel) is the name the action bears and in the structure of the ancient declaration, which in following the declaration in slander has followed a misleading analogy (7). An action does not lie at common law for slander

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(1) Vide Section 502 of I. P. Code.
(2) *Parwari* v. *Emperor*, 41 A. 311 = 17 A. L. J. 214 = 49 Ind. Cas. 855.
(3) (1878) 4 Q. B. D. at p. 46 ; *Reg* v. *Lord Mayor of London*, 16 Q. B. D. 777.
(4) 33 Sol. Jo. 350.
(5) Byrne's law Dictionary.
(6) *Malachy* v. *Soper*, 3 Big. N. C. 371.
(7) Bigelow on Torts p. 78.

of title (oral or witten) or for slander of goods (oral or written), not being an action for libel or slander properly so called but an action on the case, unless the following conditions are fulfilled :—(*i*). The statement must be made and published by the defendant of and concerning the plaintiff's title or goods ; (*ii*) in disparagement thereof ; (*iii*) falsely ; (*iv*) with actual malice ; (*v*) and cause special damage to the plaintiff which he must allege and prove (1).

What must be proved.—The plaintiff in actions at law for slander of title has to prove that the statements are false, that they were made with malice, and that they have been followed by damage (2). In *White* v. *Mellin* (3), *Lord Watson* said : "The wrong complained of being the slander of goods, the fact that the representations made by the defendant in the label already referred to might be calculated to disparage the food manufactured by the plaintiff and to interfere with its sale can afford no cause of action. Every extravagant phrase used by a trades-man in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade ; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price ; but that is a disparagement of which the law takes no cognizance. In order to constitute disparagement which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods ; that they were in disparagement of his goods and untrue ; and that they have occasioned special damage to the plaintiff ; unless each and all of these three things be established, it must be held that the defendant has acted within his rights and that the plaintiff has not suffered any legal injury." 'That an action will lie for written or oral falsehoods not actionable *per se*" says *Lord Wensleydale* (4) "nor even defamatory where they are maliciously published, when they are calculated in the ordinary course of things to produce" "and they do produce, actual damage, is established law Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion, or excuse, analogous to an action for slander of title. To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred" (5). In *White* v. *Mellin* (3). *Lord Her schell L. C.* said ; "*Lopes L. J.* adds the word 'maliciously,' that, it is actionable to publish maliciously without lawful occasion a false statement disparaging the goods of another person ! But that it may be intended to indicate that

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(1) Halsbury vol XVII p. 736, citing *White* v. *Mellin*, (1895) A. C. 154 ; *Lynch* v. *Knight*, 9 H. L. C. 577 at p. 600 ; *Griffiths* v. *Benn*, 27 T. L. R. 346, 350 ; *Royal Baking Powder* v. *Wright*, 18 Rep. of Patent Cases. 95.

(2) *Malachey* v. *Soper*, 3 Big. N. C. 371 ; *Mellin* v. *White*, (1894) 3 Ch. 276 C. A.

(3) (1895) A. C. at pp. 166, 167 see also *Royal Baking* v. *Wright*, 18 R. P. C. 95 (H. L.) ; *Dunlop* v. *Maison*, (1904) 20 T. L. R. 580 ; *Alcott* v. *Millar's* 21 T. L. R. 31 ; *Leyne* v. *Nicholls*, 23 T. L. R, 87 ; *Barret* v. *Associated News Paper*, 23 T. L. R. 606 ; *Cundey* v. *Lerwill*, 99 L. T. 275 ; *Leetham* v. *Rank*, 57 S. J. 111.

(4) *Lynch* v. *Knight*, 9 H. L. C 577 at p. 600.

(5) *Per Bowen* L. J. in *Ratcliffe* v. *Evans* (1892) 2 Q. B. 524 (527) ; Halsbury Vol. XVIII p. 628.

the object of the publication must be to injure another person, and that the advertisement is not published *bona fide* merely to sell the advertiser's own goods, or at all events, that he published it with a knowledge of its falsity. One or other of those elements, it seems to me, must be intended by the addition of the word 'maliciously'. Both these are certainly absent here. There is nothing to show that the object of the defendant was other than to puff his own goods and to sell them, nor is there anything to show that he did not believe that his goods were better than any other.

"The only case which the learned counsel for the respondent was able to rely upon as at all approaching the present case is the case of the *Western County Manure Co* v. *Lawess Chemical Manure Company* (1), in which case a declaration was held good which alleged the disparagement of the plaintiff's goods by stating that they were inferior to those sold by the defendants. In that case special damage was alleged in the declaration, and I think that that allegation was regarded by both the learned judges who were parties to the decision as material and essential.....*Evans* v. *Harlow* (2) is a distinct authority that it will not lie where special damage does not result" But a mere puff of the defendants' own goods or a statement that they were superior to those of a rival trade, even if untrue and made maliciously and the cause of damage to the latter is not actionable (3).

In *Nemichand* v. *C. W. Wallace* (4), *Maclean C. J.* said: "To enable the plaintiff to succeed he must show that the statements by the defendants to the collector were false and malicious, and that he has suffered especial damage. It is urged by the Respondents that it is not stated, with sufficient precision in para 4 what is the slander of which the plaintiff complains, but it is a little difficult to see how he could have stated it more fully than he has done.....In a case of this class, which is virtually one of slander of title of the plaintiff's goods, the allegation would appear to be sufficient. It is stated that malice is not strictly pleaded. The word doubtless is not actually used, but it is undoubtedly to be implied from the allegation that the defendants were interested in putting a stop to the sale of the plaintiff's grey shirtings, and that with intent to injure the plaintiff, the defendants falsely alleged to the collector that the marks were an imitation, and form the allegation in para 7 of the plaint. But if there were any doubts as to this, I do not think that the suit ought to have been dismissed but that the Plaintiff ought to have been allowed to amend his plaint by specifically pleading malice."

In *Alcott* v. *Millar's Karri and Jarrah* (5) *Collins M. R.* said: "There was nothing in any of the authorities to qualify the old law—namely that where there was proof of special damage, traceable to a wrongful imputation

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(1) L. R .C. Ex. 218.
(2) 5 Q. B. 624.
(3) Kerr on Injunction p. 496 citing *Hubbock* v. *Wilkinson*, (1899) 1 Q. B. 86; *Alcott* v. *Millar's Karni*. 21 T. L. R. 31; *Cundey* v. *Lerwill*, 99 L. T. 273.
(4) 10 C. W. N. 107=4 C. L. J. 268,
(5) 21 T. L. R. 30 (C. A).

courts also have jurisdiction to restrain a person from making slanderous statements calculated to injure the business of another person, and this jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as regards oral statement (1). In *Harmann Long* v. *Bean* (2), the court observed ; "Here is a man who had been in the employ of the plaintiff, making to their customers slanderous statements with regard to the business of the company, and trying to induce the customers not to pay the sums which they owe to the plaintiffs. The court has of late granted injunctions for libel, and why should it not also do so in cases of slander ? It is clear that slanderous statements such as were made to old customers in this case must, have a tendency materially to injure the plaintiff's business ; they are slanders therefore, spoken against their trade. It is not necessary, therefore, in my opinion, to show that loss has actually been incurred in consequence of them. If they are calculated to do injury to the trade the plaintiff may clearly come to the court. There is, no doubt, more difficulty in granting an injunction as regards spoken words than as regards written statements, because it is difficult to ascertain exactly what is said. But when the defendant is proved to have made certain definite statements, such as are mentioned in the order, in my opinion an injunction is properly granted to prevent his repeating them. The defendant, though no doubt the tongue is an unruly member to grovern, must take care that he keeps his tongue in order, and does not allow it to repeat those statements which he is by the injunction restricted from uttering'(3)." To maintain a bill for injunction restraintng publication of advertisements, etc , injurious to plaintiff's business, the plaintiff must allege and prove not only that the advertisements are false, but also that the defendant is actuated by malice in making or threatening the publication. If defendant is publishing the advertisements in good faith for the purpose of advancing his own sales, and upon a reasonable belief of their truth, the plaintiff is not entitled to the extraordinary remedy of injunction (4). Where there are two rival works, the court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the work, but will not restrain him from publishing an advertisement tending to disparage the other work (5).

Use of Author's name without authority.—The publication of a book as that of another when in fact it is not such constitutes such an injury as entitles such other person to an injunction, although the misrepresentation does not amount to infringement of a copyright (6). And the case is not

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(1) Ibid.

(2) L. R. 26 Ch. D. 306, 314=53 L. J Ch. 1128.

(3) Ses also *Collard* v. *Marshall*, (1892) 1 Ch. 571, 577 : *White* v *Mellin* (1895) A. C. 154 : *Dunlop Pneumatic Tyre Co* v. *Maison Talbot* (1904) 20 T. L. R. 579 ; *Lyne* v. *Nicolls*, 23 T. L. R. 86 ; *Barret* v. *Associated Newspapers Co.* 23 T. L. R. 666 ; *British Railway Traffic* v. *London County Council.* (1922) 2 K B 260 ; *Greers Lim.* v. *Pearman and Corder*, (1922) 39 R. P. C. 406.

(4) *Celluloid Manufacturing* v. *Goodyear Dental.* 13 Blat Ch. 375 : Spelling on Injunctions and other Extraordinary Remedies § 886.

(5) *Seeley* v. *Fisher*, 11 Sim. 581.

(6) *Lord Byron* v *Johnston*, 2 Mariv. 29.

publications concerning property which operate as a slander of the owner's title, and libellous publications which are injurious to the plaintiff's business, trade or profession, and the wrongful use of a name by which the public would be misled, and the plaintiff injured in his business (1). This extension of the jurisdiction is not based, as it seems, upon any statutory enlargement of the inherent powers of equity; but is the result of the new system by which the one court is empowered to administer both legal and equitable remedies in any and all actions. The American courts seem, thus far unwilling to follow the example of recent English decisions, and they decline to extend the jurisdiction so as to restrain such torts as libels on business, slanders of title, and the like (2).

Publication injurious to tradesman.—Jurisdiction to restrain publications injurious to tradesmen is now held to be conferred by statute in England upon courts of equity powers (3). But in *Liverpool H. S. Association* v. *Smith* (4), injunction to restrain the publication of future articles reflecting unfavourably on a company, refused on the ground of the difficulty of granting, an injunction which would not include matters that might turn out not to be libellous; and because if the injunction was granted in terms to restrain what was libellous, the question of libel or no libel would have to be tried in a very unsatisfactory way on motion to commit. In order to obtain an injunction in such a case, it is sufficient for the plaintiff to show that the libel is calculated to injure his trade; it is not necessary that he should prove actual damage (5). English

(1) Pomeroy's Eq. Jur. § 1358: "Such publications may be restrained by preliminary as well as final injunction. The jurisdiction is exercised with great caution, and only where the facts are clearly established, and the untruth of the publication is satisfactorily shown. The following are the most important cases. *Quartz Hill etc.* v. *Beal*, L. R. 20 Ch. D. 501, 507 (libel on a corporation); *Halsey* v. *Brotherhood*, L. R. 19 Ch. D. 386; 15 Ch. D. 514 (slander of title to a patent right): *Dicks* v *Brooks*, L. R. 15 Ch. D. 22 (same); *Thomas* v. *Williams*, L. R. 14 Ch D. 864, 871, 872 (libel injurious to a trade); *Thorley's Cattle Food Co.* v. *Masson*, L. R. 14 Ch, D. 763, reversing L. R. 6 Ch. D. 582 (same) a leading case. In *Prudential Ass. Co. v. Knott*, L. R. 10 Ch. 142, *Fisher* v. *Appolinaries Co.*, L, R, 10 Ch. 297; *Clover* v. *Royden*, L. R. 17 Eq. 190; and *Mulkern* v. *Ward*, L. R. 13 Eq. 619; the jurisdiction to enjoin such libellous publications was denied; while in *Dixon* v. *Holden* L. R. 7 Eq. 418 and *Springfield etc. Co.* v. *Kiley* L. R, 6 Eq 551, it had been exercised. See also, *Shaw* v. *Earl of Jersey* L. R. 4 C. P. D. 120, 359; *Saxby* v. *Easterbrook*, L. R. 3 C. P. D. 339. As to restraining the use of the plaintiff's name by the defendant in his own business, see *Fullwood* v. *Fullwood*, L. R. 9 Ch. D. 176; *James* v. *James*, 13 Eq. 421; *Massam* v. *Thorley's etc*, L. R. 6 Ch. D. 574; *Day* v. *Brownrigg*, L. R. 10 Ch. D. 294. In *Empeor of Austria* v. *Day*, 3 De G. F. & J. 217 it was held that an injunction could be granted at the suit of a foreign sovereign to restrain the manufacture and issue, within English territory, of spurious notes and securities of the foreign government."

(2) Pomeroy's Eq. Jur. § 1358: In *Massachusetts* these decisions are expressly repudiated. *Boston Diattic Co* v. *Florence Mfg. Co.* 114 Mass. 69; *Whitehead* v. *Kitson* 119 Mass. 484. Injunctions to restrain libellous publications concerning the plaintiff's business were also refused in *Life Ass'n* v. *Boogher*, 3 Mo App. 173; *Mauger* v. *Dick*. 55 How. Pr 132; and *Singer Mfg Co.* v. *Domestic etc. Co.*, 49 Ga. 70. In *Celluloid Mfg. Co* v. *Goodyear etc. Co.*, 13 Bla chp. 375, the jurisdiction is recognized to restrain such publications when they are not only false and injurious, but also malicious.

(3) *Thorley's Cattle Food Co* v. *Massam*, L. R. 6 Ch. D. 582.

(4) 37 Ch. D. 170.

(5) Spelling on Injunctions and other Extraordinary Remedies § 886.

restrain the circulation of an untrue statement as to the financial position of a friendly society (1).

Remedy in case of groundless threats of legal proceedings for breach of patent.—Under the law as it existed in England prior to the passing of the Patents, Designs and Trade Marks Act of 1883 (2), the holder of a patent, the validity of which was not impeached, who issued notices against purchasing certain articles, alleging that they are infringement of his patent and threatening legal proceedings against those who purchase them, was not liable for an action for damages by the vendor of those articles for the injury done to the vendor's trade by his issuing them, provided they were issued *bonafide* in the belief that the articles complained of are infringements of his patent. Nor was he liable to be restrained by injunction from continuing to issue them until it was proved that they were untrue, so that his further issuing them would not be *bonafide* (3). But section 32 of the Act of 1883 changed the law in England. By section 32, a plaintiff was entitled to bring an action for injunction to restrain a defendant from making or continuing threats of legal proceedings (4). In British India also, "when any person claiming to have an interest in a patent (5) by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring a suit against him in a District Court having jurisdiction to try the suit, and may obtain an injunction against the continuance of such threats and may recover such damage (if any) as he has sustained thereby if the alleged infringement to which the threats related was not in fact an infringement of the patent: Provided that this section shall not apply if the action for infrigement of the patent is commenced and prosecuted with due diligence (6)." This section is a verbatim reproduction of Section 36 of the English Patents and Designs Act of 1907 which repealed and reproduced s. 32 of the English Act of 1883. So now the English and Indian law on the subject are the same. An action to restrain threats in respect of an alleged infringement of a patent ought not, having regard to section 36 of the Patents and Designs Act of 1911 (7), to be commenced after an action to restrain the alleged infringement has been instituted and is being prosecuted with due diligence; and if it is so commenced, all proceedings in it may be stayed as being vexatious (8). But the proviso is not satisfied by the circumstance that

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(1) *Hill* v. *Hartz Davis*, 51 L. J. Ch. 845.

(2) Stat 46 & 47 Vict. c. 57.

(3) *Halsey* v. *Brotherhood*, 51 L J. Ch. 233=19 Ch. D. 386.

(4) *Driffield Linseed Coke Co.* v. *Waterloo Mills Co.*, 31 Ch. D. 638; *Barnett* v. *Tak* 45 L T. 743; see also *Rollins* v. *Hinks*, 41 L. J. Ch. 358.

(5) Vide *Ellis & Sons Lim* v. *Pogson*, (1923) 2 Ch. 476=93 L. J. Ch. 16.

(6) Vide s. 36 of the Patents and Designs Act (II of 1911) as amended by Act VII of 1930. This corresponds to section 36 of the English Patents and Designs Act of 1907 (7 Ed. 1 C. 29) as amended by Patents and Designs Act of 1919 (9 & 10 Geo 5 C. 8 s. 20 and Schedule).

(7) II of 1911; see also section 32 of English Patents, Designs and Trade Marks Act of 1883 and section 36 of the English Patents and Designs Act of 1907.

(8) *Barret* v. *Day*. 59 L. J. Ch. 464=43 Ch. D. 435.

the patentee has at the time of making threats of legal proceedings against a third party for an alleged infringement of the same patent (1). The remedy of the threatened party is gone so soon as an action is, within a reasonable time, commenced by the patentee to restrain the alleged infringement which is the subject of the threats; but the patentee if he does not commence his proceedings in the form of a counter claim to the action to restrain the threats, but institutes a separate action, should endeavour to obtain a stay of the first action, and in default of so doing may be deprived of his cost thereof (2).

The plaintiff brought an action against the defendants for infringement of their patent. The plaintiffs then published a circular to the effect that their patent was being infringed, and that they were bringing a large number of actions against specific alleged infringers, including the action against the defendants. The defendants delivered a defence and counter claim. The defence was that the goods complained of as infringements of the patent were manufactured and sold under a license granted by the plaintiffs to the predecessors of the defendants. By their counter claim they claimed an injunction to restrain the plaintiffs from publishing or representing by circulars etc., that the defendants were not authorised to make or sell such goods. The plaintiffs contended that they had given a license to certain persons to use their patent, there were no rights under the circumstances to assign to the defendants without the plaintiffs' consent, a consent that had never been granted. Upon motion for for an interlocutory injunction: *Held* that the case was not within section 32 of the Patents, Designs and Trade Marks Act of 1883, because of the proviso at the end of that section; in this case an action having been *bona fide* brought even before the circular was issued and that although the publication of the circular complained of might greatly damage the defendants, they had no equity to restrain the plaintiffs from stating that they were taking proceedings (3). When the plaintiff in an action under s. 32 of the Patents and Designs and Trade Marks Act, 1883, to restrain threats of legal proceedings by any person claiming to be the patentee of an invention, seeks to establishe that the patentee is not entitled to the benefit of the proviso to that section, so as to exclude the operation of the former part thereof, the burden is on the plaintiff to prove affirmatively that an action commenecd and presented by the patentee for infringement of his patent is not one in which the validity of the patent could beyond all doubt be tried (4). In considering whether such an action is brought with due diligence, the time of issuing the threats, and not the time when the party bringing the action first know of the acts which he alleges to be infringements, is the period to be looked to (5). C, a patentee,

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(1) *Combining Weighing and Advertising Co.* v. *Automatic Weighing Machine*, 58 L. J. Ch. 709=42 Ch. D. 665.

(2) Ibid.

(3) *Dunlop Pneumatic Tyre Co.*, v. *New Seddon Pneumatic Tyre Co.* 76 L. T. 405.

(4) *Craing* v. *Dowding*, 98 L. J. 231= 25 R. P. Cas. 259.

(5) *Challender* v. *Royle*, 56 L. J. Ch. 995=36 Ch D. 425; see also *Haskel* v. *Hatchison*, 21 R. P. C 497=20 T. L. R. 606; *Colley* v. *Hart*, 44 Ch. D. 179.

brought an action under section 32 of the Patents, Designs and Trade Marks Act of 1883, against a prior patentee of a similar invention to restrain R from issuing threats of legal proceedings against persons selling C's patent articles. Shortly after C had served out his writ, but before it had been served, R had commenced an action for infringement against P. & Co., who were selling C's articles: *Held* that the action mentioned in the proviso to section 32 as taking a case out of the section need not be an action against the person who is suing to restrain the threats, but that an action for infringement honestly brought with reasonable diligence against any of the persons who have been threatened, will, if duly prosecuted, satisfy the proviso (1).

Threats "by circular, advertisement" include threats by private letter to one person charged with infringement, the words "or otherwise" not being restricted, on the *ejusdem generis* principle, to "other means such as circulars or advertisements." The solicitors to the defendants, a company, sent a letter to the plaintiffs, another company, alleging an infringement of patents claimed by the defendants, and stating that unless the plaintiffs forthwith discontinued the infringement legal proceedings would be taken. The defendants not having followed up the letter by legal proceedings, the plaintiffs brought an action for an injunction, under section 32 of the Patents, Designs and Trade Marks, Act 1883, to restrain them from making or continuing threats of legal proceedings. *Held* that the plaintiffs were entitled to a perpetual injunction with costs (2). A "threat" within the meaning of this section, may be contained in letters written *bona fide* in answers to inquiries made about a patent. Such a letter cannot be considered as a privileged communication. The words "or otherwise" in the section are not to be classed as *ejusdem generis* with "circulars or advertisements;" they are extended by the words which precede them and not confined by them (3). A letter written "without prejudice," alleging infringement and threatening proceedings if infringement is continued is a threat within the act (4).

A letter may constitute a threat of legal proceedings although it does not in its terms refer to any patent or state that patent rights have been infringed (5). An action may also be brought for a circular in general terms, when it is intended to refer to a particular person (6). But the issuing of circular pending trial of action for advertisements stating that defendants had infringed is not justified (7). In an action for injunction to restrain a patentee from issuing threats of legal proceedings, the validity of the patent cannot be tried,

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(1) *Challender* v. *Royle*, 56 L. J. Ch. 995=36 Ch. D. 425; see also *Electric Lamp* v *Osram Lamp Works*. (1911) 28 R. P. C. 479.

(2) *Driffield Linseed Cake Co.*, v. *Waterloo Mills Co.*, 31 Ch. D. 638=55 L. J. Ch. 391.

(3) *Skinner* v. *Shew*. 62 L J. Ch. 196 =(1893) 1 Ch 413; *Barret* v. *Day* 43 Ch. D. 435; *Boneham* v. *Hirst Brothers*, (1917) 34 R. P. C. 209.

(4) *Hertz* v. *Spence*, 57 L. J. Ch. 238 =58 L. T. 439.

(5) *Douglas* v. *Pintsch's Patent*, (1897) 1 Ch. 176.

(6) *Johnson* v. *Edge*, 61 L. J. Ch. 262= (1892) 2 Ch. 1; see also *Cawther* v. *United Flexible*. (1905) 22 R. P. C. 549.

(7) *Gourland* v. *Lindsay*, 56 L. T. 506.

the only issue in such an action being infringement or no infringement (1). As a condition precedent to obtaining the injunction, the applicant must show that there had been no infringement on his part (2).

In order to obtain an interlocutory injunction the plaintiff must make out a *prima facie* case, *i.e.*, a case such that if the evidence remains the same at the hearing it is probable that he will obtain a decree, and unless he makes out such a case an injunction will not be granted on the mere consideration of the balance of convenience (3). In a motion by a plaintiff for an *interim* injunction to restrain the defendant from issuing threats of legal proceedings for an alleged infringement of the defendant's patent, it is not necessary for the plaintiff to prove that he has not infringed the defendant's patent, but the question is one of the balance of convenience and inconvenience, and the court will decide according to its opinion whether more harm will be done by granting or refusing injunction (4).

CHAPTER XVII

Injunction against waste.

Waste—Waste according to English law is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance (5), done or suffered by a person rightfully in possession (6) by virtue of partial estate—as, for example, a tenant for life or for years. The rightful possession of the wrong-doer is essential, and constitutes a material distinction beteen waste and trespass (7). Waste is spoil or destruction in houses, gardens, trees, or other corporeal heriditaments to the disherison of him that hath the remainder or reversion in fee simple or fee tail (8). So waste has been said to be a destructive use of realty by one lawfully in possession thereof (9). Trespass in its widest sense includes not only waste but nuisance, and is any misfeasance or act of one man whereby another is injuriously treated or damnified (10). So damage done to the inheritance in the case of leasehold or mortgaged land is waste if committed by the tenant or mortgagor, and a tort which may be deemed to be in the nature of (but not strictly as) a trespass, if committed by a stranger. But

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(1) *Kurtz* v, *Spence*, 55 L. J. Ch. 919.

(2) *Barney* v. *United Telephone Co.*, 28 Ch. D, 394.

(3) *Challender* v. *Royle*, 56 L. J. Ch. 995 = 57 L. T. 734.

(4) *Walker* v. *Clarke*, 56 L. J. Ch. 239 = 35 W. R. 245.

(5) Co Lit 53 (a); See *Meux* v. *Cobley* (1892) 2 Ch. 263; *West Ham* v. *East London*, (1900). Ch. 635; *Hyman*, v. *Rose* (1912) A. C. 632.

Davenport v. *Davenport*, 7 Ha 222; *Lowndes* v. *Bettle*, 33 L. J. Ch. 451, 454; *Gage & Roper* v. *Pigott & De Jenner*, (1919) 1 Ir. 38; *Wheeler* v. *Keeble*, (1920). 1 Ch. 64.

(7) Pomeroy's Eq. Jur, § 1348

(8) Spelling on Injunctions and other Extraordinary Remedies § 238.

(9) *Hill* v. *Bowrie)*, 1 Bland (Md) 593.

(10) 3 Bl. Com. 208; 2 Bouv L. Dic. 747.

whatever term may be applied to the act, it is a breach of duty to landlord or mortgagee, for which he is entitled to recover damages.

For example : The defendant, a tenant, or a mortgagor, or a licensee, or a stranger, cuts down trees on land owned by the plaintiff, or of which he is mortgagee or remainder-man, without the plaintiff's consent. his is a breach of duty to the plaintiff, and the defendant is liable to him for damages, though the plaintiff is not in possession (1).

The remedy by injunction is fully established, and has not only virtually superseded the old common-law "action of waste," (2) but to a great extent taken the place of the "action on the case" for damages. An injunction will be granted in all cases where a legal action would lie to recover possession of the land wasted, or to recovor damages (3). It will also be granted in many instances where no legal action can be maintained, although the interest of the injured party is legal (4); and where the estate of the injured party is wholly equitable (5); or where the waste itself is entirely equitable", that is, where, by the terms of the will, deed, settlement, or lease the tenant holds the land "without impeachment of waste" (6). An injunction will also be granted to restrain the threatend waste, although none has actually been committed (7),

Origin and Nature of the Jurisdiction.—The jurisdiction of the common law over waste was curiously defective. Originally an action at common law for waste lay only against a defendant whose estate was created by law, on the theory that as to estates created by the owner of the fee, provision against waste should be made against it by himself or else it was his own default This narrow jurisdiction was early enlarged by statutes (8), which however, gave a remedy only in favour of one having an immediate estate of inheritence, so that a person holding any estate less than a fee, or one whose estate in fee was preceded by a smaller estate, had still no remedy at law (9). It is evident that in such a situation there was a two fold reason

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(1) *Young* v. *Spencer*, 10 B & C 145 ; Bigelow on Torts p. 211

(2) Vide the observation of *Eyre C. J.* in *Jefferson* v. *Bishop of Durhams*, 1 os & Pull 120 cited in note 6 at p. 8 Supra

(3) *Pulteney* v. *Shelton*. 5 Ves 260 note ; *Twort* v. *Twort*, 16 Ves 128 ; *Hole* v. *Thomas*, 7 Ves. 589 ; *Smallman* v. *Onions*, 3 Brown Ch. 621, *Powys* v *Balagrave*, 4 De G. M. & G. 448 ; *Kekewich* v. *Marker*, 3 Mac. & G. 311.

(4) *Garth* v. *Cotton*, 1 Ves Sr. 524 ; *Perrot* v. *Perrot*, 3 Atk 94 ; *Robinson* v. *Litton*, 3 Atk 209 ; *Farrant* v. *Lord*, 3 Atk. 723 : *Davis* v. *Leo*, 6 Ves. 784 ; 787 ; *Onslow* v.—16 Ves. 173 ; *Pratt* v. *Brett*, 2 Mad 62.

(5) *Garth* v. *Cotton*, 1 Ves. Sr. 524 ; *Robinson* v. *Litton*, 3 Atk. 209 ; *Farrant* v. *Lovel*, 3 Atk. 723 ; *Stansfield* v. *Habergham*, 10 Ves. 273 277.

(6) *Garth* v. *Cotton*, 1 Ves. Sr. 524 ; *Vane* v. *Lord Barnard*, 2 Vern. 738 ; *Rolt* v. *Lord Somerville*, 2 Eq Cas. Abr, 759 ; *Ashton* v. *Ashton* 1 Ves Sr. 264 ; *Borges* v. *Lamb*, 16 Ves. 174, 185 ; *Day* v *Merry*, 16 Ves. 375 ; *Abrahall* v. *Bubb* 2 Swanst 172 ; *Morris* v. *Morris* 15 Sim 505 ; *Wellesly* v. *Wellesly*, 6 Sim. 497 ; *Micklethwait* v. *Micklethwait* 1 De G. & J. 504, 519 ; *Kekewitch* v. *Marker*, 3 Mac & G. 311 ; *Att Gen* v. *Duke of Marlborough*, 3: Madd. 498 ; *Sawerby* v. *Fryer*, L. R. 8 Eq. 417 ; *Birch-wolfe* v. *Birch* L. R. 9 Eq. 683 ; *Bubb* v. *Yelverton*, 10 Eq. 465.

(7) Pomeroy's Eq. Jur. § 1348.

(8) Statutes of Marlbridge (52 Hen. III C. 23) and Gloucester (6 Ed. W. I. C. 5).

(9) 2 Black Com. 282, 283.

for the interposition of equity to prevent waste. In the first place, from its very nature waste was a wrong such that the legal remedy of damages was inadequate. It involved as its chief characteristic a serious injury to real property, and on this ground alone, a preventive remedy was necessary. It is true that the writ of estrepment (1) was a preventive remedy but at best it was only an auxiliary to real actions to preserve property *pendente-lite* (2), and hence had no application to the ordinary case of waste in which no question was made as to the tenant's right to possession. In the second place, the fact that there was in large class of cases no remedy at all at law, furnished a sufficient ground for the jurisdiction of equity—at least in those cases (3). Of the two reasons, the first was the controlling one, however, and the second was apparently often regarded as requiring some explanation to prove that it was not an obstacle to, rather than a ground of equity jurisdiction (4). The fact that waste in nearly always an irreparable injury has resulted in the full establishment of the remedy by injunction whether in a case where there is or is not a legal remedy; and because prevention is of greater efficacy than damages after the event, the equitable remedy has not only virtually superseded the old common law "action of waste," but has to a great extent taken the place of the "action on the case" for damages, (5) which might have supplied the lack of a remedy at law to those remaindermen who could not comply with the strict requisite of the statute of Gloucester (6).

General Principles. "The jurisdiction of courts of equity" says Justice Story "to interpose, by way of injunction, in cases of waste, may be referred to the broadest principles of social justice. It is exerted, where the remedy at law is imperfect, or is wholly denied; where the natue of the injury is such that a preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are incidental to the proper relief; and where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton and capricious abuse of their legal rights and authorities by persons having but temporary and limited interests in the subject matter (7)" So the interference of equity in cases of waste is a wholesome jurisdiction, to be liberally exercised and depends on much latitude of discretion in the court, and

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(1) 3 Black 225-227.

(2) Vide note (6) at p. 8 supra.

(3) See suggestion of Counsel in *Castlemain* v. *Craven*, 22 Vin. Abr. 523; *Skelton* v. *Skelton*, 2 Swanst. 170.

(4) *Farrant* v. *Lovel*, 3 Atk. 723; *Perrot* v. *Parrot*. 3 Atk. 94; *Kane* v. *Vanderburgh* 1 Johns. Ch. 11. The explanation of this attitude of the Chancery Courts doubtless lay in the fact that equity jurisdiction over torts was primarily to furnish a better remedy for a legal wrong. Hence in determining the existence of the wrong, and from that inferring the right to a remedy, the equity Judges were accustomed to follow the rule of law. Consequently they felt the need of explaining, why they gave a remedy where the courts of law did not. So *Lord Hardwick, in Perrot* v. *Perrot* supra, said it was an 'accident." that there was no legal remedy in the class of cases under discussion, and *Lord Nottingham* in *Skelton* v. *Skelton*, 2 Swanst. 170, took the distinction that the tenant who committed waste in such cases had only "*impunitatem*' and not a right in the thing itself, Pomeroy's Eq. Jur. § 1896.

(5) 4 Pom. Eq. Jur. § 1398.

(6) 5 Pom. Eq. Jur. § 1896.

(7) Story's Eq Jur. § 1246.

has come to be allowd very much as a matter of course. Equity takes jurisdiction to restrain waste by injunction, and in some particular cases, to obtain a discovery and account, and having for these objects obtained jurisdiction of a cause, it proceeds, in order to avoid multiplicity of suits, to compensate for damages done. But the jurisdiction itself must rest in the first instance on necessity for an injunction, or discovery and account (1). An injunction to stay waste will not be granted where it is doubtful whether the acts complained of are waste ; in such cases the question of waste or no waste must first be decided (2). If a lessee, bound by covenant not to comment waste, has committed acts of waste, for which damages merely nominal would be given, the court of chancery will not entertain a suit against him founded on those acts of waste, where it appears that he does not contemplate committing any further waste, nor assert a right to commit it (3). If a case of prospective injury is made out, a court of equity has jurisdiction to issue an injunction before waste has actually been committed, and it is not neccssary to stay till waste is actually committed even where the intention appears, and the person insists on his right to do it (4). Where an application was made for a temporary injunction restraining the defendant from cutting growing timber during the pendency of the suit, held, in a case of waste although an injunction cannot be stated to be as of right, yet the court will always exercise its discretion in favour of an applicant for an injunction to restrain waste (5).

Extent of Equity Jurisdiction—Legal Waste.—"In entering upon a fuller discussion of the jurisdiction of equity over waste" says *Prof. Pomeroy* "it will be convenient to follow the lines of old and familiar classification, and treat, first of legal waste, which is the waste that courts of law always recognized (though they did not in all cases give a remedy for it), and, next, of *Equitable Waste*, which is the waste that, by the rules of common law, is permitted to a tenant in possession, but which courts of equity nevertheless do not allow. It has already been pointe i out that from its very definition waste generally falls within that class of injuries which courts of equity deem irreparable and therefore not to be adequately remedied at law (6). Hence injunctions against legal waste have always been common, and the jurisdiction extensive. Illustrations are injunctions against cutting timber (7), changing, destroying or removing

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(1) Spelling on Injunction and other Extra ordinary Remedies § 242

(2) *Lyon* v. *Wilkinson*, 1 L.J. Ch. 155. This rule is now applicable only in case of granting temporary injunction,

(3) *Doran* v. *Carrol*, 11 Ir. Ch. Rep. 379 ; Joyce Doctrines p. 111.

(4) *Gibson* v. *Smith*, 2 Atk. 182 ; *North Eastern Railway* v. *Elliot*, 1 J. & *H.* 145.

(5) *Maharup* v. *Mahabir*, 9 Pat. L. T. 325 = A. I. R. 1928 Pat. 111.

(6) In *Vandermark* v. *Schoon maker*. 9 Hun. 11, the court observed : "Waste has always been a subject of chancery jurisdiction. It is generally irreparable in its results, and hence especially within the restraining power of that court. And it has been well remarked that courts of equity will exercise a liberal jurisdiction in respect to waste, and in its restraint."

(7) *Duke of Marlborough* v. *St. John*, 5 De G & S. 174. In the early case of *Abrahall* v. *Bubb*, 2 Swanst. 172, it was said that "where he in reversion might have a trover for the trees when felled, there the court ought to grant an injunction to stay the felling." According to

buildings, or the erection of new buildings, taking minerals, gas or stone (1), changing the character of land (2), taking away crops, or manure (3) and improper mode of tillage (4)."

Waste must be threatened.—The purpose of this jurisdiction is, to prevent future acts of waste, and also, though rarely, to restore things to their former condition (5). Hence, in general, an injunction will not be granted after the acts complained of are finished, nor to prevent the removal of the personalty produced by acts of waste, such as timber cut (6). In determining the propriety of granting its preventive remedy, equity requires a plaintiff to show a need of its protection. We must establish that the defendant has been guilty of acts or words which justify a reasonable apprehension on his part of future waste (7). "The court never grants injunctions" says *Lord Eldon* (8) "on the principle that they will do no harm to the defendant, if he does not intend to commit the act in question—but if there be no ground for the injunction, it will not support it." And a plaintiff who does not shew a sufficient case of threatened waste will have his bill dismissed with costs (9). That is not saying that the courts make a plaintiff's way hard or impose on him a heavy burden. For a single act of waste is considered a sufficient threat of futher acts of the same kind (10); or mere uttered threats, or acts which, though not themselves waste, yet signify an intention to commit waste, will support an injunction (11). And it is no defence to a bill for an injunction for a defendant who has been guilty of waste to say that he does not intend to do so again (12), or that he has committed no waste since the filing of the bill (13), or for one who has threatened waste to say that he does not mean to carry out his threat (14). Such declarations do not under the circumstances, overturn the case which the plaintiff has made, and the injunction will issue in spite of them (15). But where waste is of a trivial nature, no injunction is available to restrain it (16).

English law there is distinction between trees which are timbers and which are not timbers. Vide *Harrison, In re*, 28 Ch. D. 227; *Terry, In re* (1918) 87 L. J. Ch. 581. Ordinarily it is no waste to cut down trees which are not timbers. *Phillips* v. *Smith* 14 M. & W. 593; see also *Pidgeley* v. *Rawling*, 2 Coll. 275; *Earl* of *Cowley* v. v. *Wellesley* L. R. 1 Eq. 656; *Honeywood* v. *Honey wood*, 18 Eq. 309.

(1) *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Holden* v. *Weeks*, 1 J. & H. 278. An injunction was denied in *Clavering* v. *Clavering*; 2 P. Wms. 388.

(2) *Pultney* v. *Shelton*, 5 Ves. 259; *On slow* v.—, 16 Ves. 173.

(3) *Pultney* v. *Shelton*, 5 Ves. 259.

(4) Pom. Eq. Jur. § 1897.

(5) Pom. Eq. Jur. § 1898.

(6) *Bishop* of *London* v. *Webb*, 1 P. Wms 527.

(7) Pomeroy's Eq. Jur. § 1898.

(8) *Coffin* v. *Coffin*, Jacob, 70.

(9) *Clement* v. *Wheeler*, 25 N. H. 361.

(10) *Barry* v. *Barry*. 1 Jacob & W 651.

(11) *Jackson* v. *Cator*, 5 Ves. 688; *Coffin* v. *Coffin*, Jacob. 70; *Barry* v. *Barry* 1 J. & W. 653; *Darron* v. *Carrole* 11 Jr. Ch. 379, 383; *Campbell* v. *All good* 17 Beav. 628.

(12) *Packington* v. *Packington*, Dic. 101; *Sowerby* v. *Fryer*, L. R. 8 Eq. 417.

(13) *Att. Gen.* v. *Burrows*, Dick 128.

(14) *Packington* v. *Packington*, Dick. 101,

(15) Pomeroy's Eq. Jur. § 1898.

(16) *Brace* v. *Taylor*, 2 Atk. 253; *Dorran* v. *Carroll*, 11 Ir. Ch. 329, 383; *Doherty* v. *Allman*, 3 A. C. 733; *Jones* v. *Chappel*, 20 Eq. 542; *Meux* v. *Cobbley*, (1892) 2 Ch. 264; *West Ham* v. *East London*, (1900) 1 Ch. 635; *Hyman* v. *Rose*, (1912) A. C. 632.

It would be absurd if a party were compelled to stand by until the injury has been accomplished before applying for preventive relief in cases of this nature. Courts of equity grant relief upon proper showing to prevent threatened waste without waiting for its actual commission (1). In *Gibson* v. *Smith* (2), it was held by *Lord Chancellor Hardwick*, that if a person has only threatened to open mines, a plaintiff may certainly come into court to restrain a defendant from doing it, and it is not necessary to stay till waste is actually committed, where the intention appears, and the person insists on his rights to do it, and though no proof appears of waste, yet if a tenant for life insists on a right to do it, and has none, the reversioner may have an injunction. Thus the sending a surveyor to mark out trees is a sufficient ground for an injunction, and the court will not wait till they are cut down (3). A court of equity will not interfere unless it is shown that there is danger from the mode in which a tenant for life in possession is dealing with the property (4). A tenant for life *sans* waste will not be interfered with in the exercise of his legal powers, unless he is proceeding to use those legal powers in a manner inequitable towards those in remainder; and therefore he may fell and sell trees planted for ornament, if done in a proper course of husbandry (5).

Legal Waste which is not subject to injunction.—In view of the extensive jurisdiction of equity over waste it is sometimes said that, in general, an injunction may be obtained to stay waste in all cases where an action of waste would lie at common law. The qualifications to this statement of the scope of equity's jurisdiction over waste should be made at this point. They are three in number: First, equity will not enjoin permissive waste (6). The reason for this holding is not made clear in the cases. In one of them (7) counsel argued, that to grant such injunctions "would tend to harrass tenants for life, and jointresses, and suits of this kind would be attended with great expense in depositions about the repairs." A more satisfactory reason would seem to be the same one which leads to the refusal to decree specific performance of contracts to make repairs, viz, the practical difficulty of giving adequate supervision to the performance of the decree (8). Secondly, equity will not enjoin ameliorating waste which is any act that though technically waste, yet it fact improves the inheritance (9). The reason for refusing the injunction in such cases is obvious And thirdly, equity will not enjoin the trivial acts of waste, but will require that substantial damage be shown (10).

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(1) Spelling on Injunctions etc. § 256. See also *Bindubasini* v. *Jahnabi*, 24 C. 260.

(2) 2 Atk. 182.

(3) *Jackson* v. *Castor*, 5 Ves. 688.

(4) *Dutt* v. *Dossee*, 6 M. I. A. 433.

(5) *Halliwill* v. *Philips*, 4 Jur. 607.

(6) *Castlemain* v. *Craven*, 12 Vin. Abr. 523; *Powys* v. *Blagrave*, 4 De G. M. & G. 448, 458; *Re Cart wright*, 41 Ch. D. 532, 536; *Wood* v. *Gaynon*, Amb. 395.

(7) *Wood* v. *Gaynon* Supra.

(8) Pomeroy Eq. Jur. § 1899.

(9) *Doherty* v. *Allman*. L. R. 3 App. Cas. 709; *Meux* v. *Cobley* (1892) 2 Ch. 253; *Mollineux* v. *Powell*, 3 P. Wms 268 n.

(10) *Mollineux* v. *Powell* 3 P. Wms 268 (n); *Barry* v. *Barry*, 1 Jacb & W. 651; *Doherty Allman*, L. R. 3 App. Cas, 709; *Birch Wolfe* v. *Birch*, L. R. 9 Eq. 683; Pom. Eq. Jur. § 1899.

Must the Injury be Irreparable?—The last preceding statement immediately suggests the inquiry whether a showing of even substantial damage is enough to justify an injunction against waste. Does not the usual rule that a legal wrong will be enjoined only when the legal remedy is inadequete apply here, and must not the injury therefore be irreparable? It would seem that in assuming jurisdiction over waste the courts have not always had this fundamental inquiry in mind; or else have considered it not the test of jurisdiction. Hence injunctions have been granted when, tested by the above rule, it would seem they should have been denied, as when the waste consisted in carrying away personal property not possessing any peculiar qualities or special value (1). If prohibited by a covenant in a lease, it seems that the fair weight of authority holds in favour of granting the injunction against any waste, whether causing irreparable injury or not (2).

Plaintiff's title.—A great deal has always been said in the cases about the title which a plaintiff who is seeking an injunction against waste must show, and of the effect on plaintiff's right to the injunction of a dispute as to title between him and the defendant. It is to be noted that there are here two distinct questions, which have not always been kept clearly apart. The first is as to the showing of title which a plaintiff must make in his bill to entitle him to relief, assuming his allegations of title to be admitted; it is the question of title which is raised by a demurrer to the bill as being insufficient in the allegations of title (3). The second is raised when the plaintiff's allegation of title, sufficient in themselves, are disputed by the defendant. In answer to the first question it can be said that the courts require the plaintiff to set out his claim of title fully and to support it by positive evidence (4). Hence *Lord Thurlow* in an early case refused to grant a temporary injunction because the plaintiff made affidavit generally that he was entitled to a fee simple and did not set out a particular title. And shortly afterwards *Lord Eldon* refused a motion for injunction because, though the plaintiff alleged his title sufficiently, yet his affidavit supported it only as a matter of belief on plaintiff's part, the court saying there ought to be "positive evidence of an actual title." The reason for this rule is stated in a recent American case as follows: "This rule is a simple recognition of the general principle that one is not entitled to invoke the extraordinary powers of a court of equity unless he can establish in a manner satisfactory to the law the fact that he may suffer an irreparable injury in his estate. Unless the estate be his, he can suffer no injury, and unless the title be in him there is no estate (5)." "In other words, for a plaintiff to obtain standing in a court of equity to enjoin waste, he must make a *prima facie* showing of title in himself (6). And this is the state of facts which

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(1) *Pulteney* v. *Shelton*, 5 Ves. 259, note; *Onslow* v.—, 16 Ves. 173.

(2) *Tipping* v, *Eckersley*, 2 Kay. & J. 264; *Barret* v. *Blagrave*, 5 Ves. 555; Pom. Eq. Jur. § 1900.

(3) Pom. Eq. § 1901.

(4) *Whilelegg*, *Whitelegg*, 1 Bro. C. C. 57, by *Lord Thurlow*; *Davis* v. *Leoo* 6 Ves. 784, by *Lord Elden*.

(5) *Flannery* v. *Hightower*, 97 Ga, 592.

(6) Pomeroy's Eq. Jur. § 1901.

raises the second question above mentioned. In the definition of waste at the beginning of his chapter it is pointed out that the material distinction between waste and trespass in equity lies in the fact that waste is committed by one rightfully in possession, trespass by one wrongfully in possession or not in possession at all. This is a purely technical distinction, and hence identical acts will in one case be waste, in another trespass. Influenced by this identity of substance, it has been an inveterate habit of equity judges and lawyers since the time of *Lord Eldon* (1), to speak of acts as "waste" when with strict observance of the technical distinction they would have called them trespass, A fuller discussion of the subject is therefore reserved for the chapter on Trespass. It may be sufficient to point out here that, if there is really a substantial dispute as to title, the injunction prayed, and the only one proper to grant, generally, is a temporary injunction pending the settlement of dispute; that a stronger case of apprehended injury must be shown to entitle a plaintiff to a temporary than to a permenant injunction, because of the injury which the injunction will have done the defendant if he eventually prove title in himself; and finally, that if the above conditions are complied with, though the authorities are not uniform, the injunction will issue (2)"

In *Davenport* v. *Davenport* (3) it was held that a party out of possession claiming real estate by title simply adverse to that of the party in possession cannot be heard in a court of Equity, upon an application to restrain the party in possession from committing acts of trespass productive of irreparable waste, until he has established his title at law. In *Haigh* v. *Jagger* (4), *Vice Chancellor Sir J. L. Knight Bruce*, refused an injunction to restrain a party claiming by an adverse legal title from committing acts of trespass (breaking into and entering upon a bed of coal) alleged to be productive of irreparable waste, under the special circumstances of the case; but the Vice-Chanceller said that he was not, however convinced that where a man is in possession, however full and complete, of an estate by a title simply and merely adverse to that of another, by whom the estate is, whether at law or in Equity, claimed against him, without any privity between them, such a state of things, if the party in possession, by his answer, whether truly or untruly, swears his title to be just and valid, or that of his adversary to be unjust and invalid, does, of necessity prevent a court of Equity from interfering to restrain the party in possession from stripping the estate of its timber, pulling down the mansion—house upon it, or other such acts (5). In *Norway* v. *Rowe* (6) an injunction was granted to stay waste against a defendant, who insisted on his own title, but admitted that he received possession from the plaintiff's tenant without the plaintiff's knowledge, in breach of the tenant's duty. But in *Pillsworth* v. *Hopton* (7), *Lord Chancellor Eldon* refused an injunction to stay waste against a defendant

(1) *Pills worth* v. *Hopton*, 6 Ves. 51.
(2) Pom. Eq. Jur. § 1902.
(3) 7 Hare 217,
(4) 2 Coll 231.
(5) Joyce in Injunction p. 132.
(6) 19 Ves. 154.
(7) 6 Ves. 51,

in possession claiming by adverse title, the tenants having attorned, the plaintiff having failed in ejectment (but, as the bill alleged, not on the merits), and both plaintiff and defendant setting up pretences of title. In *Courthope* v. *Mapplesden* (1), the court on a motion by a landlord, granted an injunction against a trespasser cutting timber by collusion with tenant, but without prejudice to the case of a mere trespass. In *Smith* v. *Collyeer* (2), the court refused an injunction on behalf of plaintiffs, who, by their guardian, were in receipt of the rents, against the defendant, claiming as heir, and insisting the will was not well executed, cutting timber, the title being disputed as between devisee and heir-at-law; *Lord Chancellor Eldon* saying that it was quite a new case, and that it was not a case of waste, but trespass (3). In *Mortimer* v. *Cotterel* (4), the court refused to interfere, by way of injunction, to stay waste on the ground that the defendant was a mere stranger guilty of forcible entry, and might be turned out of possession immediately. The court will not grant an injunction to stay waste without positive evidence of title (5) The court will, at the instance of a person merely alleging a legal title to realty, grant an injunction to restrain persons in possession of an estate from committing malicious and destructive waste (6).

Equitable Waste—Definition.—Although the classification of injunction into legal and equitable is not now of any practical importance, especially in British India, yet to have a comprehensive grasp of the subject, it is necessary to know the original basis of the distiction as laid down in the old courts of chancery. Equitable waste arose out of the different effect given in law and in equity to the phrase "without impeachment of waste," or equivalent words, used in a lease, or the settlement or devise creating an estate less than a fee. Courts of law held that such a phrase gave to the tenant the same absolute power of changing or destroying the inheritance that a tanant in fee would have. Courts of equity early "set up a superior equity (7)" and began to restrain acts by the tenant that were really distructive and after more or less diversity of opinion (8) finally adopted as equitable waste which would not be

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(1) 10 Ves. 290,
(2) 8 Ves. 89.
(3) Joyce on Injunction p. 133.
(4) 2 Cox. 205,
(5) *Davies* v. *Leo*, 6 Ves. 784; *Lowe* v. *Lucy*, 1 Ir. Eq. Rep. 93.
(6) *Talbot* (Earl) v. *Scott*, 4 K. & J, 90.
(7) *Per Lord Hardwicke* in *Rolt* v. *Lord Somerville*, 2 Eq. Cas. Abr. 759, *Lord Turner* in *Micklethwait* v. *Micklethwait*, 1 De. G. & J. 504, 524.
(8) Vide the opinion of *Lord Nottingham* in *Skelton* v. *Skelton*, 2 Swanst 170; of *Lord Parker* in *Bishop of London* v. *Webb*. 1 P. Wms. 527; of *Lord Hardwicke* in *Ashton* v. *Ashton*, 1 Ves. Sr. 264 and of *Lord Eldon* in *Smythe* v. *Smythe*, 2 Swanst 251. The court by applying the doctrine of equitable waste controls and restrains the excessive use of the legal power incident to an estate impeachable for waste but with reference only to the presumed will and intention of the party by whom the power was created (*Marker* v. *Marker*, 9 Hare. 1, 18=15 Jur. 663). The court may interfere where a man unconsciously exercises a legal right to the prejudice of another; and an act may, in some sense, be regarded as unconscientious or contrary to the dictates of prudence and reason, although the actor does the act without any malicious motive. *Turner* v. *Wright*, 6 Jur N. S. 809. In the above case *Knight Bruce L J.* said: "The presence or absence of a bad motive will not enable us to draw any satisfactory line between what is to be considered malicious and what is to be considered equitable waste; and no line

allowed even to a tenant without impeachment of waste, "that which a prudent man would not do in the management of his own property" (1). The cases of equitable waste are almost, if not exclusively, confined to destruction or removal of buildings (2), carrying away of the soil (3) cutting ornamental or sheltering trees or shrubs (4); of these various classes the first two need no special mention, the cases in them being very few and founded on obvious reasons. "Ornamental" as applied to trees and shrubs in matters of equitable waste is a technical term. "The question is not, whether timber is or is not ornamental; but the fact to be determined is that it was planted for ornament; or if not originally planted for ornament, was, as we express it, left standing for ornament by some person having the absolute power of disposition (5)" It is also held that cutting tress planted to exclude certain objects from view will be enjoined, on the same principle (6), and that the owner of the fee may change ornamental timber into non-ornamental timber (7). The principle would, therefore, seem to be, that whatever trees or shrubbery the last owner of the fee manifest an intention to have left standing, is within the rule as to equitable waste (8). The cutting of saplings is enjoined on the ground that

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to regutate the interposition of a court of equity by injunction can well be drawn, other than the recognised and well established line between legal aud equitable waste. The application of this to facts of particular cases may sometimes be attended with difficulty, but the principle in which the line is to be traced is known and unvariable." The doctrine applies equally to all cases of estates limited to go in a course of succession, whether that object is effected by creating life-interest, or estates in fee with executory devices over." *Ibid.*

(1) *Per Lord Campbell* in *Turner* v. *Wright*, 3 De. G. F. & J. 234, 243; see also *Baker* v. *Sebright*, L. R. 13 Ch. D. 179, 186.

(2) *Vane* v. *Barnard*, 2 Vern. 738; *Rolt* v. *Somervile*, 2 Eq. Cas. Abr. 759; *Anonymous*, Mos. 237; *Williams* v. *Day*, 2 Cas. in Ch. 32.

(3) *Bishop of London* v. *Web*, 1 P. Wms. 527.

(4) *Packington's case*, 3 Atk. 215; *Coffin* v. *Coffin*, Jacob. 70; *Wombwell* v. *Belasyse*, 6 Ves. 110 a note; *Morris* v. *Morris*, 15 Sim. 505; *Wellesley* v. *Wellesley*, 6 Sim. 497.

(5) Per *Lord Eldon* in *Wombwell* v. *Belasyse*, 6 Ves. 110a, note; see also *Downshire* v. *Sandys*, 6 Ves. 107; *Berges* v. *Lamb*, 16 Ves. 174, 185; See also *Marker* v. *Marker*. 9 Ha. 1; *Micklethwait* v. *Micklethwait*, 1 De G & J.: 524; *Weld Blendel* v. *Wolseley*, (1903) 2 Ch. 664; *Ford* v. *Tynte*, 2 De G. J. & S. 127. 'And a tenant for life without impeachment will be restrained from cutting timber planted or left standing for ornament etc. whether ornamental or not so, and the principle has been extended beyond the mansion house to out houses and grounds, plantations, vistas, avenues and all the sides about the estate, for ten mile. around." *Devonshire* (*Marquis of*) v. *Sandys*, 6 Ves. 107, 110). In *Coffin* v. *Coffin*, 16 Ves. 70, 71, *Lord Eldon* said: "The Court does not protect timber because it is ornamental, but it protects it if it was planted for ornament, whether it is or is not ornamental." But in the preservation of ornamental timber the protection of the Court is confined to timber planted and left standing for shelter or ornament, and the question whether the protection should be extended to particular timber is therefore one of fact, and the determination must depend upon the evidence which can be collected to establish the fact. *Marker* v *Marker*, 9 Hare. 1, 18. A perpetual injunction was granted against trustees who had cut down three ornamental trees, and failed in proving to the satisfaction of the Court that they were prejudicial to the residence. *Campbell* v. *All good* 17 Beav 623.

(6) *Day* v. *Merry*, 16 Ves. 375; *Campbell* v. *All good*, 17 Beav. 627.

(7) *Mickle thwait* v. *Mickle thwait*, 1 De. G. & J. 504.

(8) Pomeroy's Eq. Jur § 1904.

as they are not fit for timber it is dispoiling the estate as a prudent owner could not do (1).

Relief Against waste in equity.—The only relief against legal waste for which one is entitled to come into equity is an injunction. This injunction is almost always prohibitive, but in a proper case it may be mandatory for the restoration of the thing destroyed (2). But though one can secure standing in equity with reference to the legal waste only because of right to an injunction, he is also in addition given an accounting for the waste already done. This further relief is given on the broad general principle of equity that when once it has acquired jurisdiction of a case it will give complete relief, even though part of such relief, be purely legal in its nature, rather than to compel a plaintiff to bring another suit at law in order to obtain the full remedy to which he is entitled (3). This accounting is given only as an accident to the injunction, which is the basis of plaintiff's right in equity, and therefore it cannot be prayed alone; and if the injunction is refused the right of accounting falls with it (4). The accounting for equitable waste differs from that given for legal waste in one particular. Since equitable waste is wholly a creation of the courts of equity, there is no legal remedy for it whether it is past or future- Hence one may file his bill for an aecounting for equitable waste without praying, or being entitled to an injunction (5). The accounting which equity gives for waste, both legal and equituble, differs from the damages a Court of law gives for the former in that it is estimated according to the profits which the wrong-doer has received, and not according to the damage done to the estate nor the value of the personalty produced by acts of waste (6), and no allowance is made for the defendant's damage (7). The Court will not maintain an injunction against equitable waste, unless it is proved that equitale waste has been committed, or is threatened (8). In *Barry* v. *Barry* (9), the Court refused an injunction to stay waste, on the ground that the acts of waste committed were trivial, and also that the plaintiff's proceedings had been dilatory; but *Lord Chancellor Eldon* said that he admitted that a small degree of waste (he did not say the smallest, manifesting an attempt to do more, would be sufficient, for the court to act upon; but that it would look at it in the manner in which the subject was viewed by the courts of law, and there the extent of the waste done was considered very material; and that there was an authority at law where a verdict having been found for the plaintiff, judgment was entered

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(1) *Smy the* v. *Smy the*, 2 Swanst. 251.

(2) *Vane* v. *Lord Barnard*, 2 Vern. 738; *Rolt* v. *Lord Somerville*, 2 Eq. Cas. Abr. 759.

(3) *Jessus College* v. *Bloom*, Amb. 54= 3 Atk. 262; *Story* v. *Windsor*, 2 Atk. 630; *Parrot* v. *Palmer*, 3 M. & K. 632; *Wright* v. *Pitt*, 12 Eq. 408, 416; *Castleman* v. *Craven*, 22 Vin. Abr. 523.

(4) *Jessus College* v. *Bloom*, 3 Atk. 262 *Smith* v. *Cooke*; 3 Atk. 378.

(5) *Whitefield* v. *Bewit*, 2 P. Wms. 240; *Lansdowne* v. *Lansdowne*, 1 Madd. 116; *Lushington* v. *Boldero*, 15 Beav. 1,

(6) *Lee* v. *Alton*, 1 Ves. 78, 82; *Morris* v. *Morris*, 2 De G. & J. 323.

(7) Pomeroy's Eq. Jur. § 1905.

(8) *Potts* v. *Potts*, 3 L. J. Ch. 176.

(9) 1 Jac & W. 651.

up for the defendant on account of the extreme smallness of the damages (1); and that a Court of Equity would in this, follow the law. An injunction to stay waste will not be granted where it is doubtful whether the acts complained of are waste (2).

Ameliorating or Meliorating Waste.—A waste according to the English law may be destructive or ameliorating, such as does injury to the inheritance or improves it. The general rule is that a waste to be of any sort of effect with a view to an injunction, must be a waste resulting in substantial damage (3). Substantial damage may be done to the estate (i) by diministing its value; (ii) by increasing the burdens upon it; and (iii) by impairing the evidence of title (4). So a Court of Equity ought not to interfere where the waste is ameliorating or trivial (5). But an act which increases the value of an estate may nevertheless be considered as waste if it impairs the evidence of title (6) or increases the burden on the property. Any material change in the nature and character of the building made by the tenant is waste, although the value of the property should be enhanced thereby (7). A Court of Equity will restrain waste by a lessee for lives renewable for ever, although the act done may lead to the improvement of the land, if it immediately occasion any damage to the inheritance; and it will not refuse to restrain waste by which the estate is not necessarily and permanently improved, on the mere ground that the party has done other acts which will benefit the estate (8). But it is doubtful whether the Court will, in such a case (namely, that of a lease for lives renewable for ever), restrain mere acts of meliorating waste by the lessee for lives (9). But a tenant for life who has committed meliorating waste by allowing her tenants to dig turf in fencing lands, but under an obligation to preparing the land for agricultural purpose, is not accountable to the persons entitled in remainder for the value of the turf removed (10). But in British India the question whether injunction will be granted in the case of ameliorating waste or not depends upon the particular statute which governs the rights of the parties in a particular case. In cases of non-agricultural lease, a lessee must not without the lessor's consent, erect on the property any permanent structure except for agricultural purpose (11).

Waste either voluntary or permissive.—Again, waste may be commissive, or permissive, that is, active and wilful, or due to neglect (12). The

(1) *Harrow School* v. *Alderton*, 2 B. & P. 86.

(2) *Lyon* v. *Wilkinson*, 1 L. J. Ch. 155.

(3) *Meux* v. *Cobley*, (1892) 2 Ch. 253; *Westham* v. *East London*, (1900) 1 Ch. 635, 636; *Edmund* v. *Martell*, 24 T. L. R. 25.

(4) Kerr on Injunction p. 47 citing *Doe* v. *Earl of Burrington*, 5 B & Ad 507; *Huntley* v. *Russell*, 13 Q. B. 572; *Jones* v. *Chappel*, 20 Eq. 539; *Westham* v. *East London*, (1900) 1 Ch. 636.

(5) *Doherty* v. *Allman*, (1878) 3 A. C. 709; *Mollineux* v. *Powell*. 3 P. Wms. 268 n.

(6) Kerr on Injunction p. 47 citing *Simmons* v. *Norton*, 7 Bing. 648; *Duke of St. Albans* v. *Skipwith*, 8 Beav. 357; but see *Doherty* v. *All man*, 3 A. C. 709.

(7) *Kidd* v. *Dennison*, 6 Barb. N. Y. 13.

(8) *Coppinger* v. *Gubbins*, 3 J & Lat. 397; *Leeds* (*Duke of*) v. *Amherst*, 2 P. H. 212.

(9) Ibid; *Martin* v. *Coggan*, 1 Hoog. 120; Joyce Doctrines p. 116

(10) *Harris* v. *Ekins*, 20 W. R. 999.

(11) Transfer of Property Act s. 108 (p.)

(12) Banerjee's T. L. L. for 1906 p. 636.

common law recognized two species of waste, voluntary and permissive, the former consisting in some positive act of commission, such as the cutting of timber, the latter being the omission to do something, such as not doing of repairs whereby a house is suffered to fall into decay (1)

Voluntary waste.—The essential element in an act of voluntary waste is that it alters the nature of the thing (2) to the injury or destruction of the inheritance. The law of waste presents many analogies to the rules restricting the user of property by the usufructuary in the Roman law, and is to a great extent based upon the Roman law of usufruct (3). In regard to certain well marked classes of acts, such as the cutting of growing wood, and the working of mines and minerals, certain acts done by a limited owner have been held to be waste, with the result that certain general rules of law applicable to certain specific forms of waste have been established, The question of waste or no waste in any particular case is not, however, an abstract question depending simply upon the applicability of some general rule of law; it depends, in the case of a lease, upon the intention of those who created the relation of landlord and tenant, in the case of settlement, upon the intention of the settlor. Further, in ascertaining the intention, proof of local usage is admissible as illuminating an instrument, whether contract, will, or settlement *inter vivos* (4). In order that an act may amount to waste there must be a legal injury to the inheritance. Therefore "those acts are not waste which are not prejudicial to the inheritance (5)" "The law of waste" says *Bowen L. J.* in *Dash Wood* v. *Magniac* (6) "regards substance rather than technicality, and requires an act to be appreciably injurious to the inheritance before it condemns it as waste." The law of waste was, however, until the eighteenth century, strictly applied in the common law courts; thus the fact that an act of limited owner, plainly one of waste itself, was followed by further acts by him which improved the value of the inheritance did not relieve him from liability at law for his first act (7). But where equity intervenes, the mere destruction of old buildings, followed by erection of new buildings is not tantamount to a waste, unless the value of the inheritance is impaired thereby (8). So now in every case the question is whether an act which is alleged to be a waste is injurious to the inheritance or not. But if land

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(1) 2 Whit & Tud. Leading Case p. 1022 citing Co. Litt. 53 (*a*); 2 Jur. 145; per *Lush L. J.* in *Wood house* v. *Walker*, 5 Q. B. D. p. 409.

(2) *Prr Buckley J.* in *Westham Central Charity* v. *East London* (1900) 1 Ch. 624 at p. 635 adopting the definition in *Darcy* v. *Askwith*, Hob. 234; 2 Whit & Tud. Leading Cases p. 1022.

(3) *Per Bowen L. J.* in *Dashwood* v. *Magniac*, (1891) 3 Ch. 360 at p. 362.

(4) *Per Lindley L. J.* in *Dashwood* v. *Magniac*. (1891) 3 Ch. 306 at p. 352, *ibid* per *Bowen L. J.* at p. 366; see also *Tucker* v. *Linger*, 8 A. C. 508; *Dingle* v. *Coppen*, (1899) 1 Ch. 726; 2 Whit & Tud. Lead Cas. 1023.

(5) Per *Richardson C. J.* in *Barret* v. *Barret*, Hetley, 36

(6) (1891) 3 Ch. 306 at p. 360.

(7) 2 Whit & Tud. Lead. Cas. p. 1023 citing *Greene* v. *Cole*, (1663) 2 Wm. Sanders, 644.

(8) *Jones* v. *Chappel*, 20 Eq. 539 541, 542; *Doe* v. *Earl of Burlington*, 5 B. & Ad. 507; *Meux* v. *Cobley*, (1892) 2 Ch. 253; *Edmund* v. *Martell*, 24 T. L. R. 25; 2 Whit & Tud. Leading Cas. 1023.

used for one purpose is used for quite a different purpose it amounts to a waste, such as erection of buildings on agricultural land (1) or using premises designed for one business for a quite different business (2) or alterations in a building which entirely change its character (3). If the tenant convert ancient meadow (4) into arable, or arable into meadow or into wood, it is waste, 'for it changes not only the course of his husbandry, but the proof of his evidence." (5).

Permisssive waste.—This is waste "by reason of omission or not doing (6)," as if a man permits a room to be in decay for want of plastering, so that timber became putrid. And it seens that *Lord Coke* included in this description of waste, destruction caused by a stranger through the sufferance of the tenant (7). A tenant is not in general responsible for permissive waste where not followed by actual substantial damage to the premises (8). Tenants at will, and tenants from year to year are not responsible for permissive waste (9). It was laid down by *Vice-Chancellor Sir W. P. Wood*, in *Powys* v. *Blagrave* (10), that Courts of Equity have no means of interfering in cases of permissive waste by a tenant for life of real property and that there is no implied trust to keep the property in repair imposed upon a tenant for life under a will. And the Court of Appeal also held that a Court of Equity would not interfere, at the instance of a remainder-man, in cases of permissive waste, either by injunction or to give satisfaction against an equitable tenant for life in possession (11). But in *Cald well* v. *Baylis* (12), an injunction was granted against permissive waste by a tenant for life, where it was shown that the defendant had permitted the premises to grow ruinous for want of repairs.

Who can sue for injunction against waste.—It remains to note the estate of parties for whom injunctions to prevent waste will issue. No citations will be needed to show that a reversioner or remainder-man in fee may enjoin waste. So may a contingent remainder-man (13), a trustee to preserve contingent remainders (14) or a tenant for life whether within or without impeachment of

(1) *Broke* v. *Mernagh*, 23 L. R. Ir. 86 ; *Broke* v. *Kavanagh* 23 L. R. Ir. 97 ; *Kehoe* v. *Lansdowne*, (1893) A. C. 451.

(2) *Mausell* v. *Hart*, 11 Ir. R. Eq. 478 ; but see *Grand Cannel Co.*, v. *M' Name*, 29 L. R. Ir. 131.

(3) *Rose* v. *Spicer*, (1911) 2 K. B. 234, per *Cozen Harcy M. R.* at p. 243; 2 Whit & Tud. Lead. Cas. 1024.

(4) *Goring* v. *Goring* 3 Swans. 661 ; *Rush* v. *Lucas*, (1910) 1 Ch. 437.

(5) 2 Rolle's Abr. 814 ; 2 Whit & Tud. 1025.

(6) 2 Inst. 145.

(7) Bewe's Waste pp. 214, 215; 2 Wiht & Tud. 1026.

(8) *Ibid.*

(9) *Countess of Shrewsbury's* Case. 5 Co. 13 a ; *Tariano* v. *Young*, 6 C. & P. 8 ; *Leach* v. *Thomas*, 7 C. & P. 327 ; 2 Whit & Tud. 1026.

(10) 1 Kay. 495.

(11) *Powys* v. *Blagrve*, 4 De. G. M. & G. 448.

(12) 2 Mer. 408.

(13) As to legal rights where there is an intervening estate, *Tracy* v. *Tracy* 1 Vern. 23 ; *Robinson* v. *Little ton*, 3 Atk. 209 ; *Udal* v. *Udal*, Al. 8', 82 ; *Seegram* v. *Knight*, 2 Ch. Ap. 628, 632. 'If a lease be made to A for life, the remainder to C in fee, in this case where it is said that the Register and in F. N. B. that an action of waste does lie, it is to be understood after the death or surrender of B in the mesne remain der, for during his life no action of waste doth lie" : *Co.*, Litt. 54 (a).

(14) *Garth* v. *Cotton*, 1 Ves. 524, 556 ; *Perrot* v. *Perrot*, 3 Atk. 54 ; Pom. Eq. Jur. § 1906.

waste (1). A mortgagee or a purchaser at a foreclosure sale may also enjoin waste by a mortgagor in possession who threatens to do acts which impair his security (2). The injunction will not issue, however, unless the sufficiency of the security is threatened (3). On the same principle of protecting a security, a vendor of land who retains title may enjoin waste by a vendee in possession (4), and a vendee, because of his equitable estate, may enjoin a vendor in possession (5). So also the security of an attachment creditor (6) or judgment creditor (7), or which a landlord has for rent (8) will be protected by injunction. It was formerly thought that, because of the nature of their legal rights, an injunction would not issue between tenants in common for any ordinary acts of waste either legal or equitable, but that acts of waste was so destructive as to go beyond the requisites of either of these might be enjoined (9). But the cases show that the exercise of equity jurisdiction is now more liberal, and any acts of waste by one tenant in common that are inconsistent with prudent management of the estate or that jeopardize the interest of his co-tenant will be enjoined (10). But when one co-shorer landlord, in exclusive possession of a waste plot of land, although such exclusive possession may be held with the permission of the other co-sharer landlord, leases it out to a tenant, who improves it without any objection on the part of the latter, it is not open to the latter to obtain *khas* possession of the land so improved, jointly either with the lessor or with the tenant (11). In the above case the Court observed : "The silted up tank was yielding no profit to any body. If the lessor defend-

(1) *Perrot* v. *Perrot*, 3 Atk. 94 ; *Rolt* v. *Somerville*, 2 Eq. Cas. Abr. 759 ; *Davis* v. *Leo* 6 Ves. 784 ; Pom. Eq. Jur. § 1906.

(2) *Parsons* v. *Hughes*, 12 Md. 1 ; *Humphreys* v. *Harrison*, 1 Jacob & W. 581 ; Pom. Eq. Jur. § 1906.

(3) *Fair bank* v. *Cud worth*, 33 Wis. 358. For further details Vide Chapter XI *supra*.

(4) *Moses Brothers* v. *Johnson*, 88 Ala. 517 ; Pom. Eq. Jur. § 1906.

(5) *Smith & Fleck's Appeal*, 69 Pa. St. 474 ; Pom. Eq. Jur. § 1906.

(6) *Camp* v. *Bates*, 11 Conn. 51.

(7) *Jones* v. *Britton*, 102 N. C. 166 ; Pom. Eq. Jur. § 1906 ; but see *Leake* v. *Backett*, 1 Y. & J. 339.

(8) *Garner* v. *Cutting*, 32 Iowa. 547 ; Pom. Eq. Jur § 1906 ; but see *Sande man* v. *Rushton*, 61 L. J. Ch. 695.

(9) *Small man* v. *Onions*, 3 Bro. C. C. 621 ; *Hale* v. *Thomas*, 7 Ves. 589 ; *Twort* v. *Twort*, 16 Ves. 128 ; *Bailey* v. *Hobson*. 5 Ch. 182 ; *Durham* v. *Wawn*, 3 Beav. 119 ; *Arthen* v. *Lambe*, 2 Dr. & Sm. 428 ; *Job* v. *Potton*, 20 Eq. 84 ; *Glyn* v. *Howell* (1909) 1 Ch, 667 ; Pom. Eq. Jur. § 1906.

(10) *Hole* v. *Thomas*, 7 Ves. 589 ; see also *Aniunt* v. *Gopal*, 19 B. 269 ; For further particulars Vide Chapter XIII supra. "As each tenant in common has a right to 'enjoy as he pleases,' short of actually 'ousting' the others (*Lord Hatherly* in *Jocob* v. *Sewards*, 5 H. L. 464, 472,) and may, moreover, obtain a decree for a partition, the court will not in general grant an injunction to restrain any one of them from committing either ordinary (*Goodwyn* v. *Spray*,. Dick. 667) or equitable waste, (*Hole* v. *Thomas*, 7 Ves. 589 ; *Twort* v. *Twort* 16 Ves. 132, or from working coal mines (*Jobb* v. *Potton*, 20 Eq. 84), but it will interfere between them to prevent malicious or destructive waste, as for instance, 'against cutting saplings and any timber trees or underwood at unreasonable times (*Hole* v. *Thomas*, 7 Ves. 589, 590 ; *Clegg* v. *Clegg* 3 Gif. 322, 336 ; *Martyn* v. *Knowllys*, 8 T. R. 145)" 2 Whit & Tud. 1034. An equitable tenant in common was restrained by *Lord Thurlow* at the instance of his co-tenant, where the former was insolvent from committing waste. *Small man* v. *Onions*, 3 Bro. C. C. 621.

(11) *Madan mohan* v. *Rajab Ali* 28 C. 223.

ants acted beyond what they were entitled to, it has what would be called in English law ameliorating waste. They settled the tank with the lessee defendants who improved it, and a rent of rupees 4 is new derived therefrom. The Courts below have given the plaintiffs a decree for their share of the rent."

An under lessee will be enjoined from waste at the suit of the ground land lord (1). A tenant in tail will not be restrained from waste, because he may at any time bar the entail and give himself a fee (2) but a tenant in tail after possibility of issue extinct is subject to be restrained from committing equitable waste (3). "In India among Hindus, joint tenants or co-perceners predominate over tenants in common, and they clearly have a right to prevent a member of the family from, cutting trees growing on the family property, or destroying part of the family house or selling some of the family utensils (4)." Where a Hindu father attempted to alienate the undivided co-percenary property, the Madras High Court restrained him from transferring more than his share but did not grant injunction to prevent him from alienating his own share therein (5). Where the plaintiff in the cause had obtained an order for a Receiver, and was proceeding to cut timber upon the estates before the Receiver had been appointed, the court refused to grant an injunction upon the application of the defendant, it appearing that the latter, who was the agent of the owner of the estates (also a defendant) had no interest in such estates, and no authority from his principal to make the application (6).

Injunction—compelling Timber to be felled.—The jurisdiction to restrain permissive as well as positive active waste will be exercised sometimes to compel the felling of timber by the tenant in possession. For instance; equity will in a proper case interfere in cases where the tenant in possession is fmpeachable for waste, and direct timber to be felled which is fit to be cut down and in danger of running into decay, and will thus secure the proceeds for the benefit of those entitled (7). Such order can also be passed where the trees are injurious to the adjoining trees or for any sufficient reason (8)

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(1) *Farrant* v. *Lavel*, 3 Atk. 723.

(2) *Turner* v. *Wright*, 2 De G. F & J. 234; *Sarile's Case*, Tabot. 16 (cited); *Att. Gen* v. *Marlborough*, 3 Madd. 498; *Lydall* v. *Clavering*, cited Amb. 371.

(3) *Williams* v. *Day*, 2 Cas. in Ch 32; *Att. Gen* v. *Marlborough*, 3 Madd. 498; Pom Eq. § 1906. But he is not so impeached in a court of law. *Lewis Bowle's Case*, 11 Rep. 79; *Williams* v. *Williams*, 15 Ves. 419. In *Att. Gen* v. *Marlborough*, 3 Madd 498, *Sir John Leach* said: "In a court of law, a tenant in tail after a possibility of issue extinct, is, in effect a tenant for life in that impeahment of waste; and courts of equity have, in the question of equitable waste, confounded him with other tenants for life without impeachment of waste, and have not entered into the distinction that he is unimpeachable of waste, not by any provision of the grantor but as a legal incident to his estate."

(4) Banerjee's T, L. L.' for 1906 p. 638 see also S. R. A. s. 54 ill. (n).

(5) *Kanukarti* v. *Venkata Ramdas*, 4 Mad. Jur. 251 cited in Banerjee's T. L. L. for 1906 p. 639.

(6) *Hunter* v. *Nocholds*, 15 L. J. N. S. Ch. 320, Joyce on Injunction p. 151.

(7) Eden on Injunction Chapter X pp. 218 to 221; *Berges* v. *Lamb*, 16 Ves. 182; *Mildmay* v. *Mildmay*, 4 Bro. C. C. 76; *Delapole* v. *Delapole*, 17 Ves. 150; *Osborn* v. *Osborn*, 19 Ves. 423; *Wickham* v. *Wickham*, 19 Ves. 419, 423; Spelling on Injunctions etc. § 252.

(8) Kerr on Injunction p. 80 citing

Life estate holder and Hindu female heirs.—An estate for life, whether it be given expressly by instrument which creates it, or whether it arises from equitable considerations, is always impeachable of waste, unless the contrary be provided by express stipulation (1). But the nature of the estate inherited be a Hindu female heir cannot be explained by the terms of English Law. It was one time common to speak of a Widow's estate as being one for life. But this is wholly incorrect (2). "Hindu law" says Mr. Mayne "knows nothing of estates for life, or in tail, or in fee, It measures estate not by duration but by use. The distinctive feature of the estate is that, at her death, it reverts to the heirs of the last male owner. She never becomes a fresh stock of descent (3)." In *Nobo Kishore* v. *Hari Nath* (4), *Garth C. J.* said: "The difficulty, if there is any, which we have to deal with in this case, arises from the anomalous character of a Hindu Widow's interest. I have no doubt that *Mr. Justice Dwarkanath Mitra* was perfectly right in the Full Bench case of *Kery Kolitany* v. *Mooneram Kolita* (5), in describing that interest as having been originally a mere trust for the benefit of her deceased husband. But it has been found so impossible in practice to carry out that idea, that this court as well as their lordships of the Privy Council, have for many years past, considered and treated her estate as an absolute one, subject only to certain conditions" In the case of *Phool Chand Lall* v. *Raghubans Suhave* (6), *Sir Barnes Peacock* describes it thus: "It is not," he says "an absolute estate for all purposes, and it is not merely an estate for life, but she takes the estate of her husband for the benefit of her husband (which includes her maintenance and the performance of her religious duties) rather than for the benefit of those who may become the heirs of her husband upon her death." In *Moniram Kolita* v. *Kerry Kolitani* (7), *Sir Barnes Peacock* said: "Accorning to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship—as to which see the *Shiva Ganga Case* (8)—does not take a mere life estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever

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Campbell v. *Allgood*, 17 Beav. 623; *Att. Gen* v. *Duke of Marlborough*, 5 Mad. 280; *Lushington* v. *Boldero*, 6 Mad. 149; *Ford* v. *Tynte*, 2 De G. J. & S. 127; *Baker* v. *Sebright*, 13 Ch. D. 179.

(1) Kerr on Injunction p. 62 citing *Cole* v. *Peyson*. 1 Ch. Rep. 57; *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Ridge In re*, 31 Ch. D. 504; *Pardoe* v. *Pardoe*, 82 L. T. 547, *Hall In re*, (1916) 2 Ch. 493.

(2) Mayne's Hindu Law and Usage p. 818.

(3) Ibid p. 819 citing *Collector* of *Masulipatan* v. *Cuvaly Venkata*, 8 M. I. A. 529, 550; *Kery Kolitany* v. *Moniram*, 13 B. L. R. 5, 53, 73.

(4) 10 C. 1102 (F. B.)

(5) 13 B. L. R. 1.

(6) 9 W. R. 108.

(7) 5 C. 776 (P. C.) on appeal from 13 B. L, R. 1 at page 789.

(8) 9 M. I. A. 604.

her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. The suceession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who have been the heirs of the husband if he had lived up and died at the moment of her death (1)" The widow can at any time relinquish her estate—this having the effect of accelerating the estate of the next heir. The rule originated with the idea of a retirement from the world, or extinction of desire for property, which is tatamount to civil death. The widow may withdraw her life estate and destroy her own rights so as to accelerate the succession and vest the estate in the then next helr in the same way as if she were dead at the time of the surrender or relinquishment, in favour of the reversioner (2) Where a widow acquires certain property by pre-emption from the savings of her husband's estate and treats the property so acquired as one with the property received from her husband it is to be presumed that she intended the property so acquired to be treated as an accretion to her husband's estate (3).

A widow has an absolute right to the fullest beneficial interest in her husband's property inherited by her for her life. She takes as heir a prorietary estate in the land, absolutely for some purposes, although in some respects subject to some qualifications. Her disposition of the property is good for her life (4). Savings or accumulations by a Hindu widow out of the income of her husband's estate pass to husband's heirs' on her death (5). The extent and limit of her power of disposing of the property are not definable in the abstract, but must be left to depend on circumstances of the disposition when made and must be consistent with the law regulating such disposition. There is no distinction in this respect (*i.e*, as to the power of disposition) between the moveable and immoveable property descended (6). Where any femal takes as heir to a male, she takes a restricted estate (except in Bombay), and on her death the property passes not to her heirs, but to the person who would be next heir of the last full owner (7).

In *Collector of Mosulipatam* v. *Cavaly Venkata* (8), the principle which restricts a widow were laid down by the Judicial Committee, as follows :—"It is admitted, on all hands, that, if there be collateral heirs of her husband, the widow cannot of her own will alienate the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes.

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(1) *Shivaganga Case* 9 M. I. A. 601.
(2) *Jogesh Chandra* v. *Prasanna*, 55 C. L. J. 283=A. I. R. 1932 Cal. 664 ; see also *Antu* v. *Yeshvant*, 34 Bom. L. R. 811=A. I. R. (1932) Bom. 430.
(3) *Parshottom* v. *Keshavlal*, 56 B. 164=34 Bom. L. R. 186=A. I. R. 1932 Bom. 213.
(4) *Venkata* v. *Narasingappa*, 3 M. H. C. 116.
(5) *Rivett Carnac* v. *Jinbae*, 10 B. 478.
(6) *Cossinauth* v. *Harroosoondry*, Morley's Digest Vol. II, 198.
(7) Mayne's Hindu Law p. 822.
(8) 8 M. I. A. 529, 550.

To support an alienation for the last, she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not other-wise be legitimate, may become so if made with consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition, that, in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that, where that consent is given, the purpose for which the alienation is made must be proper." The primary religious purpose which a widow is bound to carry out at any expense to the estate is the performance of the funeral obsequies of her husband, and of all ceremonies incidental to those obsequies. These are absolute necessities. There are other religious benefits procurable for him, which are more of the nature of spiritual luxuries (1). The obligation of the widow taking her husband's property to pay his debts comes under the head of religious benefit, unless they are contracted for immoral purposes (2). As a female heir is bound to maintain, and perform the marriages and other ceremonies of those who are a burthen on the estate, so she may mortgage or sell the property to procure the necessary funds (3). So a widow can absolutely alienate the property inherited from her husband, even where the consent of the reversioners are wanting, (i) for the payment of her husband's debts (4), (ii) for the performance of his exequial right as well as that of his mother and the like (5), (iii) for meeting the expense of a pilgrimage to *Gaya* in order to perform her husband's *Sradh* ceremony (6) (iv) for meeting the cost of maintainance of herself and of those who are entitled to it out of the estate, such as his mother, paternal grand-mother, maiden sister and daughter, and the like (7), (v) for meeting the cost of the marriage of his maiden sister, daughter, son's daughter, grand son's daughter and the like (8), (vi) for the preservation of the estate by payment of Government Revenue and the like (9), (viii) for meeting the cost of any litigation respecting her husband's estate (10).

Waste by Hindu Widow and Injunction.—The general rule is that an action against the heir in possession is only maintainable in respect of some acts of hers which is injurious to the reversioner. Such acts are of two classes; first those which diminish the value of the estate: second, those which endanger the title of the next in succession. But no one can sue in respect of the acts of the female proprietor, except those who have an interest in the succession, and who would be injured by the acts complained of. A next reversioner is such a person and a suit by him is competent (11). On the

(1) Mayne's Hindu law p. 849.
(2) Ibid p. 850.
(3) Ibid p. 851.
(4) *Udai* v. *Ashu*, 21 C. 190.
(5) Sarkar's Hindu law p. 394 citing 5 B 450; 22 B. 818.
(6) Ibid citing *Collector* v. *Cavaly*, 8 M. I. A. 529.
(7) Sarkar's Hindu law p. 394.
(8) Ibid.
(9) Ibid.
(10) Ibid.
(11) Mayne's Hindu law § 646; *Lukhu Golab* v. *Gakool*, 13 M. I. A. 209, 224; *Koer Kurun*, 14 M. I. A. 176.

other hand, it seems equally settled that only the immediate reversioners can bring such a suit (1), unless the reversioners are themselves fraudulently colluding with the female heir, so that their protection of the estate is in fact withdrawn (2), or unless the immediate reversioner is herself only the holder of a life estate (3). Where a Hindu female heir brings about the the improper destruction or deterioration of the substance of the property inherited by her from a male, the right of those next in reversion to bring about a suit to restrain such waste, was established apparently for the first time, by an elaborate Judgment of *Sir Lawrence Peel C. J.* in 1851 (4). What will amount to waste has never been discussed. Probably no assistance upon this point could be obtained from an examination of the English cases in regard to tenants for life (5). In the same case *Sir Lawrence Peel* said: "The Hindu female is rather in the position of an heir taking by descent until a contingency happens, than heir or divisee upon a trust by implication. Therefore, a bill filed by the presumptive heir in succession aginst the immediate heir who succeeded by inheritance, must show a case approaching to spoliation." "She must appear not merely to be using, but to be abusing, her estate. Therefore, specific acts of waste, or of mismanagement, or other misconduct, must be alleged and proved. Unless this is done, the female heir can neither be prevented from getting the property into her possession, nor from restraining it in her hands, nor compelled to give security for it, nor can any orders be given to her by anticipation as to the mode in which she is to use or invest it (6). But where such a case is made out, the heiress will be restrained from the act compiained of. In a very gross case, she may even be deprived of the management of the estate, and a receiver appointed, not upon the ground that her act operate as a complete forfeiture, which lets in the next estate, and entitles the reversioner to sue for immediate possession, as if she were actually dead (7), but upon the ground that she cannot be trusted to deal with the estate in a manner consistent with her limited rights in it (8). After the passing of she Specific Relief Act (9) the right of the next reversioners to obtain such injunction is established beyond all doubt. Now, if a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her so doing, the heir-expectant may sue for an injunction to restrain

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(1) *Brojokishore* v. *Sreenath*, 9 W. R. 463; *Bama* v. *Bama*, 10 W. R. 301; *Raghu* v. *Thakuri*, 4 A. 16; *Madari* v. *Maliki*, 6 A. 428; Mayne's Hindu Law § 646.

(2) Mayne's Hindu Law § 646; *Shama* v. *Jamoona*, 24 W. R. 86; *Petor* v. *Lalljee*, 24 W. R. 399; *Koor Golab* v. *Rao Kurun*, 14 M. I. A. 176.

(3) Mayne's Hindu Law § 646; *Kandasami* v. *Akkammal*, 13 M. 195.

(4) *Hurry dass* v. *Rungumoney*, Sev 657.

(5) Mayne's Hindu Law § 647.

(6) *Hurry dass* v. *Uppornah*, 6 M. I. A. 433; *Bindoo* v. *Bolie*, 1 W. R. 125; *Grose* v. *Amritamoyee*, 4 B. L. R. O. C. J. 1; *Subba Reddi* v. *Chengalamma*, 22 M. 126.

(7) *Rao Kurun* v. *Nawab Mahomed*, 14 M. I. A. 198=10 B. L. R. 1; *Kishnee* v. *Khealie*, 2 N. W. P. 424.

(8) Mayne's Hindu Law § 647.

(9) I of 1877.

her (1). In ordinary cases, the reversioner of the last male owner are not entitled to obtain an injunction to restrain his widow in possession of her customary estate from alienating property. An injunction is a proper from of relief only when it is found that the widow is committing or is about to commit acts of waste in a sense in which the term is used in law. Where therefore in a suit by the reversionary heirs of the last male owner for an injunction to restrain his widows from alienating and wasting the property of their deceased husband, and the plaintiffs failed to prove the alleged acts of waste except in two very minor particulars: *Held* that they were not entitled to an injunction (2).

In a suit for partition amongst co parceners, one of whom is a widow, if a case is made out that there is a reasonable apprehension of waste by a widow, provision will be made in the final decree in the suit for the prevention of future waste by the widow of such cash or other moveable property as may fall to his share (3). In delivering the judgment in the above case the court observed: "The learned Advocate-General on behalf of the Plaintiff-Respondent has contended that she is entitled in this suit to obtain uncontrolled possession of her share of the moveables as well as the immoveable; but if a case approaching to spoliation were made out from her conduct in the use of the property in her possession, subsequent to partition, the defendant might be entitled to sue for an injunction restraining waste by her. He has further contended that the contingency which would entitle the Defendant to bring such a suit which is in the nature of a bill of *quia timet* has not happened, and there is no reasonable apprehension of waste by her. We, however, think that if a proper case is made out, the defendant is entitled to relief in the present suit. A separate suit for injunction is unnecessary and the object of such a suit may be gained in the suit. A multiplicity of suits is always undesirable and there is nothing to prevent relief being given without a fresh suit. *Harry Das Dutt* v. *Rangamoney Dasi* (4) and *Harry Das Dutt* v. *Uppornah* (5) are authorities for the proposition that if a Hindu widow abuses her estate she may be restrained by a bill *quia timet* but they do not show that a bill *quia timet* or a suit for injunction is the only means. The case of *Soudamini Dasi* v. *Jogesh chandra Dutt* (6) and *Janoki Nath Mukhopadhya* v. *Mothura Nath Mukhopadhya* (7) are ample authorities for the Court giving the same relief by way of injunction or appointment of a receiver in a suit for partition. We have next to see whether the Defendant has made out a case entitling him to relief in the way sought for in his defence. We have no doubt that there is a reasonable apprehension of waste of the moveable properties by the Plaintiff

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(1) Vide illustration (*m*) to s. 54 of the Specific Relief Act; see also *Oojul money* v. *Sagarmonee*, Sevester 663, 664; *Manmatha* v. *Rohelli noni*. 27 A. 406.

(2) *Tajo* v. *Allah Din*, 35 Ind. Cas. 229=53 P. W. R. 1916=124 P. L. R. 1961.

(3) *Durga Nath* v. *Chintamoni*, 8 C. W. N. 11=31 C. 214.

(4) 2 Taylor & Bell 279=Sev. 657.

(5) 6 M. I. A. 433.

(6) 2 C. 262.

(7) 9 C. 580.

as soon as he gets possession of him. Improper destruction of the property may fairly be anticipated from her present conduct. She is, as appears from the evidence, a tool in the hands of her paternal relations. Not only was the suit instituted too soon after her husband's death without sufficient cause and without any resonable apprehension from the previous conduct of the defendant, but she has been attempting to get immediate possession of the cash money and has repeatedly shown her anxiety to avoid any investment either in Government Promissory notes or mortgages, so that there may be no fetters to her misusing the corpus. A debtor during the course of the suit paid into the hand of the receiver appointed in the cause a large sum of money in satisfaction of a debt. The defendants asked the court to direct the money to be invested in Government Promissory Notes. The Plaintiff objected to the investment. The defendant also asked for the investment of a sum of Rs. 60,000 in a mortgage of immovable property, and considering the security there could be no reasonable ground for opposing the application. But the plaintiff would not have it. They both institute suit against a debtor for recovery of a debt. The Plaintiff withdraw from the suit and the Court was compelled to strike her name from the category of plaintiff, and she was made a defendant. The suit was ultimately decreed against the debtor. We, therefore, think that it is very desirable that in the final decree in the suit sufficient provision should be made for the prevention of the misuse, by the Plaintiff of the cash-money and other moveables that may be allotted to her share. As regard the immoveable properties, however, no such direction is necessary."

Of course the reversioners will be equally entitled to restrain the unlawful acts of persons holding under the female heiress (1). But the mere fact that strangers are affecting to deal with the property as their own, without actual dispossession of the intermediate estate, or waste or injury to it, gives no right of action against them to the reversioner, either for a declaration of title or otherwise (2).

A Hindu widow exchanged a security standing in her own name and belonging to the estate of the deceased husband for one standing in her brother's name. The security got in exchange made no reference to the widow's title, but on the contrary by its language lead to the inference that the property belonged solely to her brother. The husband's reversioners sued for an injunction restraining her from effecting the exchange. *Held*, that the absence of any reference to the widow's title in the security got in exchange clearly rendered it difficult for the reversioners to prove later on that the property formed part of the estate of the widow's deceased husband. There was thus a well grounded fear that the interests of the reversioners were substantially imperilled. The plaintiff was therefore entitled to a decree restraining the widow from obtaining the security

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(1) *Gobind mani* v. *Shamlal*, B. L. R. Sup. Vol. 48 ; *Kamavadhani* v. *Joysa* 3 M. H. C. 119.

(2) *Suraj Bansi Kunwar* v. *Mahipat*, 7 B. L. R. 669=16 W. R. 18 ; Maynes Hindu Law § 647.

referred to otherwise than in her own name (1). A suit to restrain alienation must be founded on specific alienation. A suit would not be maintainable to restrain all alienations (2)

Laches and Delay.—The mere fact that the owner of land has permitted another for several years to cut and remove timber, does not estop him from restraining a continuance of the wase (3). But a man who comes to Court for an injunction against waste should use diligence in making the application (4). In cases of waste it is the business of reversioners to apply to the Court promptly (5). Still in cases of trespass and waste, delay is not so prejudicial as in other cases of injunctions. In some cases indeed it is not material (6). Certain rate payers who had delayed from December to April to take proceedings to restrain an improper application of the rate-payers' money by commissioners under a Taxing Act were not deprived of their right to an injunction (7). In the same case *Lord Hatherley* has said that a man, for instance, who has been permitted to cut down half of the trees upon the land of another, can acquire no title, from the negligence of the owner, to cut down the remaining half (6). A tenant was restrained from cutting turf for sale (his lease giving a right of estovers only), notwithstanding an uninterrupted practice for eighty years (8).

Parties defendant alone restrained.—The Court will not grant an injunction to restrain waste against persons specifically who are not parties defendants to the bill, but they may be restrained as workmen or servants of the defendants, if they fill that character (9).

Landlord and Tenant—Injunction against waste.—Generally speaking, and in the absence of any exception or agreement to the contrary, the lessee according to the English law, has the fruit, mart, shade and loppings of trees, and the inheritance is in the lessor (10). No user of a tenement which is reasonable and proper, having regard to the class to which it belongs, is waste ; the tenant is entitled to assume that it is fit to be used for the purposes for which it is let, and, in the absence of agreement to that effect a tenant is not liable for the destruction of the property, if such destruction is due to a businesslike user of it for the purpose for which it was intended (11). A perpetual injunction was granted to restrain a tenant of a farm, in part of which was a pool, from taking and carrying away from and out of the bed and bottom of the pool mineral substances (12). So also the court will award a perpetual

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(1) *Muthu Lakshmi* v. *Narayana*, 7 M. L. J. 216.

(2) *Ratansi* v. *Umerbai*, 9 Ind. Cas. 997.

(3) *Davis* v. *Hull*, 67 Iowa 479 (Am.)

(4) Kerr on Injunction p. 50 citing *Barry* v. *Barry* 1 J & W. 651 ; *Bagot* v. *Bagot*, 32 Beav, 509.

(5) *Barry* v. *Barry*, 1 J. & W. 651, 653.

(6) Kerr on Injunction p. 46.

(7) *Att. Gen.* v. *Eastlake*, 11 Hare. 205.

(8) *Lord Courtown* v. *Ward*, 1 Sch. & Lef., 8.

(9) *Freeman* v. *Burke*, 7 Ir. Eq. Rep. 282 ; *Norbury* v. *Alleyne* 1 D & W. 337.

(10) *Liford's Case*, 11 Co. 46 (b).

(11) 2 Whit & Tud. Lead Cas. 1035 ; Cf. *Saner* v. *Billar*, 7 Ch. D. 815 ; *Manchester* v. *Carr*, 5 C. P. D. 507 ; *Doherty All man*, 3 A. C. 709.

(12) *Thomas* v. *Jones*, 1 Y. & C. Ch. 510 ; *Liaraet* v *Johnson*, 1 Y. & C. Ch. 527 (n).

injunction to restrain waste by ploughing, burning, breaking, or sowing of down land (1). *In Goring* v. *Goring* (2), *Lord Nottingham* refused an injunction to restrain a lessee from ploughing pasture land which had remained unploughed, during the continuance of the lease, for thirty years, but had been ploughed within six years prior to its commencement, holding that this circumstance prevented them from being ancient pastures (3).

Mortgagor and Mortgagee.—" In interfering to restrain acts in nature of waste (4) committed by a mortgagor or mortgagee, equity did not act upon the principles governing the common law of waste. It inferred in order that the contract between the mortgagor and mortgagee might be fairly carried out (5), not in order that the inheritance might be protected against wrongful acts of a limited owner. Thus in *Usborne* v. *Usborne* (6), a tenant in fee simple who after mortgaging land by way of demise had remained in possession and had cut timber, was restrained by injunction from cutting more. Equity only interfered against the mortgagor, when the security by his acts might be so reduced as to render it inadequate (7) " (8). In order to entitle the mortgagee to restrain the mortgagor by an injunction, " it must be shown to the Court that the acts complained of substantially impair the value which was the basis of the contract between the parties at the time its was entered into (9) " Where after a decree in a foreclosure suit, a mortgagor in possession began to commit waste, he was restrained by injunction, though no injunction was prayed for in the bill (10). On a mortgage of wood and underwood it is not waste by the mortgagor in possession to cut underwood at reasonable times and of proper growth ; but being a bankrupt an injunetion was granted on the right of the mortgagee to have the estate sold in the plight in which it was at the bankruptcy, and to prove the rest of his debt (11). Though a mortgagee in fee may commit waste in law, yet he shall never be allowed to do so in equity and will be restrained from cutting down timber, unless the security is defective (12). But if a mortgagee in possession commit waste by cutting down timber, and does not apply the money arising by sale of the timber in sinking the interest and principal of his mortgage, a Court of Equity will grant an injunction to stay the waste (13).

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(1) *Worsely* v. *Stuart* 4 Bro. P. C. 377.

(2) 3 Sw 66.

(3) For further details Vide Chapter XII Supra.

(4) See per Romilly M. R. in *Millet* v. *Davey*, 31 Beav. 470 (475) where the inexactitude of the word " waste " in this connection is hinted out.

(5) See *e. g. Farrant* v. *Lovel*, 3 Atk. 723 ; *King* v. *Smith*, 2 Ha. 239.

(6) Dick. 75.

(7) *Hampton* v. *Hodges*, 8 Ves. 105 ; *Harper* v. *Aplin*, 54 L J. Ch 383 ; *Blaney* v. *Mahon*, 2 Eq. Cas. Abr. 758 ; *Usborne* v. *Usborne*, Dick. 75 ; *Humphreys* v. *Harrison*, 1 J. & W. 581 ; *King* v. *Smith*. 2 Ha. 239 ; see also *Kekewich* v. *Marker*, 3 Mac. & G. 329 ; *Ellis* v. *Glover*, (1908) 1 K. B. 399=77 L. J. K. B. 257.

(8) 2 White & Tud. p. 1037.

(9) *Per Wigram V. C.* in *King* v. *Smith*, 2 Ha. 239.

(10) *Goodman* v. *Kine*, 5 Beav. 379. For further details Vide. Chapter XI *supra.*

(11) *Hampton* v. *Hodges*, 8 Ves. 105.

(12) *Witherington* v. *Cartesworth*, Sel. Cha. Ch. 31.

(13) *Farrant* v. *Lovel*, 3 Atk. 723 ; Joyce Dotrines p. 130. For further particulars *Vide* Chapter XI *supra.*

Ecclesiastical waste.—"A rector or vicar is in the same position as an ordinary tenant for life (1) and has no right to fell timber except for necessary repairs to the vicarage-house, buildings, and premises (2), neither can he commit waste for the purpose of making a general repairing fund (3). He may however, perhaps, have a right to dispose of timber, and apply the proceeds in getting some other timber for repairs at a more convenient place (4)" (5).

Suit for account.—It has already been stated that in a suit to restrain the defendant from waste, a further relief of accounting for the waste already done is also given on the broad general principle of equity that when once it has acquired jurisdiction of a case it will give complete relief, even though part of such relief be purely legal in its nature (6). In *Parrot* v. *Palmer* (7), *Lord Brougham* points out the distinction between the cases in which the right to an account is incident to an injunction, and those in which it is independant of that relief, and the peculiarity of the cases of mines in this respect. He said: "Whether the former of these species of relief (*i. e.* accoun', can be granted, whether the latter (*i. e.* injuction) is competent, is a question which has been often times agitated, and has perhaps never received a clear and general decision; that is to say, a distinct judgment on the general proposition, with its limitations. But it may be laid down generally, that, unless in the case of mines—the rule is—no injunction, no account.....From the whole (of the case noticed by him) it may be collected that, although, as to timber, there exists considerable discrepancy, yet the sound rule is 'to make account the incident and not the principal, where there is a remedy at Law (8); but that mines are to be otherwise considered, and that as to them, the party, may have an account even in cases where no injunction would lie.....That even if it had been otherwise, even if the rule had been that there could be no account of mines in a case where no injunction lay, the rule would have had no application to the present case. The rule is, not that in any particular instance where, from accidental circumstances, the party fails in obtaining an injunction he cannot have an account; it is only that where, from the nature of the question, injunction is not competent and could not be prayed, as where the waste has been committed by a former tenant, and his lease is out, or his term assigned, and consequently there is nothing to restrain, no account will lie (9)" The above rule was laid down by *Lord Brougham* where the remedies obtainable in the Courts of Common Law was distinct from remedies obtainable in a Court of Equity. In British India the

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(1) *Huntley* v. *Russell*, 13 Q. B. 572 (588).

(2) *Stracy* v. *Francis*, 2 Atk. 217; *Marlborough* (*Duke of*, v. *St. John*, 5 De G. & Sm. 174.

(3) *Sowerby* v. *Fryer*, 8 Eq. 417, 422.

(4) *Ibid*; *Wither* v. *Dean* of *Westminister*, 3 Mer. 421, 426; *Knight* v, *Mosely*, Amb. 176.

(5) 2 Whit. & Tud, 1039.

(6) Pom. Eq. Jur. § 1905.

(7) 3 My. & K. 632.

(8) *Bailey* v. *Taylor*, 1 Russ. & My. 73.

(9) See also *Jesus College* v. *Bloom*, 3 Atk. 263; *Thomas* v. *Oakly*, 18 Ves. 184; *Elias* v. *Griffith*, 8 Ch. D 521, 525 526; *Clegg* v. *Edmondson*, 8 De G. M. & G. 814; *Rule* v *Jewell*, 18 Ch. D. 662; *Phillips* v. *Hamphray*, 24 Ch. D. 448.

Courts grant legal and equitable remedies in the same suit. But every plaint must state specifically the relief which the plaintiff claims, whether it be damages or specific performance, or an injunction, or a declaration or an account, or the appointment of a receiver, or possession of land. These reliefs may be claimed by the plaintiff either simply or in the alternative (1).

Temporary Injunction and waste.—The earliest exercise of the jurisdiction to restrain waste of which any record can be found, was with the view to preserve the estate *pendente lite*. The remedy is still freely employed where necessary to prevent irremediable mischief amounting to the destruction of the substance of an estate in litigation, by the person in possession (2). Equity will interfere pending an action in ejectment to restrain the cutting of timber, the quarrying of rock, or any other act amounting to waste by the tenant in possession, but not to disturb the possession or prevent the occupant from the customary use of the premises or the full beneficial enjoyment of all the profits and advantages of possession. In the absence of fraud, collusion or fear of irreparable loss no injunction will be granted (3). Where the order granting an injunction does not contain a finding as to who is in *prima facie* possession of property with which the injunction is concerned and whether the property is in danger of waste or damage. *Held* that the injunctive order should be set aside and that it cannot be supported by allegations from affidavits filed in the lower Court and from the presumption of law that possession follows title (4). But when the plaintiff has made out a *prima facie* case for possession and there is a real danger of damage or waste to the suit property which is in the defendant's possession, an order for temporary injunction restraining defendant from using the property is good (5).

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(1) Civil Procedure Code, Order 7, rule 7 ; see also Mullas's C. P. Code notes under order 7, rule 7.

(2) C. P. Code Order 39 rule 1 ; *Kesho Prosad* v. *Srinivas*, 38 C 791.

(3) *Seoram* v. *Sardarni*, A. I. R. 1925 Lah. 167.

(4) *Devabhaktuni* v. *Punnama*, 21 L. W. 693=A. I R. 1925 Mad. 896.

(5) *Sundar Singh* v. *Ram Saran Das*, 5 Lah. L. J. 262=1923 Lah. 227.

CHAPTER XVIII

Injunction against Trespass.

Trespass.—Trespass is a generic name for various torts, most of them being distinguished by the Latin words formerly used in the appropriate writs. Trespass *vi et armis* "(with force and arms) includes injuries to person accompanied with actual force or violence, as in the case of battery and imprisonment, and the act of entering on another man's land without lawful authority. This latter kind of trespass (in which the 'force' is implied or fictitiou's, is also called trespass *quare clausum fregit*, "because he (the defendant) broke or entered into the close" or land of the plaintiff. Not only entering a man's land, but also the acts of allowing cattle to stray in his land, or driving nails into his walls; or digging the mineral under his land, constitute trespass *quare clausum fregit*. To enable a person to bring an action of *trespass quare clausum fregit*, he must have an actual possession of the land, therefore, an heir of land cannot maintain an action for a trespass committed before he took possession by entry (1). Trespass is essentially a wrong done to one in possession. But it does not follow necessarily that a trespasser should have no colour of title, though the fact that he claims the right of possession, under colour of title prior to an action being brought to settle the title, will often warrant refusal of equitable relief (2). The remedy of trespass (to property) was accordingly conceived of at first as a remedy for interference with actual possession. In modern times it has been found necessary to extend the conception of trespass (for no new remedy has been invented) to certain cases in which the possession is fictitious,—where there is or was only a right of possession, as in the case of the fiction of relation in regard to land, and the right to take possession of goods. Trespass between co-tenants is an extension of trespass in another way. The action of trespass has accordingly always been called a 'possessory' action (3).

Trespass to land is an unlawful entry upon land; trespass to goods is an unlawful taking or interfering with the possession of goods. All other wrongful acts connected with the trespass are aggravation of the wrong. Accordingly, to prove an entry upon land in plaintiff's possession, or the interrupting of the plaintiff's possession, or right to take pessession, of goods is necessary to make, and will make, a *prima facie* case (4). The gist of an action for trespass to land consists in the wrongful entry upon it, and so in interfering with the owner's (or tenant's) right of entire possession. Any entry upon land in the rightful possession of another, without license or permission,

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(1) *Byrne's Law Dictionary*; see also *Scott* v. *Shepherd*, 2 Wm. Bl. 892; *Harvey* v. *Bydges*, 14 M. & W. 437; *Wright* v. *Burroughes*, 3 C. B. 685; *Holmes* v. *Mather*, L. R. 10 Exch. 261; *Leame* v. *Bray*, 3 East. 543; *Gilberston* v. *Richardson*, 5 C. B. 502.

(2) Spelling on Injunctions and other Extraordinary Remedies § 336.

(3) Bigelow on Torts p. 205.

(4) Ibid p. 206.

is a breach of duty to the possessor; and this too though the land be unenclosed. It follows that an action is maintainable for such an entry, though it be attended with no damage to the possessor (1). The act is a breach of duty (though not in strict technical sense a trespass) even if the close entered be a private way, if only the plaintiff has a right of passage along or across it, it matters not that the plaintiff has no right to the soil (2). A mere act of omision cannot be a trespass but continuing to remain in possession of the property of another is an act of commission and not an act of omission (3). So trespass is a wrongful act of commission, done in disturbance of the possession of property of another against his will. To constitute trespass the act must in general be unlawful at the time when it was committed; if an act done in respect of property was lawful when it was done, the doer cannot be made a trespasser by relation in consequence of a person becoming entitled to the property and of such person's title relating back to the time when the act was done. If the act complained of was unlawful when it was done a person whose title relates back can sue for a trespass committed before he became owner. To amount to a trespass an act must be voluntary; but an act may be a trespass, although it is committed by mistake or without malice. A negligent act of commission may amount to a trespass, but a person who has not been negligent cannot be a trespasser in respect of an involuntary and inevitable accident (4).

Right of owner in cases of trespass.—Where a person trespasses upon the property of another, the owner, if he does not acquiesce, may re-enter upon the land and reinstate himself, provided he does not use more force than is necessary. If the owner acquiesces or acts otherwise, so that legal possession rests in the trespasser, then he must resort to the Civil Court. The continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time the true owner goes upon the land to make a claim (5). If a person has got any legal right in any property he is entitled to claim relief if his rights are infringed by any co-sharers or outsiders, although he does not suffer any damages or inconvenience by the infringement during his absence (6). Where graveyard is reserved for the use of a community, and one member of it prevents common use of it by leasing it out for drying chillies etc., he is guilty of trespass on person as much as on land. It is a trespass on the person in the sense that feelings and sentiments of persons are outraged by seeing the graves of their ancestors desecrated (7).

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(1) Ibid p. 218.

(2) Bigelow on Torts p. 218; but see Halsbury Vol. 27 p. 850

(3) Halsbry vol 27 p. 844 citing *West* v. *Nibbs*, 4 C. B. 172; *Winterborne* v. *Morgan*, 11 East. 395.

(4) Halsbury Vol. 27 p. 845.

(5) *Emperor* v. *Bandhu Singh*, 6 Pat. 794=106 Ind. Cas. 691=A. I. R. 1928 Pat. 124. Before force is used a trespasser must always be given an opportunity of withdrawing peacefully. *Kumud Kant* v. *Bignold*, 1923 Cal. 306.

(6) *Jiwan Ram* v. *Hussaini Baksh*, 102 Ind. Cas. 631=A. I. R. 1927 Lah. 534.

(7) *Shamsuddin* v. *Abdul Aziz*, 138 Ind. Cas. 691=33 P. L. R. 768=A. I. R. 1923 Lah. 423.

In an action for trespass, the damages awarded against a wilful trespasser ought not in any case to be less than the amount, for which having regard to all the circumstances, a prudent and reasonable landlord would have agreed to let the land, or less than the amount which the trespasser would have had to pay as the result of reasonable negotiations for the use and occupation of land. Over and above the minimum amount, the *animus* with which a trespasser commits the wrong may be taken into consideration for the purpose of awarding higher damages than would otherwise have been given. But a plaintiff who stands by and virtually encourages the wrong is not entitled to damages on the same scale (1). A trespass is the infringement of a right, and gives a cause of action even when no damage results, and not only substantial, but examplary, damages may be given if the circumstances require (2). A trespasser is not liable to account, but is liable for damages (3).

Possession is necessary to maintain an action of trespass.—In order to maintain an action solely for damages for a trespass to land, and not merely for the recovery of the land it is necessary, apart from statute, for the plaintiff to have had possession of the premises entered at the time of the entry. On the other hand, possession at the time of the entry, if held under a claim of right, is *prima facie* sufficient in all cases to enable a person to maintain an action for an entry upon the land without the permission, and possession alone is not only *prima facie* but absolutely sufficient against all persons who have not a better right than the possessor. It follows that one who is in possession of land under a claim of title, though without right, may recover for an entry by a wrong doer; that is by one who enters without a right, or under one not having a better right (4). Possession gives rise to peculiar rights and consequences. The principle is that a possessor has a presumptive title, that is to say, is presumed to be the absolute owner until the contrary is shown, and is protected by law in his possession against all who cannot show a better title to the possession than he has (5). Any possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrong doer (6) A plaintiff who is out of possession should not be allowed to sue the defendant who is alleged to be in possession as a trespasser for an injunction. He ought to sue for recovery of the land (7). In the above case *Coxe. J.* said: "This was a suit for an injunction to restrain the defendant from digging up the land in his possession for the purpose of making bricks. The Munsif dismissed the suit holding that as the plaintiff was out of possession the suit was not maintainable. The Subordinate Judge in appeal held this view was erroneous. He accordingly decreed the plaintiff's

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(1) *Ramaswami* v. *Meenakshi*, 1925 Mad. 222=45 M. L. J. 922; *Venkata* v. *Srinivasa*, 4 M. H. C. R. 410.

(2) *Nga Tun Nyo* v. *Nga Tha Hmat*, U. B. R. 1907, 3rd. Qr. Tort. 1.

(3) *Srinibash* v. *Nagendra*, 4 C. W. 105.

(4) Bigelow on Torts p. 207.

(5) Byrne's Law Dictionary.

(6) Halsbury Vol. 27 p. 854; *Currimbhoy* v. *Careet*, 50 C. L. J. 208.

(7) *Jahar Lal* v. *Nanda Lal*, 18 C. W. N. 548=24 Ind. Cas. 199.

suit. The defendant appeals. The question whether a suit of this nature is maintainable by a plaintiff who is out of possession is discussed in the case of *Davenport* v. *Davenport* (1). That case may be regarded as authority that the Courts will not interfere by way of injunction when the plaintiff is out of possession unless there is some privity between the parties. As pointed out in *Lowndes* v. *Bittle* (2), the tendency of decisions has been to break down the unreasonable distinction between waste and trespass, and in *Davenport* v. *Davenport* (1), the refusal of injunction was regretted. Indeed, in such a case as the latter in which an ejectment also was pending, the Courts in India would probably grant an injunction. But it certainly seems to me wrong that when a plaintiff avers that the defendant is on his land without any right whatever, he should be allowed to sue for an injunction when he ought to sue for recovery of the land." The defendant placed a *chhapar* on the wall of his house and made a door opening on to the plaintiff's land, which was also used by the defendant for egress and ingress. The plaintiff sued for an injunction to close the door and to remove the thatch and to prevent the flowing of water from the defendants' roof on to his land. *Held* that the facts did not constitute such a dispossession as to bar the suit, under s. 56 of the Specific Relief Act and to necessitate a resort to an action for ejectment (3). Where the tenant is in possession of the land, he is the proper person to sue for trespass. A joint tenant or tenant in common of land can maintain trespass against his co-tenant if the co-tenant expels him from the land (4) or destroys the subjects of co-tenancy without the co-tenant's consent (5), but not otherwise (6). If there be two persons in a close, each asserting that the premises are his, and each doing some act in the assertion of the right of possession, he who has the better title or right is considered as being in possession ; and the other is a trespasser (7). The former is therefore in a position to demand damages of the latter for his wrongful entry (8). Any possession, with the intention to possess, is sufficient to support an action of trespass against a wrong doer (9). A mere trespasser by the act of trespass immediately and without acquiescence. cannot give himself possession (10). In order to entitle a person to obtain damages in an action of trespass actual loss suffered by the plaintiff need not be proved (11). The mere tethering of cattle and erection of kucha huts etc., on a vacant land belonging to the plaintiff by another person does not amount to dispossession of the plaintiff from the site and consequently a suit by the owner for a permanent injunction restraining the other person from collecting

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(1) 7 Hare. 217.
(2) 33 L. J. Ch. 451.
(3) *Gauri Shanker* v. *Lala Ram*, 12 O. C. 33=1 Ind. Cas. 689.
(4) *Murray* v. *Hall*, 7 C. B. 441.
(5) *Wilkinson* v. *Haygarth*, 12 Q. B. 837.
(6) *Martyn* v. *Knowllys*, 8 Term. Rep. 145 ; *Cubitt* v. *Porter*, 8 B. & C. 257 ; *Jobb* v. *Potton*, L. R. 20 Eq. 84. cited in Halsbury vol. 27 p. 855.
(7) *Reading* v. *Royston*, 2 Salk. 423.
(8) Bigelow on Torts p. 207.
(9) *Foster* v. *Warblington*, (1906) 1 K. B. 648 C. A. ; *Perry* v. *Clissod*, (1907) A. C. 73 P. C.
(10) Halsbury vol. 27 citing *Browne* v. *Dawson*, 12 Ad & El. 624 ; *Stanford* v. *Hulstone*, 9 Ch. App. 116.
(11) Halsbury vol 27.

cattles on the land and for removal of mangers and pegs and the platform erected by him and from interfering with the plaintiff's right of property in future is maintainable (1). A co-owner of immovable property can maintain a suit for an injunction against intending trespassers without joining the other co-owners as parties, if he was in sole actual possession when the trespass was threatened and the suit was brought (2).

A suit by a dismissed trustee of a temple for a declaration of the invalidity of his dismissal and for an injunction restraining the other trustees from interfering with the management of his office, is not maintainable without a prayer for possession (3). In delivering the judgment in the above case the Court observed : "We think a plaintiff out of possession is not entitled to ask for an injunction merely against the person in possession. This question has been fully discussed in the judgment of *Subramania Aiyar J.* in *Vengan Poosari* v. *Patchamuttu* (4) though his actual decision in that case wasnot upheld on appeal on another ground. Upon a review of the English cases the learned Judge came to the conclusion that injunction is not the appropriate relief where the plaintiff is entitled to claim possession against the defendants. Kerr on injunctions (4th Edition) states at page 82 : 'The result of the cases apart from the alteration made by the Judicature Act of 1873 was, that where the plaintiff was out of possession, the Court would refuse to interfere by granting an injunction, unless there was fraud and collusion, or unless the act perpetrated or threatened were so injurious as to tend to the destruction of the estate.' Again at page 114 'if the trespass or damage is complete and the title a pure legal title, the Court would not in general interfere by way of mandatory injunction, there being a full remedy at law by ejectment.' The passage above cited are supported by number of English cases some of which *Mr. Subramania Aiyar*, has referred to in his judgment in *Vengan Poosari* v. *Patchumuttu* (5). It is true that the language of section 25, sub-section 8 of the Judicature Act of 1873, is wider and allows an injunction, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise. But notwithstanding the generality of the language the principle laid down by *Kindersley*, *Vice-Chancellor*, in *Lowndes* v. *Bettle* (6) and approved by the Court of Appeal in *Stanford* v. *Hulstone* (7) has been re-affirmed viz., that while defendant is in possession and the plaintiff seeks an injunction without possession, his claim will not be upheld. See *Leeds and Liverpool Navigation Co.* v. *Harsfall* (8). An injunction is a discretionary relief under section 52 of the Specific Relief Act ; and the consideration adverted to by *Mr. Justice Subramania Aiyar* in the

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(1) *Mahomed Amin Khan* v. *Balanda*, 109 Ind. Cas. 657.
(2) *Selambayi* v. *Sangu*, 35 Ind. Cas. 147.
(3) *Rathnasabapathi* v. *Ramsami*, 5 Ind. Cas. 630=33 M. 452=20 M. L. J. 306.
(4) 14 M. L. J, 290.
(5) 14 M. L. J. 290.
(6) 33 L. J. Ch. 451 (454).
(7) L. R. 9. Ch. 116.
(8) 33 S. J. 183.

case of *Vengan Poosari* v. *Patchamuttu* against the grant of such relief in this country where the plaintiff is entitled to ask for possession against the defendant, are entitled to full weight. Passing to the next point, viz., that the plaintiff is only a trustee of the temple, we are unable to appreciate the distinction. It is said that the property vested in the idol and that an injunction restraining interference secures to the plaintiffs the rights he claims, in the most complete manner. In the Bombay case (1) the plaintiff claimed the office of an *Acharyya*, but it included the management of the temple and of *inams* and other properties attached to it. It was not a mere performance of certain duties which might involve no possession of properties. Under those circumstances, it is difficult to see that a mere restraint from interference is equivalent to the transfer of possession from the defendant to the plaintiff. The learned Chief Justice of Bombay asks, 'how would practical effect be given to an award of possession of an office otherwise than by preventing interferance with the rights of which it is made up.' Where tangible movable and immovable property is also attached to the office, the question as regards property is easily answered. There are provisions in the code for giving possessions of immovable property; and the possession of such property is a great deal more than the prevention of other people's interference. But even where it is a mere office of which possession is claimed, article 124 of the Limitation Act, explains the mode of possession, which certainly is more than the mere restraint of another from interference. Possession is positive, and connotes acts of dealing with the property, and sometimes beneficial enjoyment, while an injunction which restrains another from interference is negative. The fact of the idol being the owner and the plaintiff the trustee does not appear to us to affect the question. In *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (2), the Judicial Committee of the Privy Council, while reccgnizing that an idol may be regarded as a juridical person capable as such of holding property observed 'Assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the *shebait* and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait and not in the Idol. It follows that the circumstance of a trustee suing is no answer to the objection that possession should have been sued for and not a mere declaration."

Where a person has only a right of access to a certain house and use of certain article kept therein for the purpose of performing worship in a certain temple he need not sue for possession. A suit by him for a permanent injunction under the circumstances is maintainable and will not be debarred by his failure to claim possession (3). In the above case after quoting the passage

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(1) *Kunj Bihari* v. *Keshablal*, 28 B. C. W. N. 809 P. C. 567.

(2) 32 C. 129=7 Bom. L. R. 765=8

(3) *Vengah Poosari* v. *Chinnu*, 14 M. L. J. 290.

from Kerr on Injunction, already quoted (1), *Subramania Aiyer J* said; "It is scarcely necessary to say that the refusal on the part of courts of Equity to interfere by way of injunction in such cases is on the ground that the plaintiff, having an adequate remedy at law must pursue it. It must be added that, even in the exceptional cases mentioned in the passage just quoted, the plaintiff must satisfy the Court that there is an action pending at law between him and the defendant which will try the right as between them (2). Further even where there is no question of ouster, a mandatory injunction will not issue against a trespasser whose act is complete (3). Thus in *Deere* v *Guest* (4), where the defendants had completed the construction of a railway on the plaintiff's land before suit and claimed only a right of way *Lord Cottenham* dismissed the bill for an injunction observing, 'The thing complained of has been done; the tram road has, with the leave of the Court asked by the bill to restrain the defendants, who having finished the undertaking, are now in the daily use and occupation of it, from continuing so to use it and from interrupting the servants and workmen of the plaintiffs in their attempt to destroy it; in other words, the Court is virtually asked to eject the defendants and to authorize the plaintiffs themselves to take possession of the tram road. The case originally may have been a case of waste occasioned by the cutting of the tram road and the laying of the iron rails over the plaintiff's land: but what is now claimed by the defendants is simply a right of way and if they are not entitled to that right they are mere trespassers and the plaintiffs have their proper legal remedy against him as such. In *Moreland* v. *Richardson* (5) *Sri John Romilly M. R.*, expressed his concurrence with the view laid down in *Deere* v. *Guest* (4) and observed that no injunction would be granted if the trespass were complete and perfect, however clear the original right might be. No doubt in the *Goodson* v. *Richardson* (6), *Lord Selborne* and *Lord Justice James* apparently attach to the facts in *Deere* v. *Guest* (4) an effect somewhat different from that attributed to them by *Lord Cottenham*, as they both thought that the possession was with the defendant Guest, but the reasons assigned by them for considering that the injunction was rightly refused by *Lord Cottenham* go only to support the view of the law as stated in the passage quoted from there; for according to the judgment of those learned Judges no bill for an injunction would lie against a defendant in possession in the absence of any impediment to the institution of an action of ejectment or any equitable circumstances which would induce Chancery to assume jurisdiction. I have only to add that to allow a plaintiff in this country who is

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(1) Vide Supra (Kerr 4th Ed. page 82).

(2) Kerr on Injunction p. 111. (3rd Ed).

(3) *Vide* Kerr on Injunction *6th Ed.* p. 95, citing *Deere* v. *Guest*, 1 Myl & Cr. 516; *Moreland* v. *Richardson*, 22 Beav. 604.

(4) 1 My L. & Cr. p. 516.

(5) 22 Beav. 596 at p. 604=25 L. J. Ch. 883=111 R. R. 501.

(6) L. R. 9 Ch. 221.

entitled to ask for possession to ask for injunction only instead, would be to enable him to evade the provisions of the law as the proper tribunal to try the right, and, as to the Court-fees payable in suits for possession. The opinion expressed in *Kanak asabai* v. *Muttu* (1) seems, therefore, to be correct as a general rule, and as there is no question in the present instance of fraud, irreparable damage, continuing trespass or other equitable grounds warranting the issue of an injunction and as the case is clearly one where the plaintiffs ought to sue for such possession as they are entitled to, it is not a proper case for the grant of the injunction sought." Where the plaintiff himself admits that, at the date of the suit, he was out of possession, his suit for a mere declaration and injunction is barred by s. 42 of the Specific Relief Act (2).

Unless a permament tenant makes out, by such act and user as are in evidence that he has acquired a prescriptive right to hold the sub soil as against the landlord, he may be restrained by means of an injunction from working the sub-soil (3).

Lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree and an injunction restraining the wrong doer. In such a suit the defence was that the land was wakf, and the defendant muttwalli of it. Both Courts found that the plaintiff was in possession as purchaser from some of those who were entitled to sell. But the first Court did not find a fact, which the Appellate Court found, viz., that the property had been constituted wakf. Both Courts, however, concurred in the finding that the defendant at all events was not the *mutwalli*, and had no title. *Held*, that the plaintiff was entitled to a declaratory decree against the defendant as to their right and an injunction restraining him from interfering with his possession. For the purposes of the plaintiff's claiming such a decree, it was not necessary that he should negative the *wakf*, as to the validity of the endowment no decision being needed. This could not be decided either way in this suit, as parties interested were not before the Court (4).

What posession is sufficient.—One seeking an injunction against trespassers on land must be in actual possession as well as entitled to the possession (5). A person in possession of land, claiming title, is entitled to an injunction against an intruder who threatens to enter and 'dispossess him for the purpose of laying out a public street (6). In the primary sense, possession is the visible possibility of exercising control over a thing, coupled with the intention of doing so, either against all the world, or against all the world except certain persons. There are, therefore, three requisites, of possession.

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(1) 13 M. 445.
(2) *Deivasikamani* v. *Subbia Bhattar*, 5 M. L. T. 224.
(3) *Bagdu Majhi* v. *Sri Sri Durga Prosad*, 9 C. W. N. 292.
(4) *Ismail Ariff* v. *Mahomed Ghous*, 20 C. 834=20 I A. 99 P.C.
(5) *Hillman* v. *Hurley*, 82 Ky. 626.
(6) Joyce on Injunction § 1142.

First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention ; he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no sign of being under the control of any one, it is not possessed ; hence if a piece of land is deserted and left with fences or other signs of occupation, it is not in possession of any one and the possession is said to be vacant (1), Possession does not necessarily imply use or enjoyment ; thus a ware-house man has possession of the goods entrusted to him, without having the use of them. But in as much as the use of property cannot be had without possession, the term 'possession' is frequently used as implying use and enjoyment, and in this sense is oppoesd to "reversion", "remainder" "expectancy" "action" etc. ; thus a tenant for life in possession is one who has the immediate benefit of the property (*e.g.*, by occupation, receipt of the rents or income etc.,) as opposed to a tenant in remainder, whose right to the enjoyment of the property is deferred (2).

Possession gives rise to peculiar rights and consequences. The principle is that a possessor has a presumptive title, that is to say, is presumed to be absolute owner until the contrary is shown, and is protected by law in his possession against all who cannot show a better title to the possession than he has. A person has actual possession (*de facto* possession) possession in fact, of a thing when he exercises physical control over it. Thus a person who holds a thing in his hand has actual possession of it, and the lessee of a house is in actual possession of it while he occupies it. A person has constructive possession (or possession in land) (i) when some one representing him has actual possession of the thing. Thus if A, the owner of the land, leases it to B, A has constructive possession by B, and if A dies intestate leaving C his heir C is immediately in constructive possession of the land by B, although he has never had any actual possession ; (*ii*) a person may have constructive possession of one thing because he has actual possession of another ; thus if a person is in legal possession of a house he is ordinarily in constructive possession of the goods in it, or if he is in legal possession of a portion of an estate as a farm he is in constructive possession of the whole of it (3).

There is distinction between possession and property or ownership. "Possession," says *Ihering* "is the actuality or objective realisation of ownership ; it is to ownership what an out-work is to a fortress (4)." "Possession is the *de facto* exercise of a claim ; ownership is the *de jure* recognition of one. A thing is owned by me, when my claim to it is maintained by the will of the state as expressed in the law ; it is possessed by me, when my claim to it is maintained by my own self-assertive will. Ownership is the guarantee of the law ; possession

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(1) Byrne's law Dictionary. "In common speach" says *Sir F. Pollock* "a man is said to possess or to be in possession of anything of which he has the apparent control, or from the use of which he has the apparent power of excluding others". Pollock & Wright Possession 1.

(2) Byrne's Law Dictionary.

(3) *Ibid.*

(4) Banerjee's T. L. L. for 1905 p. 47.

is the guarantee of the facts (1)." Possession is *prima facie* evidence of ownership (2). For, as we have seen, possession in fact is the visible exercise of ownership, and, so long as it is not otherwise explained, it tends to show that the possessor is also the owner (3). The presumption raised is rebuttable, but the strength of it is shown by the popular saying, *possession* is *nine points* of law (4)."

Acts indicative of possession must vary according to the nature of the property over which possession is exercised, and in the case of waste lands, the cutting of grass and grazing of cattle are ordinarily acts by which possession is asserted (5). Occupation by a wrong-doer of a portion of a land only cannot be held to constitute constructive possession of the whole, so as to enable to obtain a title by limitation (6). "Trespass is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question". A person in possession without title has an interest in the property good as against all the world except the true owner which interest is capable of being dealt with, until the true owner interferes, just in the same way as if it were unimpeached, and it therefore passes by conveyance, devise or by an execution sale. Such interest so possessed confers an unimpeachable title which becomes complete as soon as the true owner's claim is barred by limitation, practical effect of which is to extinguish his title in favour of the party in possession (7). A person claiming by virtue of long possession cannot claim a larger right than he would have had if the title under which he claimed had been a valid one (8).

It is of the essence of the title by adverse possession that it must relate to some property which is recognized by law (9). Adverse possession means possession by a person holding the land on his own behalf or on behalf of some person other than the true owner having a right to immediate possession. There ought to be nothing equivocal in a possession which is relied upon as a bar (10). In order to prove title to land by adverse possession, it is not sufficient to show that some acts of possession have been done, but the possession must be adequate in continuity, in publicity and in extent of area, to establish that it is possession adverse to competitor and to take the title out of the true owner. The adverse possession to be effective must be actual, visible, exclusive, hostile and continuous for the statutory period. The doctrine of constructive possession applies only in favour of a rightful owner, and must not, as rule, be extended in favour of a wrong-

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(1) Salmond's Jur. p. 267 ; Banerjee's T. L. L. for 1906 p. 48.

(2) *Hari Khardu* v. *Dhondi Natha*, 8 Bom. L. R. 96 ; *Krishna* v. *Lingawo*, 20 B, 270.

(3) Evidence Act. s. 110.

(4) Banerjee's T. L. L. for 1906 p. 49.

(5) *Wali Ahmed* v. *Tolamea* 31 C. 397.

(6) *Lambert* v. *Strother*, Wiles 221.

(7) *Brindabun Chunder* v. *Tarachand*, 11 B. L. R. 237=20 W. R. 114 ; *Gobind* v. *Mohan*, 24 A. 157.

(8) *Venkata Swami* v. *Ramanna*, 6 M. L. J. 188.

(9) *Jethabai* v. *Nathabhai*, 6 Bom. L. R. 428=28 B. 399.

(10) *Balkrishna* v. *Gobind*, 4 Bom. L. R. 312=26 B. 617.

doer, whose possession must be confined to the land of which he is actually in occupation (1).

Civil and criminal Proceedings.—Trespass is an actionable wrong, and if a mere trespass, is, as a rule, actionable only and not criminal (2). But under certain circumstances it is also a criminal offence. In section 441 of the Indian Penal Code it is described as 'criminal trespass'. Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent to commit an offence is said to commit criminal trespass. The author of the Code says : "We have given the name of trespass to every usurpation, however slight, of dominion over property. We do not propose to make trespass as such an offence except when it is committed in order to the commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance of such a person. Even then we propose to visit it with a light punishment, unless it be attended with aggravating circumstances (3)." In such a case a trespass is both actionable as a tort as well as a crime.

Waste and trespass distinguished.—In waste the rightful possession of the wrong doer is essential, and constitutes a material distinction between waste and trespass (4). So trespass is easily distinguishable from waste in this respect that it can be committed only by a stranger to the right of possession, while waste is only imputable to one in possession (5). The term "trespass" as used in equity differs from waste in respect to the privity of title between the plaintiff and the defendant, and in respect to the rightfulness of the defendant's possession of the land, which two facts constitute the technical requisites of wastes. It differs from trespass in law in that it does not require that plaintiff be either entitled to, or actually in possession, but includes also cases in which plaintiff's action at law would be on the case or in ejectment (6).

Trespass and Nuisance. Trespass resembles nuisance in some respects. It differs from nuisance in being in itself unlawful, while a nuisance may be lawful in itself, but actionable by reason or circumstances or the manner of exercising the legal right (7). In the case of trespass it is the immediate act which causes the injury ; in the case of nuisance the injury is the consequence of an act done beyond the bounds of the property affected by it (8).

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(1) *Borada Prodad* y. *Annoda Mohan* 6 Ind. Cas. 359 ; see also *Fitz hardinge* v. *Purcell*, (1908) 2 Ch. 145 ; *Canvey* v. *Preedy*, 91 L. J. Ch. 203 ; *Kynock* v. *Rowlands*, (1912) 1 Ch. 527 ; *Wallis* v. *Hunds* (1893) 2 Ch. 75.

(2) Halsbury Vol. 27 citing *R.* v. *Starr*, 3 Bur. 1698 ; *R.* v. *Bake.* 3 Burr. 1731 ; *R.* v. *Atkins* 3 Burr. 1706.

(3) Note N. p. 168.

(4) Pomeroy's Eq. Jur. § 1348.

(5) Spelling on Injunctions and other Extraordinary Remedies § 336.

(6) Pomeroy's Eq. Jur. § 1907.

(7) Spelling on Injunction and other Extra ordinary Remedies § 336.

(8) Kerr on Injunction p. 131.

Injunction to restrain trespasses—Early Rule in the Court of Chancery.—At an early day the Court of Chancery refused to interfere and restrain any trespasses (1) *Lord Thurlow* broke through this rule, and began to use the preventative relief against such wrongs. He was followed by *Lord Eldon* (2). In *Thomas* v. *Oakley* (3) *Lord Eldon* thus spoke of this enlargement in the jurisdiction in cases of trespass: "The distinction, long ago established, was that, if a person, still living, committed a trespass by cutting timber, or taking lead ore, or coal, this Court would not interfere, but gave the discovery; and then any action might be brought for the value discovered. But the trespass dying with the person, if he died, the Court said, this being property, there must be an account of the value; though the law gave no remedy. In that instance, therefore, the account was given, where an injunction was not wanted. Throughout *Lord Hardwicke's* time, and down to that of *Lord Thurlow*, the distinction between waste or trespass was acknowledged; and I have frequently alluded to the case in which *Lord Thurlow* first hesitated (4). A person having a close demised to him, began to get coal there, but continued to work under the contiguous close, belonging to another person. And it was held, that the former, as waste, would be restrained; but as to the close which was not demised to him, it was a mere trespass, and the Court did not interfere. But I take it that *Lord Thurlow* changed his opinion upon that; holding that if the

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(1) 'Formerly Courts of Equity were extremely reluctant to interfere to prevent trespasses, even in cases of repeated trespasses." Spelling on Injunctions and other Extraordinary Remedies § 357 citing *Cooper*, Eq. Pl. 152, 153, 154; *Norway* v. *Rowe*, 19 Ves. 147, 148, 149.

(2) *Vide* opinion of *Lord Eldon* in *Thomas* v. *Oakley*, 18 Ves. 184; *Hanson* v. *Gardiner*, 7 Ves. 705; see also *Courthope* v. *Maplesden*; 10 Ves. 291; *Field* v. *Beamont*, 1 Swanst 207, 208; *Trockford* v. *Alexander*, 15 Ves. 138.

(3) 18 Ves. 184.

(4) "It is said that originally, Courts of Equity, did not grant injunctions to restrain trespasses in any case, but, whether in analogy to the remedy to prevent waste, or to prevent injuries supposed not to be adequately recompensed by damages in the legal form, it is now firmly settled that injunctions will be granted to restrain trespasses under certain conditions." *H. C. Joyce* on Injunction § 1125. In *Jerome* v. *Ross*, 7 Johns. Ch. 315, 332, per *Kent C. J.* said: "The English Court of Chancery is now in the habit of granting injunctions in trespass when the case is peculiar and special; and even this practice came into use long subsequent to the date of our revolution. As late as 1786 in *Mogg* v. *Mogg*, 2 Dickens, 670, *Lord Thurlow* directed a search to be made to see if ever there was an instance of an injunction where a mere trespasser entered upon land and cut timber and as no such precedent could be found, he denied injunction in cutting down timber. But since that time the practice has been introduced and justly and recently applied to special cases, where irreparable ruin would have followed the refusal to enjoin the trespass. It was allowed in *Mitchell's Case*, 6 Ves. 147, where the defendant had worked from his own land into the coal mine of plaintiff; and that case was followed by *Lord Eldon* in *Hanson* v. *Gardiner*, 7 Ves. 305, 307, on the principle that irreparable mischief and ruin of the property as a mine would be the consequence if the party was not stopped. On the same ground the injunction is granted against diverting a water course from a mill, *Robinson* v. *Lord Byron*, 1 Bro. C. C. 588; against the destruction of timber, *Courthope* v. *Mapplesden*, 10 Ves. 290; against the taking of stones of peculiar value, *Cowper* v. *Baker*, 17 Ves. 128; or stones from a quarry, *Thomas* v. *Oakley*, 18 Ves. 184. All these are cases of great and irremediable mischief which damages could not compensate, because the mischief reaches to the very substance and value of the estate and goes to the destruction of it in the character in which it is enjoyed."

defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which in cquity he was entitled. The interference of the Court is to prevent your removing that which is his estate. Upon that principle *Lord Thurlow* granted the injunction as to both. That has since been repeatedly followed; and whether it was trespass under the colour of another's right actually existing or not. If this protection would be granted in the case of timber, coals, or lead ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered. The present established course is to sustain a bill for the purpose of injunction, connecting it with the account in both cases, and not to put the plaintiff to come here for an injunction, and to go to law for damages." So at the present day the jurisdiction is firmly established in its principles, although there is no little disagreement among the Courts, in applying these principles (1). In cases of trespass on immovable property, money compensation is not adequate relief (2).

General Principles governing and Limitations upon jurisdiction.—The inadequacy of the legal remedy is the foundation and indispensable pre-requisite for the interposition of Chancery in such matters, for the obvious reason that a legal remedy has been devised to redress such wrongs, and, so long as the law provides an adequate remedy, equity has no right to interfere. The general rule, as has often been stated, is that, in order to give the court of equity jurisdiction to enjoin torts to property, two conditions must concur: *First*, the complainant's title must be admitted or established by a legal adjudication; and, second, the threatened injury must be of such a nature as will cause irreparable damage, not susceptible of complete pecuniary compensation (3). If the trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere (4). "The principle' says *Prof. Pomeroy* "determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: (i) If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable, —that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money,—then the wrong will be prevented or stopped by injunction. (ii) If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be distinctive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction, on the ground of repetition of similar actions. In both cases the ultimate criterion is the in-

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(1) Pomeroy's Eq. Jur. § 1356.

(2) *Dip Narain* v. *Jogmohan*, 87 Ind. Cas. 15; see also *Jittulal* v. *Lalbhai*, 28 B. 298; *Ganga Devi* v. *Jagatswari*, 25 Ind. Cas. 198.

(3) H. C. Joyce on Injunction § 1125.

(4) Section 54 of Specific Relief Act Cls. (b), (c) and (d).

adequacey of the legal remedy (1). All the cases English and American, preferred to adopt the inadequacy of legal remedies as the test and limit of the injunctive jurisdiction; but in applying this criterion, the modern decisions, with some exceptions among the American authorities, have certainly held the injury to be irreparable and the legal remedy inadequate in many instances and under many circumstances where *Chancellor Kent* would probably have refused to interfere. It is certain that many trespasses are now enjoined which if committed, would fall far short of destroying the property, or of rendering its restoration to its original condition impossible. The injunction is granted, not merely because the injury is essentially destructive, but because being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages (2). While the same formula is employed by the Courts of Equity in defining their jurisdiction, the jurisdiction itself has practically been enlarged; judges have been brought to see and to acknowledge—contrary to the opinion held by *Chancellor Kent*—that the common-law theory of not interfering with persons until they shall have actually committed a wrong is fundamentally erroneous, and that a remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed (3)." As has been truly said, if Courts did not interfere in such cases there would often be a great failure of justice in the country (4). Although

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(1) "The legal remedy is not adequate simply because a recovery of pecuniary damages is possible. It is only adequate when the injured party can by one action at law, recover damages which constitute a complete and certain relief for the whole wrong,—a relief virtually as efficient as that given by a court of equity. This conclusion is sustained by the consensus of modern decisions of the highest authority; although it cannot be claimed that the cases are unanimous in its acceptance. The principle, so far as it applies to the first class of trespasses—those essentially destructive—was stated by *Chancellor Kent* in two leading cases, which may be regarded as counterparts of each other: *Livingston* v. *Livingston*, 6 Johns. Ch. 497, 499 and *Jerome* v. *Ross* 7 Johns Ch. 315, 333. In *Living ston* v. *Livingston* he granted injunctions, citing and relying upon English cases.....In *Jerome* v. *Ross*, he refused to enjoin canal commissioners.....Whatever may be the thought of actual decision in *Jerome* v. *Ross*, it cannot be denied that the tendency of *Chancellor Kent's* opinion in narrowing the jurisdiction to the comparatively few trespasses of an extraordinary and specially aggravated nature is opposed to the modern decisions of the highest ability and authority."

(2) *Powel* v. *Aiken*, 4 Kay & J. 343, 355; *Great North* v. *Clarence*, 1 Coll. C. C. 507; *Philips* v. *Truby*, 8 Jur. N. S. 999; *Manchester* v. *Workshop Board of Health*, 23 Beav. 198, 209; *Stannard* v. *Vestry*, L. R. 20 Ch. D. 190, 196; *Strellery* v. *Pearson*, L. R. 15 Ch. D. 113, 116; *Hall* v. *Byron*, L. R. 4 Ch. D. 667; *Stanford* v. *Hurlstone*, L. R. 9 Ch. 116; *Hext* v. *Gill*, L. R. 7 Ch. 699; *Lord Auckland* v. *Westminster*, L. R. 7 Ch. 597; *London* v. *Lancashire*, L. R. 4 Eq. 174; *Bowser* v. *Maclean*, 2 De G. F & J. 415; *Lloyd* v. *London*, 2 De G. J & S. 556 578.

(3) Pom. Eq. Jur. § 1357.

(4) *Hanson* v. *Gardiner*, 7 Ves. 306-308, *Court-hope* v. *Mapplesden*, 10 Ves. 291; *Field* v. *Beaumont*, 1 Swast. 207,

equity will not grant an injunction to restrain a trespasser merely because he is a trespasser, yet the Court will interfere where the trespass goes to the destruction of the property in the character in which such property has been held and enjoyed, or where there is a necessity of preventing a multiplicity of suits (1) as where the injunction is sought for the purpose of restraining persons from interfering with public worship (2).

Extent of the Jurisdiction.—Although the ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed, yet if tried by this test all legal remedies are inadequate, and "if inadequacy of legal remedy" were used in this sense by courts of equity they would enjoin any and all threatened trespass, however trivial, whether to realty or to personalty—a length, it is hardly necessary to say, to which they have never gone (3). "Instead, the equity courts have marked the limits of their jurisdiction far short of this. Trespasses to personalty are not enjoined at all, in general, on the ground that for a trespass, even one so serious as to amount to complete destruction, the damages which a jury will award are an adequate remedy (4). And the same thing is true of trespasses to realty when they consist of single acts or of occasional acts which are temporary in their nature and effect, and which are of such nature that damages as estimated by a jury will be adequate reparation. On the other side, speaking now affirmatively of the many cases in which trespasses to realty are enjoined, they can be divided in the following four classes: (*i*) The legal remedy is inadequate because the injury is irreparable in its nature. (*ii*) The legal remedy is inadequate because the trespass is continuous, or because repeated acts of wrong are done or threatened, although each of these acts, taken by it-self, is not destructive. (*iii*) The legal remedy is inadequate because the defendant is insolvent. (*iv*) The legal remedy is inadequate in a miscellaneous class of cases because the courts of law for one reason or another cannot give any or, at least, not accurately estimated or sufficient damages, though damages would be a perfectly adequate kind of remedy (5).

Irreparable injury.—The term "irreparable" has often been defined by the courts in varying languages (6). 'It is believed" says *Prof.*

208; *Crockford* v. *Alexander*, 15 Ves. 138; *Thomas* v. *Oakley*, 18 Ves 184.

(1) Cl. (*e*) of Section 54 of the Specific Relief Act (I of 1877).

(2) Spelling on Injunction § 337.

(3) Pomeroy's Eq. Jur. § 1907.

(4) It is subject to an exception in the case of chattels of unique or peculiar qualities such that damages for their injury or destruction would be an inadequate remedy. *Arundell* v. *Phipps*, 10 Ves. 139.

(5) Pom. Eq. Jur. § 1908.

(6) Vide pp. 84 to 89 Supra. The following definitions of the word may be considered: Irreparable, as being beyond any method of pecuniary estimation." *Kellong* v. *King*, 55 Am. St. Rep. 74. "An injury is irreparable when it is of such a nature that the injured party can not be adequately compensated therefor in damages or when the damages which may result, therefrom cannot be measured by any certain pecuniary standard." *Wilson* v. *City of Mineral Point*, 39 Wis. 160. "The word 'irreparable' means that which cannot be repaired, restored or adequately compensated for

Pomeroy (1) that the characteristics which the courts should seek as certainly making an injury as irreparable, and which the majority of the decisions show to be its essential features, are : (*i*) That the injury is an act which is a serious change of, or is destructive to, the property it affects either physically or in the character in which it has been held and enjoyed. (*ii*) That the property must have some peculiar quality or use such that its pecuniary value, as estimated by a tribunal, will not fairly recompense the owner for the loss of it. In the application of this test, however, there are many conflicting dicisions. Thus, some courts treat land as *per se* property of peculiar value and will enjoin destructive trespasses to its substance without regard to the question whether, in the particular case, it really does have any peculiar value or not. By these courts it is made a subject for protection by injunction, just as in cases of contract it is a subject for specific performance without reference to its quality, use or value (2). Other courts, however, in similar cases have taken the attitude that the question, whether an injury is irreparable or not is an open matter of fact to be enquired into in every case, and have refused injunctions against destructive trespasses because the value of the land injured was small, and it had no peculiar use or quality for the owner (3). So, too. in the case of mining, the courts have sometimes applied the test of irreparability to the particular case, and finding that the owner had no use for the land beyond getting its value from it in the shape of minerals, have refused to grant the injunction when the defendant was solvent, and thus was able to give the legal relief of damages (4), although in England, and generally in America, mining is a form of trespass that is especially considered as irreparable, and, as such, is enjoined (5). And the

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in money, or where the compensation cannot be safely measured." *Bettman* v. *Horess*, 42 Wa. Va. 433. In *Jerome* v. *Ross* 7 Johns. Ch. 315, 332=11 Am. Dec. 484, *Chancellor Kent* defined "irreperable" as the "great and irremediable mischief, which damages could not compensate, because the mischief reaches to the very substance and value of the estate and goes to the destruction of it in the character in which it is enjoyed."

(1) Pomeroy's Eq. Jur. § 1909.

(2) *Thomas* v. *Oakley*, 18 Ves. 184 ; *Hexo* v. *Gill*, L. R. 7 Ch. App. 699. In some cases injunction was granted although there was even no destructive trespass, vide *Shaw* v. *Lord Jersey*, 4 C. P. D. 359 affirming 48 L. J. C. P. 308 ; *Carter* v. *Salmon*, 43 L. T. 490 ; *Walsh* v. *Lansdale*, 21 Ch. D. 9 ; *Stocker* v. *Planet building Society*, 27 W. R. 8 7 ; *Yelloby* v. *Morley*, 27 T. L. R. 20,

(3) In cases of naked trespass, the old court of Chancery did not interfere. *Garstin* v. *Asplin*, 1 Madd. 152 ; *Jackson* v. *Stanhope*, 15 L. J. Ch. 446 ; *Cooper* v. *Crabtree*, 20 Ch. D. 589.

(4) *Rice* v. *Looney*, 81 Ill. App. 537 ; *Erskin* v. *Forest Oil Co*, 80 Fed. 583 ; *Deep River* v. *Fox*, 4 Ired. Eq. 61. No. English court has acted on this view though in a comparatively earlier case (*Haight* v. *Jaggar*, 2 Coll. 231, decided in 1845) *Bruce V. C.* said ; "The defendants.....are it is true, by working the coal, taking away the very substance of the property ; which may, in a sense, be perhaps called in this case, and might in others most certainly be waste or destruction ; but on the other hand, it is the only mode in which the property in question can be usefully enjoyed or made available, and may therefore, in a sense, perhaps be deemed not more than taking the ordinary usufruct of the thing in dispute."

(5) *Mitchell* v. *Doss*, 6 Ves. 1907 ; *Earl Cowper* v. *Banker*, 17 Ves. 128. In *Erhordt* v. *Boaro*, 113 U S. 537, *Field* J. said : "It is now a common practice in cases where irremediable

same thing may be said of cutting off or destruction of timber (1). These conflicts in the cases thus result, not so much from different views of what constitutes an irreparable injury, as an original question, as from a different practice with reference to distributing certain cases of the same general character in the subject matter, into fixed groups that shall be considered as *per se* cases of irreparable injury. As a further source of conflict, there are a number of cases which, when dealing with trespasses to real property, tend to give to the term "irreparable" an enlarged signification, and make it virtually symonymous with 'serious injury.' There are of course, no particular class of cases to which irreparable injuries are confined (2)." A suit to close doors opened by a person in his own wall, on the ground of the possibility of his committing trespass in the plaintiff's land or of his having actually committed trespass, is not maintainable, unless the opening of the door is in itself such an irremediable injury to the plaintiff that he would not be sufficiently compensated for by money damages, the court could under no circumstances, order the doors to be closed up (3). Where it was found that the defendant encroached on plaintiff's wall but the plaintiff was not able to prove any

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mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue injunction, though the title to the premises be in litigation".

(1) *Musch* v. *Burkhart*, 83 Iowa, 301. In this case the court observed: "But it does not follow that the damages would not be irreparable within the meaning of the law. The trees cannot be replaced, nor can their benefit to the plaintiff and the comfort and satisfaction which he derives from them be accurately measured by a pecuniary standard.....A person is not obliged to suffer his property to be destroyed at the will of another, even though he may be able to recover ample pecuniary compensation therefor.....This is especially true of property like trees planted for and adopted to a certain use and serving a special purpose. Their owner has an interest in them which they may protect, and to be deprived of it without consent would be to suffer irreparable injury, within the meaning of the law.' See also *Court hope* v. *Mapplesden*, 10 Ves 290; *Kinder* v. *Jones*. 17 Ves. 110; *Neale* v. *Cripps*, 4 Kay & J. 473; *Lowndes* v. *Bittle*, 33 L. J. Ch. 451, *Stamford* v. *Hurlestone*, L. R. 9 Ch. App. 116.

But in *Gause* v. *Perkins* 69 Am. Dec. 728, *Pearson J.* in refusing the injunction said: "In the present condition of our country, does the cultivatton of pine trees for turpentine, or the cutting down of oak trees for staves, or cypress trees for shingles, cause an irreparable injury—one which cannot be compensated for in damages? The very purpose for which these trees are used by the owners of land is to get from them turpentine, staves and shingles for sale. It follows, therefore, as a matter of course, that if the owner of the land recovers from a trespasser the value of the trees that are used for those purposes, he thereby receives compensation for the injury, and it cannot in any sense of the word be deemed irreparable..' In *Brown* v. *Solary*, 37 Fla. 102, *Mabry C. J.* said: "When the value of land consists chiefly if not entirely, in the timber thereon, it is destruction if destruction amounts to irreparable injury, within the rule on the subject."

(2) 5 Pom. Eq. Rem. § 495. The Indian Legislature wisely limited the issue of injunction in the three following cases: "(i) Where there exists no standard for ascertaining the actual damages caused, or likely to be csused, by the invasion; (ii) where the invasion is such that pecuniary compensation would not afford adequate relief; and (iii) where it is probable that pecuniary compensation cannot be got for the invasion." Vide section 54 of the Specific Relief Act clauses (b), (c) and (d).

(3) *Gibbon* v. *Abdur Rahman*, 3 B. L. R. A. C. 411; See also *Parum Sookh* v. *Sitaram*, 2 Agra. 119. But see *Amrit Ali* v. *Gopi*, A. W. N. 1887, 216.

particular damage: Held that the plaintiff was not entitled to a mandatory injunction, but only to some damages (1). In the above case *Phillips J.* said "It has also been found that the plaintiff has not suffered material injury. In view of the difficulty that would be experienced in framing an injunction in a case where the extent of encroachment has not been found, I think this is a case where an injunction should be refused. It does not appear that the plaintiff took any action until the work was completed and a court will rarely interfere to pull down a building which has been erected without objection, *Gaskin* v. *Balls* (2). That was, no doubt, a case of breach of covenant and not of trespass upon immoveable property, but as the court is vested with a discretion under section 54 of the Specific Relief Act, it cannot be contended that an injunction must necessarily be granted against a trespasser under all circumstances; for in exercising its discretion the court cannot exclude all consideration of the extent of damages which would be caused to either party by refusing or granting the injunction, vide, *Shamnagar Jute Factory Co.*, v. *Ram Narain Chatterjee* (3) and *Benode Coomaree Dossee* v. *Soudamineey Dossee* (4). In this case, I think, the District Judge rightly refused an injunction and would dismiss this appeal with costs. In the same case *Abdur Rahim J.* said: "The Vakil for the respondents has relied upon the well known cases which lay down the general proposition that the Court would not ordinarily grant mandatory injunction if damages would be adequate remedy, of which *Benode Coomaree Dossee* v. *Soudaminy Dossee* (4) and *Boyson* v. *Deane* (5) are examples. The rule is embodied in sections 54 and 55 of the Specific Relief Act. I may mention that it is not necessary to consider in this case whether there is any substantial difference between the law enacted in those sections and the rule of English law on the point as suggested in *Boyson* v. *Deane* (5). I am inclined to doubt whether there is any such difference, but it is not necessary to decide that point in this case, because it was found by the District Munsiff that there was no acquiesence or delay on the part of the appellants and that finding was not impugned in the appeal to the District Judge. I must, therefore, accept that finding as final for the purpose of this appeal. In this case, therefore, which is one of continuous trespass, when the defendant's action has no justification or excuse, and the plaintiffs have not been guilty of any laches or delay in coming to Court, as the finding is and the facts amply showed the proper remedy is injunction and mere damages would not obviously be an adequate remedy. The fact that no actual damage can be shown is in itself a good ground in cases of this nature for the granting of injunction. I may also observe that the necessity for injunction becomes all the greater and not less by reason of the fact that the defendants had, before the wall in dispute was built, encroached to a small extent at another part of

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(1) *Per Philips J.* in *Soma Sundaram* v. *Bappa*, 12 Ind. Cas. 635=10 M. L. T. 473.
(2) 13 Ch. D. 324.
(3) 14 C. 189.
(4) 16 C. 252.
(5) 22 M. 251.

plaintiff's parapet wall by another wall running north to south built by the defendant."

Continuous or repeated trespasses.—The jurisdiction of equity to restrain continuous or repeated trespasses rests on the ground of avoiding a repetition of similar actions (1). It is a basis of jurisdiction that is frequently found in cases where the injury is also irreparable. Very often, indeed the injury is irreparable only because it is continuous or repeated, when it would not be if temporary, and in such cases the injunction will issue as a matter of course (2). For the better understanding of the subject, it will be convenient to consider, first, the cases in which the injury is the result of a single act, or set of acts, of the defendant, which afterwards operate by virtue of natural laws to produce the injury : and second, the cases in which there are several or many acts of the defendant or defendants which give rise to as many different causes of actions. The distinction is roughly that between continuing and repeated trespasses, and is based on the distinctions made in the cases themselves. If a trespass is of the first class and produces substantial damages to the plaintiff, the authorities are well agreed that a proper case for an injunction is presented (3). If, however, the injury is little or nothing more than the technical invasion of plantiff's legal right without substantial damage, there is a division among the courts, though a majority of the decisions show that the foundation principle of this branch of the jurisdiction fairly includes all such cases, whether the damage is substantial or not (4). When the trespasses complained of are caused by the separate act of individuals, a multiplicity of suits may be caused to plaintiff either because the defendants are numerous or because a single defendant does the same or similar acts repeatedly. The principle involved in all such cases is the same, and injunctions should issue (5). A court of equity will generally grant injunctive relief in cases of continued and repeated trespasses (6). So where there is a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the

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(1) 4 Pom. Eq. Jur. § 1357. This entire class of cases is comprehended in the broader jurisdiction of equity to prevent multiplicity of suits. Vide clause (e) of section 54 of the Specific Relief Act, Pom. Eq. Jur. §§ 243, 275.

(2) 5 Pom. Eq. Rem. § 496 ; see alao *Goodson* v. *Richarason*, 9 Ch. 221, 227 ; *Allen* v. *Marten*, 20 Eq. 465 ; Kerr on Injunction p. 93 ; see also *Martyr* v. *Lawrence*, 2 De G. J. & S. 269, 271 ; *London and North Western Ry.* v. *Lancashire & Yorkshire Ry*, 36 L. J. Ch 479 ; *Marriott* v. *East Greanstead*, (1909) 1 Ch. 79 ; *Kynock* v. *Rowlands*, (1912) 1 Ch. 527.

(3) Pomeroy's Eq. Jur. § 1910. In the following cases it was held that no actual damage is necessary. *Rogers* v. *Spence*, 13 M & W. 581 ; *King* v. *Brown*, (1913) 2 Ch. 316 ; see also *Good son* v. *Richard son*, L. R. 9 Ch. App. 221 ; *Powell* v *Aiken*, 4 Kay & J. 343; *Allen* v. *Marten*, L. R. 20 Eq. 462. In the following cases where the injury was trifling, injunction was refused. *Cooper* v. *Crabtree*, 20 Ch. D. 589 : *Llanduduo* v. *Word*, (1899) 2 Ch 705 ; *Behrens* v. *Richards*, (1905) 2 Ch. 705 ; *Behrens* v. *Richards* (1905) 2 Ch. 614 ; *Att. Gen.* v. *Small* (1919) 88 L. J. K. B. 490.

(4) Pom. Eq. Jur. § 1910.

(5) Pomeroy's Eq. Jur. § 1910 ; Specific Relief Act s. 54 (e).

(6) H. C. Joyce on Injunction § 1129.

consent of the owner of the land: it is a proper subject for an injunction, and the owner of the soil will not be left to his remedy at law, nor required to establish his right at law; and the mere fact of the trespass being complete at the time the suit is filed will not prevent an injunction in the nature of a mandatory injunction, against the continuance of the trespass, if there has been neither acquiescence nor delay (1). So in cases of continuing trespass, the jurisdiction of a court of equity to grant injunction is firmly established (2). And when the basis of the multiplicity of suits which plaintiffs fears is that the defendants are numerous, all authorities agree in granting the injunctions (3). If the defendant manifests a purpose to persist in perpetrating his unlawful acts, the vexation, expense and trouble of prosecuting the actions at law make the legal remedy inadequate, and justify a plaintiff in coming into equity for an injunction (3). It is unnecessary to adduce proof of damages to maintain an action for obtaining an injunction to restrain defendant without any title from collecting rent over and above the full rent from the plaintiff's estate (4).

Insolvency of defendant.—"The inadequacy of legal remedies, ordinarily, against an insolvent trespasser is obvious, and the reason for equity's intervention in such cases is clear (5). The number of cases in which the defendant's insolvency is made a material part of the court's reasonings for granting an injunction is very great. The number of cases in which the question has arisen whether insolvency alone is enough to support an injunction is not so large, but is sufficient to show the general recognition by the courts of the glaring insufficiency of a judgment for damages against an insolvent. When, however, the legal remedy is not rendered inadequate because of the defendant's insolvency, as when the desired relief is possession of the land which may be procured by the ordinary possessory action at law, the injunction will be refused (6)." So the solvency or insolvency of a trespasser is never alone decisive, though it will be given important consideration in all cases where the court is in doubt as to the nature of the threatened injury,—whether it is susceptible of compensation or is in itself irreparable. And the court will not stop to enter into nice calculations or to diligently seek a standard by which to measure the extent of the probable damages to result, where it is shown that if its commission be allowed to proceed plaintiff's action at law will be barren of beneficial results, owing to the defendants being pecuniarily irresponsible (7).

Where a bill was filed praying for an injunction to restrain various acts of trespass committed against the plaintiff, and of conveyance to his tenants,

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(1) *Goodson* v. *Richardson*, L.R. 9 Ch. 221; Joyce on Doctrines p. 64.

(2) *Allen* v. *Marten*, L. R. 20 Eq 462; see also *Ardley* v. *Guardian of St. Pancras* 839 L. J. Ch. 871; *Eardley* v. *Lord Granvelle*, 3 Ch. D, 126, *Battersea Vestry* v. *County of London Electric Co.* (1899) 1 Ch. 474; *Marriott* v. *East Greenstead Gas*, (1909) 1 Ch. 79; *Schweder* v. *Working Gas Light.* (1912) 1 Ch. 83.

(3) Pomeroy's Eq. Jur. § 1910.

(4) *Nadir Jumma* v. *Ramchander*, W. R. (1864) 362,

(5) Section 54 clause (e).

(6) Pomeroy's Eq. Jur. § 1911.

(7) Spelling on Injunctions and Extraordinary Remedies § 361.

by a pauper defendant, the court, on demurrer, granted the injunction, as recovering damages at law against a pauper did not constitute an adequate remedy (1).

Cases where legal remedy is inadequate.—Besides the three classes of cases just discussed, there are other cases which permit of no definite classification, but which, largely for that reason, show most clearly the comprehensive nature of equity jurisdiction to restrain trespasses (2). In one of the leading cases of this kind the supreme court of the United States quoted as the criterion of the jurisdiction: "It is not enough that there is a remedy at law, it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity (3)."

Where injunction cannot be granted.—A person cannot prevent another from opening a door on an old public street of a village unless he is able to show some special damage to himself, even if the soil was originally his property (4). Where a plaintiff seeks to remove an obstruction to a public way or street, it has been well settled that he must prove special damage to himself, before he can maintain an action (5).

Injunction between husband and wife.—A husband may be restrained from continuing in possession of his wife's separate property (6) or from entry into wife's house and interfering with her property (7).

Injunction between parent and son.—The court will, in a very grave case grant an injunction at the instance of a mother to restrain her son from breaking and entering into her dwelling house (8). But in *Water house* v *Water house* (9) an injunction was refused, where a son, aged thirty-five, strong in body and by education capable of earning his living, insisted on visiting his father's house and staying there contrary to his father's wishes. The father was willing to maintain him elsewhere. In an action brought by the father against the son for an injunction restraining the son from entering or remaning, etc: *Held*, that a case for granting an injunction had not been made out; it was inadmissible to put it in the power of a father to get his son committed to prison for coming to visit him.

A son of a Hindu, governed by the *Dayabhaga* law, out of his own earnings made additions and improvement to the family dwelling house, being allowed and encouraged by his father to send large sums of money for that

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(1) *Hodgson* v. *Duce*, 2 Jurs. N. S. 1014; see also *Ardley* v. *St. Pancras Union*, 39 L. J. Ch. 871.

(2) Pomeroy's Eq. Jur. § 1912.

(3) *Watson* v. *Sutherland*, 5 Wall. 74.

(4) *Mumchand* v. *Budh Ram*, 80 P. W. R. 1914=179 P. L. R. 1914=24 Ind. Cas. 902; see also *Gangadin* v. *Jagat Tewari*, 12 A. L. J. 1026.

(5) *Ganga* v. *Jagat*, 12 A. L. J. 1026: see alo *Dun* v. *Halt*, (1904) L. J. K. B. 341; *Viruyascappa* v. *Sharif*, 11 Bom. L. L. R. 372.

(6) Kerr on Injunction p. 94; see also *Green* v. *Green*, 5 Hare 400 (n).

(7) Kerr on Injunction p. 94 see also *Symonds* v. *Green*, 24 Ch. D. 346; *Shipman* v. *Shipman*, (1924) 2 Ch. *Weldon* v. *De Bathe*, 14 Q. B. D. 339 cited in Kerr on Injunction p. 94.

(8) *Stevens* v. *Stevens*, 24 T. L. R. 20.

(9) 94 L. T. 133=22 T. L. R. 195.

purpose. Subsequently the son began to abuse and ill-treat the father and to behave in such a manner as practically to destroy the house of the family. In a suit by the father to eject the son from the house and for an injunction restraining him from trespassing therein: *Held* that the father had absolute control of the family property, notwithstanding the improvement effected by the son, and was not estopped from suing to eject the son, and was further entitled to an injunction restraining the son from entering into the house (1).

Threatened trespass.—In the subject of trespass as elsewhere the main function of an injunction is to preserve property from future injury. Courts will not, however, enjoin against a mere speculative or possible injury. Instead, a reasonable probability of the injury resulting must be shown. Hence, if defendant has neither done nor threatened any wrongful acts, and denies his intention to do the acts against which an injunction is sought, it will be refused (2). On the other hand, if plaintiff shows that defendant has threatened to do acts of the kind which equity enjoins, that is enough to rest his case upon (3). And threats may be purely verbal without any acts, (4) or they may consist of acts from which the inference as to defendant's intention may be made (5). If, however, a wrongful act is done, and it is not accompanied by threats of repetition, and does not itself constitute a threat, the injunction will not issue, since, in such case, it is needless (6).

Dispute as to title; General Principles.—The effect of a dispute as to title on the propriety of granting an injunction to a plaintiff who seeks to enjoin destructive acts of a defendant who, in turn, justifies on the ground that he is life-owner of the land affected, has been much discussed by the Courts, and a considerable difference of judicial opinion has resulted. The source of the difficulty was a *dictum* (7) and a decision (8) of *Lord Eldon* that when a plaintiff stated that the defendant claimed by an adverse title, he stated himself out of Court,—a statement of the law which, when taken absolutely, *Lord Eldon* himself disapproved, and which after repeated expressions of disapproval (9), the English Court finally modified half a century later (10). In *Lowndes* v.

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(1) *Dharmdas Kundu* v. *Amulya Dhan*, 10 C. W. N. 765=33 C. 1119=3 C. L. J. 616.

(2) *Kerlin* v. *West*, 4 N. J. Eq 449; see also *Chabildas* v. *Municipal Commissioners*, 8 B. H. C. R. O. C. J. 85.

(3) *New York etc. Co.* v. *Scorill*, 71 Conn. 136=71 Am. St. Rep. 159, see also *Stampford* v. *Hurlstone*, L. R. 9 Ch. 116; *Gibbon* v. *Abdur*, 3 B. L. R. A. C. 41; *Poran* v. *Paresh*,—12 W R. 82.

(4) *Union Mill etc Co* v. *Warren*, 82 Fed. 522

(5) *Bonaparte* v. *Camden*, Baldev. (C. C.) 205.

(6) *Ocmulgee Lumbar Co* v. *Mtichelt*, 112 Ga. 528.

(7) *Pillsworth* v. *Hopton*, (1801) 6 Ves. 51.

(8) *Smith* v. *Collyer*, (1803) 8 Ves. 89.

(9) *Vide Jones* v. *Jones* 3 Mer. 160; *Haigh* v. *Juggar*, 2 Cole. C. C. 231; *Davenport* v. *Davenport*, 7 Hare, 217.

(10) *Commissioners* v. *Blackett* (1848) 12 Jur. 151; *Neale* v. *Cripps*, 4 Kay. & J. 472; *Lowndes* v. *Bettle*, 33 L. J. Ch. 451. The point is now covered by statute in England 36 & 37 Vict., C. 66, S. 25, clause 8; Pomeroy's Eq Jur. § 1916. Under the Judicature Act, 1873, s. 25, Clause 8, an injunction may be granted to prevent any threatened or apprehended waste or trespass, if the Court shall think fit, whether the person against whom such injunction is sought

Bettle (1), *Kindersely V. C.* said: "Where, therefore, the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under colour of right, the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction of the estate, the Court will grant it. But where the party in possession seeks to restrain one who claims by adverse title, there the tendency will be to grant the injunction, at least where the acts done either did or might tend to the destruction of the estate. Formerly before the passing of the Judicature Act, 1873, great importance was attached to the fact that a defendant whom it was sought to restrain from committing trespass, in good faith set up a claim to the land upon which it was alleged trespasses were about to be committed and a few American Courts still attach undue importance to a dispute concerning the title, apparently losing sight of the general departure from the early practice in this respect (2). The reason that a dispute as to title should preclude the granting of an injunction permanently is that under such circumstances "it is possible that title may be in the defendant . . . . . If he has the title, then he has a right to possession, and ought not to be precluded from acquiring it. But if the injunction stands, he is under a permanent judicial inhibition from in 'any wise meddling with the property. His right to litigate title in an action at law should be preserved to him (3)" "In brief, one should not be finally enjoined from acts which may be wholly rightful and lawful. But on the other hand, it does not follow from this that injunction should be wholly refused. There being a substantial dispute over the title, it is clear that the plaintiff may prove to be the owner, and his possible interest should be protected at once, because otherwise 'the injury may be committed before trial. Hence, a true regard for the interests of both parties requires that a temporary injunction should issue to preserve the property in its present condition till the ownership is decided. Such temporary injunction is of course subject to the usual governing principles of temporary injunctions, which are discussed elsewhere (4). Some of the more important of these principles in this connection are that, since the action of the Court may wrong one party, whether it grant or refuse the injunction,

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is or is not in possession under any claim, title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable." See also section 45 of the Judicature Act, 1925, repealing and replacing section 25, clause 8 of the Judicature Act of 1873, which runs as follows:—'If an injunction is asked, either before or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if not in possession) does not claim the right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or either of the parties are legal or equitable."

(1) 33 L. J. Ch. 451.

(2) Spelling on Injunctions and other Extra ordinary Remedies § 367.

(3) *Echelcamp* v. *Schrader*, 45 Mo. 505.

(4) *Vide* Chapter III *supra*.

the defendant is wronged by granting the injunction if he is the rightful owner; the plaintiff is wronged by refusing it if he proves the title,—the Courts are largely guided in forming their conclusion by balancing these possible wrongs against each other, and acting unfavourably towards whichever party will be least injured by unfavourable action; and small degree of laches will lose plaintiff his right to it (1); its purpose is almost always to preserve the *status quo* (2), the prospective injury on which the plaintiff must rest his case is that which will occur before he can have time to establish his right, not the full and entire injury on which his right to a permanent injunction may rest, and the injury to occur in this interval must be sufficient to support an injunction (3); and, finally, its continuance or dissolution is dependent upon the outcome of the dispute as to title. It follows that when the sole basis of equity's jurisdiction is to prevent a multiplicity of suits caused by a continuing trespass or by repeated trespasses of a single individual, a temporary injunction will rarely, if ever, be appropriate (4). For it is the plaintiff's own fault if, during the interval while he is establishing his right, he brings a number of suits. He can afford to wait till the right is determined in his favour at least better than the defendant can afford to give up even temporarily the right to use the property, if it be his (5)."

Where the plaintiffs had a lawful possession of the land and it appeared that the contesting defendants were interfering as mere trespassers: *Held*, that the plaintiff could rely on their possessory title and obtain an injunction under section 54 of the Specific Relief Act (6). Trespass is a wrong in another's possession and the proper person to sue is the person who is in actual or constructive possession of the land, that is entitled to immediate possession, A mere right of property without possession is not sufficient to support the action. On the other hand mere possession is *prima facie* evidence of title and is alone sufficient to sustain an action against a mere wrong doer. A co-sharer can maintain an action of trespass against a wrong doer (7).

Where a plaintiff sued for an injunction alleging title in himself, while the defendant claimed title likewise, a finding that the property in dispute was public property entails dismissal of the suit (8). The defendant company acting under a *bona fide* claim of right began to cut an incline and sink a pit for the purpose of working the minerals in certain lands and had already finished constructing a railway siding when the Plaintiffs sued for a permanent injunction restraining the defendant company from interfering with the same.

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(1) *Field* v. *Beaumont*, 1 Swanst. 204; *Jones* v. *Jones*, 3 Mer. 163; per *Bruce L. J.* in *Att. Gen* v. *Sheffield etc. Co.*, 3 De. G. M. & G. 304, 328.

(2) *Blakemore* v. *Glamorganshire, etc. Co.* 1 Mylne & K. 154.

(3) *New York* v. *Fitch*, 1 Paige, 97.

(4) *Hill* v. *Bowie*, 1 Bland. Mad. 593.

(5) Pomeroy Eq. Jur. § 1916.

(6) *Uttam* v. *Tabu*, 10 Lah. L. J. 480 =115 Ind. Cas. 480.

(7) *Currimbhoy* v. *Creet*, 50 C. L. J. 208.

(8) *Barkoo* v. *Atmaram*, 92 Ind. Cas. 818=A. I. R. 1926. Nag. 383; see also *Balkrishna Das* v. *Gobind*, 5 N. L. R. 67=2 Ind. Cas. 245.

They also applied for a temporary injunction pending the hearing of the suit restraining the defendant company from proceeding with the boring operations on the allegation that the lands were being rendered unfit for cultivation thereby. The Court of first instance granted a temporary injunction mainly on the ground that the object of the suit would be frustrated if the defendant company were allowed materially to alter the features of the locality. *Held* that in making this order the Court had over-looked certain material considerations. The balance of convenience in this case was in favour of the defendant company being allowed to continue the mining operations. The loss caused to the company by stoppage would be out of all proportion to the loss apprehended by the plaintiffs, specially as the plaintiffs (of whose title there was no evidence) would, if successful, be able to recover damages from the company which was a substantial one and which did not enter as a mere wanton trespasser. Moreover, it appeared that the plaintiffs stood by for a considerable time whilst the defendant company was spending a large amount of money over the works sought to be stopped. This is a circumstance of considerable importance in dealing with an application for injunction, specially in the case of a mining company (1).

Plaintiff sought to restrain the defendant from obstructing him in the enjoyment of a piece of land alleging that he has been in possession for fifteen years as purchaser from its owner: *Held*, that if plaintiff established his right, this was eminently a case for an injunction. Where a legal right, violated by another under colour of title, is established the recurrence of violation cannot, in ordinary cases, be adequately met by damages nor can those damages be satisfactorily ascertained. A relief by way of injunction only is an adequate relief (2).

Possessor's title—suit against trespasser for injunction.—A person in long anterior and peaceable possession at the time of the threat of dispossession is, until the contrary is shown, entitled to maintain his possession against all but the true owner (3). In a suit for declaration of title to land and for an injunction restraining defendant from disturbing possession, it was found that neither plaintiff nor defendant has established title but the plaintiff was in possession on the date of suit and for 11 years previously and that the defendant was never in possession. *Held* that the plaintiff was entitled to be maintained in possession (4). In order to succeed on the strength of long possession, the plaintiff must show that the defendant is a trespasser (5).

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(1) *Singaram Coal Syndicate* v. *Indra Nath Chatterjee*, 10 C. W. N. 173.

(2) *Appaji* v. *Appa*, 4 Bom. L. R. 534 =26 B. 735.

(3) *Periasami* v. *Anandaji*, 80 Ind. Cas. 82=20 L. W. 14=1924 Mad. 722; see also *Narayan Rao* v. *Dharmachar* 26 M. 514; *Ismail Ariff* v. *Mahomed*, 20 C. 834=20 I. A. 94; *Narayanappa* v, *Hanumanthappa*, 1931 M. W. N. 487; *Satish Chandra* v. *Madan Mohan Jati*, 58 C. 29=132 Ind. Cas. 906=A. I. R. 1931 Cal. 483; *Ram Ranjan* v. *Secretary of State*, A. I. R. 1931 Cal. 430.

(4) *Periasami* v. *Anandayi*, 80 Ind. Cas. 82=20 L. W. 14=1924 Mad. 722.

(5) *Central Karkend Coal* v. *Karuc Rewani*, 1 Pat. L. J. 47=34 Ind. Cas. 616.

Defendant in possession enjoined from Destructive acts.—In the leading English case (1) which discusses the effect of a dispute as to title on the granting of an injunction against trespass, the court after an exhaustive review of the cases made the following distinction: "Where a defendant is in possession, and a plaintiff claiming possession seeks to restrain him from committing acts similar to those here complained of (cutting timber, ornamental trees and shrubs, and sods) the court will not interfere unless indeed [as in *Neal* v. *Cripps* (2)] the acts amount to such flagrant instances of spoliation as to justify the court in departing from the general principle.....But where the person in possession seeks to restrain one who claims by an adverse title the tendency of the court will be to grant the injunction, at least when the acts either do or may tend to the destruction of the estate." A close analysis of the above passage may perhaps lead to the conclusion that the class of acts which will lead to the injunction in the one case usually will have the same effect in the other. Nevertheless the distinction is one which cannot be disregarded in view of the state of the authority, nor is it without reason. That reason, as given in the same case, is as follows: "If a man claims to be owner of an estate of which he either is in possession, or in a position tantamount to that, the court will be very slow to interfere to restrain such an apparent owner from doing those acts which the owner so situated may properly do. There is a wide difference between such a case and that of a person claiming to be owner (whatever the ground of his claim), not taking proceedings at law to recover, but coming on the owner's estate, and doing acts injurious to it." In other words, the fact of possession in the defendant is regarded as strong evidence of title in him, and the plaintiff must therefore make a stronger case to justify an interference with him. The logical effect of this reasoning is, that the plaintiff should be granted an injunction either if he produce stronger evidence of title than would be otherwise required of him, in order to affect the inference of title which defendant's possession raises, or if (as is suggested in the passage above cited), he show that defendant is committing "flagrant instances of spoliation"—that is, more than ordinarily destructive acts. The actual effect is that some courts either grant the injunction only in the latter case, or else lay down the hard and fast rule that no injunction will issue when the defendant is in possession under claim of title or till the plaintiff has established his ownership in an action brought for that purpose (3).

In a recent case (4) it has been held that a claim for an injunction against breach of a covenant in a lease cannot be joined, without the leave of the court, in the same writ with a claim for recovery of possession of the land upon forfeiture for breach of covenant, unless the act complained of amounts to a nuisance or other spoliation of the freehold independent of the covenant. In delivering the judgment *Younger J* said: "In my opinion, therefore, the

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(1) *Lawndes* v. *Bettle* 33 L.J. Ch. 451.
(2) 4 K. & J. 472 = 116 R. R. 413.
(3) Pomeroy's Eq. Jur. § 1917.
(4) *Wheeler* v. *Keeble*, (*1914*) *Limited*, 88 L. J. Ch. 554.

plaintiffs are not entitled to this injunction simply by referring to the terms of the covenant. If they are entitled to an injunction it must be apart from the terms of the lease altogether ; it must be solely in respect of their own interest in the premises and any irreparable injury that may be sustained by them in respect of that interest by the acts of the defendants on the plaintiff's property, if those acts are allowed to continue. If that be the true view to be regarded in arriving at the liability of the defendant in respect of this matter, the principles of the court in dealing with it will be found set forth clearly in the case of *Lowndes* v. *Bettle* (1). That was a case before *Kindersley V. C.* and he stated very shortly the principle in his judgment. I take it from the head note : 'Where the defendant is in possession of an estate, and a plaintiff, claiming possession, seeks to restrain him from acts of spoliation (cutting down trees and digging sods and other such like acts), the court will not grant an injunction unless the acts are so flagrant as to justify it in departing from the general principle Where a plaintiff is in possession the court will leave him to his remedy at law against a stranger committing such acts, unless they tend to the destruction of the inheritance.

"Now here, there is no evidence that *Westminster Estate* is threatening to forfeit the plaintiff's lease. No other apprehended injury is suggested. [His Lordship reviewed the evidence, and continued.] Accordingly it appears to me, subject to one case, which I shall have to refer to in a moment, that in principle the injunction which is asked for is misconceived by reason of the fact that, the action being framed upon the footing that the lease has determined, an injunction to enforce the covenants in that lease can no longer be asked for or obtained.

"But then it was said by counsel for the plaintiffs—and it is a point which requires careful consideration—that the breach complained of was complete before the writ was issued, and before the lease had been determined, and, accordingly, that the court can be properly asked to grant an injunction in respect of an injury which was then complete. I think, however, that the answer which counsel for *Hitchens Limited* gave to that contention was the true one. He said that this breach, consisting of placing his lettering in front of the premises, was either a continuing breach or it was not. If it was a continuing breach, it had ceased to be a breach by the destruction of the covenant. If it was not a continuing breach it had ceased to be a breach by the destruction of the covenant."

Where the plaintiff is out of possession and claims possession, the court will refuse to interfere by grant of injunction against the defendant in possession under a claim of right, but where the threatened injury will be irreparable, an injunction will lie at the instance of a complainant out of possession (2). In delivering the judgment the Court observed : "We are invited in this

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(1) 33 L. J. Ch. 451.

(2) *Kesho Prosad* v. *Srinibash Prosad*, 38 C. 791.

rule, by the plaintiff respondent in an appeal from original decree to grant an injunction upon the defendants appellants so as to restrain them in the use and enjoyment of the subject matter of the litigation now in their possession. .....In support of the Rule, it has been argued by the learned counsel, that the defendants-appellants ought not to be allowed to spend the income of the properties in their possession to which the title of the plaintiff has been declared by the court of the first instance, and that, in any event, the defendant ought not to be allowed to spend any sums in excess of what is needed for the payment of the Government Revenue and other public charges and rents due to the superior landlords and also sums needed for the management of the estate.....In an answer to the Rule it has been argued, that the question of title of the plaintiff is still in controversy ; that in spite of the decision of the original Court, it cannot be maintained that the plaintiff has any prospect of success ; and that in any view the plaintiff has other remedies at his disposal : and that in any view, the plaintiff cannot by injunction practically compel the defendants to manage the estate at their cost for his benefit. After careful consideration of the arguments which have been addressed to us on both sides, we are of opinion that the application for any injunction ought to refused.

"It may be conceded that the plaintiff now occupies a position of some advantage by reason of the decision in his favour by the original court. If the application for injunction had been made during the pendency of the trial in the court below, the defendants could undoubtedly have contended that the injunction ought not to be granted until the plaintiff had established, as put by *Lord Cottenham* in *Clayton* v. *Attorney General* (1), that he has a fair prospect of success, or as observed in the other cases [*Preston* v. *Luck* (2), *Chalender* v. *Royle* (3), and *Republic of Peru* v. *Dreyfos* (4)], that he has made out a probable or *prima facie* case. Let us assume, therefore, that as the plaintiff has made out his title after a protracted trial in the court of first instance, he has a *prima facie* clam to the disputed properties. But this by itself is not sufficient to justify the grant of an injunction. It is well settled that, as a general rule when the plaintiff is out of possession and claims possession, the court will refuse to interefere by grant of injunction against the defendant in possession under a claim of right but where the threatened injury would be irreparable, an injunction will lie at the instance of a complainant out of possession, though in jurisdiction where a distinction is made between a Court of law and a Court of Equity, such injunction has been refused even against irreparable injury, if the title has not been well-established at law and no action to establish it has been brought : *Strelley* v. *Pearson* (5), *Harman* v. *Jones* (6), and *Wilson* v. *Townsend* (7). In this country, however,

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(1) (1834) 1 Coop. temp. Cott. 97, 139.
(2) (1884) 27 Ch. D. 497, 505.
(3) (1887) 37 Ch. D, 425, 436.
(4) (1888) 38 Ch. *D.* 348, 362.
(5) (1880) 15 Ch. D. 113.
(6) (1841) 1 Cr. & Ph. 299.
(7) (1860) 1 Dr. & Sm. 324.

we are not embarrassed by the distinction between a court of law and a Court of Equity; in any event in the case before us, the plaintiff has commenced a suit for declaration of his title and has been successful in the original court

"The principle, therefore, to be applied here is that, unless irreparable injury is threatened, the court will not grant an injunction to the plaintiff who is out of possession as explained in *Lowndes* v. *Bettle* (1), where the decisions were reviewed and classified by *Kindersley V. C.* As the learned Judge pointed out, the remedy by injunction is afforded more liberally to a complainant in possession to protect that possession than to one out of possession to protect the property until possession can be recovered by law.

"The same doctrine has been recognised in numerous decisions in the American courts as based on sound principles of jus ice, equity and good conscience; and it has been respeatedly ruled that a defendant in possession will not be enjoined from the use of the property in controversy unless it is made to appear that the complainant *will otherwise lose the fruits of his action if he establishes* his title. The leading decision upon the point is the case of *Snyder* v. *Hopkins* (2), where *Mr. Justice Brewer* laid down the principle that, pending an action for possession, while the title is disputed and still finally undetermined, the defendant ought not to be restrained from continuing in possession and from the natural use of the premises and the enjoyment of all the benefits which flow from such possession. If, however, the defendant should attempt to commit any act in the nature of waste, the court will interfere by injunction to restrain him. A similar view was affirmed in *Hent* v. *Strese* (3), *Williams* v. *Lang* (4), and *Taylor* v. *Clerk* (5), see also *Lloyd* v. *Trimleston* (6) and *Fingal* v. *Blake* (7). In the case before us, there is no foundation for any suggestion that the defendants are about to commit an act in the nature of waste; the plaintiff therefore, is not entitled to an injunction to restrain him in the enjoyment of the property still in their possession."

"The weight of authority, has now come to be" says *Prof. Pomeroy* "that even in this case a temporary injunction will issue if, pending litigation, there will otherwise be such serious acts of trespass that damages will not be an adequate remedy (8)." The reason which sustain this holding has never been more forcibly and clearly stated then in *Duvall* v. *Waters* (9) one of the earliest American cases in which the question was considered, in which *Chancellor Bland* said: "Should it turn out that the defendant had an unquestionable title, then the granting of such an injunction could only operate temporarily and partially to the prejudice of the free exercise of his right of

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(1) (1864) 33 L. J. Ch. 451.
(2) (1884) 31 Kansas. 557=3 Pac. 367.
(3) (1888) 75 Cal. 620=17 Pac. 920.
(4) (1900) 129 Cal. 229=61 Pac. 1087.
(5) (1898) 89 Fed. Rep. 7.
(6) (1829) 2 Molloy 81.
(7) (1828) 2 Molloy. 50.
(8) Pom. Eq. Jur. § 1917.
(9) 1 Bland Ch. (Md) 569.

property. But on the other land, if it should be eventually shown that the plaintiff had the title, then, as the injunction turns no one out of possession nor displaces anything, it must necessarily leave to the defendant the advantage of fighting the plaintiff within his own property, upon which, had not the injunction been granted, the most irretrievable destruction might have been perpetuated ; acts of waste might have been committed which would deprive the plaintiff of the very substance of his inheritance, mischief might have been done which it would require years to repair ; and things might have been turned away or destroyed which it would be difficult or impossible to restore in kind, such as building, fixtures, trees, or other peculiarities about the estate, which a multitude of associated recollections had rendered precious to their owner ; but as compensation for the loss of which, a jury would not give one cent beyond their mere value (1)." Where the defendant in possession of plaintiff's land intending to build a mosque and dedicate the same to the public an injunction to restrain the building of the mosque can be granted (2).

Defendant not enjoined from mere use.—"It is not to be inferred" says *Prof. Pomeroy* "from the above that the courts which have gone thus far are at all hasty or even ready, to enjoin one in possession claiming title. It has already been pointed out that the injunction granted is a temporary one, subject to all the restraints which the courts always throw about this exercise of 'the strong arm of equity.' It is only acts for which there is no adequate legal remedy that will thus be enjoined. Hence, the courts never enjoin a defendant in possession from mere use of the premises (3)." In *Snyder* v. *Hopkins* (4), *Brewer J.* said : "Pending an action for the possession, while the title is disputed and undetermined by a judgment at law, equity ought not to interfere to restrain the defendant from continuing the possession, from the ordinary and natural use of the premises, and the enjoyment of all benefits which flow from possession. If the premises be a firm, the defendant should not be restrained from cultivating the land and enjoying all the benefits which flow from the natural and ordinary use of a farm as a farm. To this end he should be permitted to sow and gather any ordinary crop upon the cultivated ground. He should be permitted to put up any temporary sheds or other buildings necessary for the protection of his stock or the preservation of his crops. He should be permitted to use all the usual agricultural implements in the cultivation of the broken land not merely in the harvesting of crops as seems be indicated by the restraining order, but also in planting and cultivation. He should be at liberty to pasture his stock on the grass lands, provided, at least, he has no more stock than is ordinarily raised and kept on such a farm.

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(1) Pomeroy's Eq. Jur. § 1917 ; Banerjee's T. L. L. for 1906 pp. 633. 634 ; Story Eq. Jur. §§ 928, 929 ; *Jetha Lal* v. *Lall bhai*, 28 B. 298 ; *Anathnath* v. *Makintosh*, 6 B. L. R. 571.

(2) *Municipality of Tando* v. *Khair Mahomed*, 92 Ind. Cas. 1019=A- I. R. 1925 Sind. 260.

(3) Pomeroy's Eq. Jur. § 1918.

(4) 31 Kans. 557=3 Pac. 367, cited with approval in *Kesha Prosad* v. *Srinibash*, 38 Cal. 789 at p. 795.

In short, he should be permitted to use the farm in any ordinary way, as such a farm is used, with the single limitation that he *commits, no waste, and makes no substantial and injurious change in its condition.*"

A prayer for an injunction to the defendant to lease a house is really nothing more than a prayer for possession (1).

Essential Elements of Equitable Jurisdiction.—Three conditions have been declared as essential to relief by injunction against trespass: (i) Admission or adjudication of plaintiff's rights. (ii) Admission or adjudication of defendant's wrong. (iii) Inadequency of remedy at law (2). Where the plaintiff's title is not disputed the court will grant an injunction to restrain acts of trespass without requiring him first to bring an action (3). In cases of trespass, under colour of title, where the mischief apprehended is irreparable, a court of equity will grant an injunction, and whether the mischief be irreparable or not, it will by decree, if not by order upon motion extend the jurisdiction of preventive justice to all cases of trespass in which damage would be an inadequate and uncertain remedy, and the protection of the right *in specie* the only mode of doing justice (4). The court will, by mandatory injunction, restrain a trespass by a stranger, the continuance of which will inflict irreparable damage upon persons in possession, and damage which it is impossible to measure will be deemed irreparable (5). But where there is no irreparable injury it will be refused (6). Every common trespass is not a foundation for an injunction in a court of equity, where it is only contingent and temporary; but if a common trespass be continued so long as to become a nuisance or a constant grievance, the court will restrain its continuance (7). An injunction will not be granted to restrain a trespass, unless the trespasser is insolvent, or the injury irreparable and destructive to the plaintiff's estate - to its very nature and substance—and such as calls for immediate relief (8), at least until the right is determined (9). There must be something particular or special in the case for which a court of law cannot afford adequate redress and for which, either from difficulty of proof or some other cause, the party cannot obtain adequate satisfaction in the ordinary course of law (10). An injunction will be granted to restrain various acts of trespass committed against a plaintiff, and of annoyance to his tenants, by a pauper defendant, as recovering damages at law against a pauper would not constitute an adequate remedy (11). But the court will not restrain trivial trespasses (12). If a lessee for life commit waste (from the privity) by opening a mine in his own close, and dig a mine in the adjoin-

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(1) *Nagasamy* v *Perumal*, 13 M. L. J. 475.

(2) Spelling on Injunctions and other Extraordinary Remedies § 338.

(3) *Goodson* v. *Richardson*, 43 L. J. Ch. 790 = L. R. 9 Ch. 221.

(4) *North Union* v. *Bolton and Preston Ry. Co.*, 3 Ry. Cas 345.

(5) *London* v. *Lacashire*, L. R. 4 Eq. 174; *Lowndes* v. *Bettle*, 33 L. J. Ch. 451.

(6) *Sandys* v. *Murray*, 1 Ir. Eq. Rep. 29.

(7) *Coulson* v. *White*, 3 Atk. 21.

(8) *James* v. *Dixon*, 20 Miss. 79.

(9) *Shurnicer* v. *St. Paul*, 8 Min 13.

(10) Joyce on Doctrines pp. 218, 219.

(11) *Hodgson* v. *Duce*, 2 Jur. N. S. 1014

(12) *Saunders* v. *Smith*, 3 My & Cr. 711.

ing close of the lessor, not confined in his lease, an injunction will be granted as to both closes; as to the lessor's close, first, from the irreparable ruin of the property as a main; secondly, as it is a species of trade; and thirdly, upon the principle of a court of equity enjoining in matters of trespass, where irreparable damage is the consequence (1). The court will grant an injunction to restrain trespass, upon the principle of avoiding multiplicity of suits (2).

Imminency of danger justifying Injunction.—It may be stated as a general rule that greater certainty of proof will be required where a bare threat to commit a trespass is the basis of an application for relief, than where the commission of the wrongful act has already been commenced, or one or more of a succession of such act has been already committed; as where defendants had repeatedly torn down plaintiff's fence in order to pass over his lands, and has threatened to continue to do so (3). Where the bare threat is relied upon, the Court will be influenced to a great extent by the nature of the act threatened; the right to relief depending upon whether the injury if done would be irreparable in damages at law, a clear case of impending injury and urgent necessity being required to authorize the writ (4),

Complainant's title.—A party seeking equitable title against one alleged to be a trespasser must allege and prove at least a possessory title in himself to *locus in quo*. Nor is it sufficient that, on a trial, defendant fails to prove title in himself. It is always an absolute bar to the allowance of an injunction for the protection of property during the litigation, that the defendant shows that the party seeking the injunction has no title or interest in the property, and no claim to the ultimate relief sought by the litigation. And it is not sufficient that he shows himself entitled to possession; he must be actually in possession. A mere *prima facie* title which is not disputed is sufficient as a basis for an injunction against a trespasser (5). Accordingly one who is in possession of mining ground, claiming title thereto, and who makes a *prima facie* case covering his surface locations, may sue to restrain an alleged unlawful interference with underground veins of ore within the lines of his claim (6). A party in possession showing an equitable title to realty will be protected by injunction against trespassers, though the location of the legal title has not been finally determined (7). A relief is not confined to those able to show a clear title of record A title by prescription is sufficient (8). In order to justify the interference by the Court, the complainant must be in actual possession, or have established his legal right, or have brought an action to recover possession;

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(1) Joyce Doctrines p. 219, *Flaming's case* cited in *Hanson* v. *Gardiner*, 7 Ves. 308.

(2) Section 54 of the Specific Relief Act.

(3) *Safer* v. *Stull*, 48 N. W. 882

(4) *Dunvan* v. *Central Passenger R. Co.*, 85 Ky. 525; Spelling on Injunction and other Extraordinary Remedies § 360.

(5) Spelling on Injunction and other Extra ordinary Remedies §§ 364, 365.

(6) *Gilpin* v. *Sierra Nevada*, 23 p. 547; *Chapman* v. *Toy Long*, 4 Sawyer 28; see also *Hext* v. *Gill*, L. R. 7 Ch. 699; *Ashden* v. *Seddon*, L. R. 10 Ch. 394.

(7) *Wilson* v. *Rockwell*, 29 F. 674.

(8) Spelling on Injunctions and other Extraordinary Remedies § 366.

or his exclusive right must be admitted by the defendant; and the Court will act in the case with great precaution; it will not take jurisdiction to try title, and ordinarily will not decree that the defendant surrenders possession (1). But in British India, the above rules are of very little importance, inasmuch as in this country the archaic division of Courts and remedies into legal and equitable were never recognised in the Moffusil Courts and even in the case of the Three Presidency High Courts, they have become obsolete.

Cutting of Timber.—The jurisdiction in trespass is often and beneficially exercised to restrain the cutting of timber and destruction of growing trees. Formerly the fact that the title to the premises was in dispute at the time of the application was considered a sufficient reason for refusing relief by injunction against the cutting and removal of timber (2). But owing partly to the serious nature of the wrong, and partly to a relaxation of the rule, Courts in later times usually grant temporary injunctions in this class of cases pending an adjudication of the legal right between the parties. Especially will relief be granted where the trespass of cutting timber amounts to a destruction of the essential value of the estate in the character in which it has been enjoyed (3). Where there is a dispute respecting one of the boundaries of an estate, and one of the claimants is about to cut down ornamental or timber trees in the disputed territory, he will be restrained by injunction from doing so until the disputed legal rights are settled (4).

Trespass on Burial Grounds.—The irreparable nature of the injury caused by entering upon burial grounds and removing therefrom the remains of bodies interred therein is generally recognized. The relief is granted in such cases upon the ground that, from the nature of the case, there can be no adequate pecuniary compensation (5).

Destroying and altering Land-marks etc.,—Removing and defacing land-marks and monuments which mark the boundaries of land is an injury of such serious and irreparable character as warrants equitable preventive relief (6). On the same principle an injunction lies to restrain one from entering on another's land, against the owner's consent, and setting up new land-marks, and from making out and recording the survey made, in the registers with a view of carrying it into an adverse grant (7).

Destruction of Buildings and Fixtures.—An injunction will usually be granted to prevent the defacement or removal of buildings or parts thereof, since such injuries are essentially injurious to the inheritance, and for that reason considered to be irreparable (8). On the same principle an injunction will be granted against the removal of fixtures forming part of the realty (9).

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(1) Spelling on Injunctions and other Extraordinary Remedies § 368.
(2) *Smith* v. *Collyer*, 8 Ves. 89.
(3) *Foulton* v. *Harman*, 44 Md. 251.
(4) *Kinder* v. *Jones*, 17 Ves. 128.
(5) *Mooney* v. *Cooledge* 30 Ark. 640.
(6) *Preston* v. *Preston*, 85 Ky. 16.
(7) *Ibid*; Spelling on Injunction and other Extra ordinary Remedies § 348.
(8) *Junney* v. *Jackson*, 6 Ill. Ap. 32.
(9) *Brown* v. *City of Frankfort*, 9 S. W. 384, 702; Spelling on Injunctions § 349.

Removal of Stone—Ashphaltum—Soil.—The unlawful quarrying and removal of stone, wherein consists the chief value of land, may be restrained by injunction (1). An injunction was granted to restrain the removal of clay from complainant's lot to be used in making brick (2).

The Balance of Injury—"The state of facts which has just been considered often occurs in such form as to raise another question which Courts of equity have had some difficulty in answering. If a defendant's building encroaches slightly on the plaintiff's land and the plaintiff's damage is small, while the cost to the defendant of removing it is great, should a Court of equity disregard wholly the injury which granting relief to the plaintiff will cause the defendant, and issue the injunction? Or, should it balance the injury which its course will cause in granting or in withholding relief, and be influenced by this consideration in its decision? A further element is sometimes introduced into the case by the fact that the defendant is engaged in a business which serves public convenience, and thus can plead not only the injury to himself, but also to the public, as a reason for not granting the injunction. It should be premised in the beginning that the question cannot arise except in a case in which some sufficient reason for equity jurisdiction, such as irreparable injury or the prevention of a multiplicity of suits exists; in other cases, the injunction will be refused on the simple ground that the legal remedy is adequate. It is believed, too, that the question of the convenience of the public should be treated as immaterial, though it must be said that Courts have sometimes allowed their decision to be influenced by this consideration (3). In answer to the suggestion that the convenience of the public should be taken account of in determining the propriety of granting an injunction, *Lord Chancellor, Lord Selborne* replied: 'It is said that the objection of the plaintiff to the laying of these pipes is an unneighbourly thing, and that his right is one of little or no value, and one which Parliament, if it were to deal with the question, might possibly disregard. What Parliament might do if it were to deal with the question, is, I apprehend, not a matter for our consideration now, as Parliament has not dealt with the question. Parliament is, no doubt, at liberty to take a higher view upon a balance struck between private interest and public interest than this Court can take (4). In other words, so far as the ulitity to the public is made the basis of an argument, it would seem to be simply urging the propriety of taking private property for public use without the requisite condemnation proceedings—the unwise policy of which can not be doubted.

"Assuming, then, that the only question before the Court is the propriety of balancing the injury that may be caused to the parties by the decree, and remembering that the question does not arise except when equity has juris-

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(1) *Althen* v. *Kelly*, 32 Minn. 280; see also *Thomas* v. *Oakley*, 18 Ves. 184; *Cowper* v. *Baker* 17 Ves. 178.

(2) *Bates* v. *Slade*, 76 Ga. 50.

(3) *Mc Elroy* v. *Kansas City*, 21 Fed. 261.

(4) *Goodson* v. *Richardson*, L. R. 9 Ch. 221.

diction of the case because the plaintiff's legal remedy is inadequate, it should be noted that to deny the injunction is (*i*) 'to allow the wrong doer to compel innocent persons to sell their right at a valuation, (1) and (*ii*) to refuse him altogether any equitable relief in a case where, on the ground of avoiding multiplicity of suits at least, he is clearly within one of the most frequently given reasons for assuming jurisdiction, and where, also, his injury may be irreparable. In view of this situation it is clear that the plaintiff's prayer will not be readily denied, and it can safely be said that the argument based on the balance of injury to the defendant will be availing only in a limited class of cases. On the other hand, it is a general rule of equity not to exercise its extraordinary jurisdiction when it will operate inequitably and oppressively (2). The problem presented is, therefore, to strike a medium rule between these principles that, as fairly as may be, will do justice. The Courts of *Massachusetts* and *New York* have considered the question, upon various states of facts, oftener than the Courts of any other jurisdiction; and acting independently, have arrived at substantially the same result. That result, in the words of the *Massachusetts* Court is, as follows (3). 'Where, by an innocent mistake, erections have been placed a little upon the plaintiff's land, and the damage caused to the defendant by the removal of them would be greatly disproportionate to the injury of which the plaintiff complains, the Court will not order their removal, but will have the plaintiff to his remedy at law.' The language of the New York Court is (4): 'It must be remembered that a wilful trespasser cannot in this way acquire an inch of land, because the mandatory injunction must issue as to him; that in other cases where the injury to the plaintiff is irreparable the mandatory injunction will issue, and permanent damages will not be awarded; that where the granting of an injunction would work greater damage to an innocent defendant than the injury from which the plaintiff prays relief, the injunction could be refused absolutely, and the plaintiff compelled to seek his remedy at law.' In practice these rules are probably almost the same, and they perhaps represent as nearly a fair resultant of the arguments on the side of both parties as can be arrived at. Both rules protect the plaintiff from very serious injury, both deny any protection to a wilful wrong-doer, and both, as far as possible, refuse to apply the remedy of mandatory injunction when to do so would be oppressive to the defendant (5)." In a case where the defendant trespasses on the plaintiff's land by extending a cornice, the proper remedy is not to award damages but to issue a mandatory injunction (6). The law with regard to granting of injunction which obtains in a case brought against a trespasser is not the same as that in a case where one of the co-sharers sues another in partition. Every owner of the land, whatever the

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(1) *Tucker* v. *Howard*, 128 Mass. 361.

(2) *Starkie* v. *Richmond*, 155 Mass. 188.

(3) *Lynch* v. *Union Institution* for *Savings*, 159 Mass. 306.

(4) *Goldbacher* v. *Eggers*, 38 Misc. Rep. 36=76 N. Y. Supp, 881, 886.

(5) Pom. Eq. Jur. § 1922.

(6) *Rama subbier* v. *Sheriboga ratnam*. 25 L. W. 154=99 Ind. Cas. 1003=A. I. R. 1927 Mad. 357.

extent of his share, has the right to use the land in any way which he thinks proper. If that be not so, it will not be possible for any co-sharers to use any part of the land in coparcenary for any profitable purpose and, therefore an order passed against a co-sharer restraining him from building upon a portion of the joint-property must be passed with great caution (1).

In *Abdul Hossein* v. *Ram Charan Law* (2), where a suit was brought for demolition of a wall constructed by the defendant on the land covering plaintiff's footings, after its completion, the Court held that a proper remedy was by way of mandatory injunction ordering the demolition of the defendant's wall. The learned Chief Justice, *Sir Lawrence Jenkins*, and *Mr. Justice Woodroffe* who decided the case thought that the case clearly came within the law as laid down in Chapter X of the Specific Relief Act, and in view of the provisions of s. 55 of the Act they considered that they would be right in compelling the defendant "to pull down so much of the wall as is an encroachment on the land of the plaintiff, that is to say, so much of the wall as stands over the 13 inches, to which the plaintiff has established his title in this suit (3)." This view was accepted by *Mookerjee* and *Fletcher JJ* in *Levy* v. *Ezra* (4). It has also the support of English law. In *Krehl* v. *Burrell* (5), it was held that where the defendant, despite repeated warnings from the plaintiff, had persisted in building over a Courtyard, over which the plaintiff had a right of way to his shop and had refused terms of compensation which the plaintiff had agreed to accept a mandatory injunction to remove the building was issued though built at an enormous cost. In *Shelfer* v. *City* of *London Electric Co.* (6), *Kine* v. *Jolly* (7), *Jones* v. *Tanker Ville* (8), it was held that where the injury complained of is of a very serious nature, or if the defendant has acted in a

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(1) *Macneil* v. *Debendra*, A. I. R. 1928 Cal. 293.

(2) 38 C. 687=16 C. W. N. 313.

(3) In this case the plaintiff alleges that the wall was built on his land, and that it therefore constitutes a trespass. The defendant on the other hand denies this, and he goes on to plead that even if it was built on the plaintiff's land, still it occupied the site of the old wall on that land which had stood there for more than thirty years; and so he says, any claim by way of trespass now fails. But the Court found on the facts proved that the defendant's plea that his new wall occupied the site of the old wall failed. The Court of appeal observed: "The just conclusion from this is that there had been an unlawful encroachment. Now if that be so, there is a wrong, in respect of which the plaintiff is entitled to a remedy. In the prayer of his claim he seeks a declaration, or mandatory injunction and damages. In the view I take, it is unnecessary to enter into the question of damages, but I think the plaintiff is entitled to a mandatory injunction, and in the circumstances it appears to me that this is his proper remedy. To begin with I do not think that there has been any delay or acquiescence on the plaintiff's part..... It is true that the wall has been completed, or was completed before this suit was brought, still we are here concerned with trespass on the land of the plaintiff,—a trespass not carried out as the result of long and continuous work but of work completed quickly and promptly. Not only has a trespass been committed but the trespass is one which still continues and will hereafter continue to be committed as long as the wall remains in its present site. That being so, I think the proper remedy is by way of mandatory injunction".

(4) 33 C. L J. 26=62 Ind. Cas. 199.

(5) 47 L. J. Ch. 353=7 Ch. D. 551=38 L. T. 407.

(6) (1895) 1 Ch. 287.

(7) (1905) 1 Ch. 480.

(8) (1909) 2 Ch. 440=78 L. J. Ch. 674.

high handed and unfair manner, the plaintiff is entitled to an injunction (1). In cases where an injunction is sought to restrain defendant from erecting buildings on land alleged to belong to plaintiff, it is essential that the boundaries of the land should be given in order to assist the Court to find out what is actually in dispute and against what portion of the land the injunction is sought to be effected. A map ought to be attached to the plaint, and vague descriptions of the boundary ought not to be accepted (2).

In *Gangadin* v. *Jagat* (3), *Sunder Lal J.* said: "No one can by merely trespassing upon the land of another and constructing costly buildings upon it claim a right to retain possession. He has no right to compel the plaintiff to receive compensation for this land, instead of the land itself. In a case like this the decree should reserve leave to the defendants to remove their materials within a time to be fixed by the Court, failing which the plaintiff should be put in possession of his land, with or without the buildings, which he may pull down at his pleasure. The rule of law on this point is thus formulated in *Dr. Satish Chandra Banerjee's* work at page 815: 'Similarly as a general rule, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property or to interfere with his rights; and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he has wrongfully done affecting the plaintiff, and to pay damages. In such a case the plaintiff is not compelled to part with his property at a valuation even though it would be much cheaper for the defendant to pay damages in money than to restore the property . . . . . one who has gone on wrongfully in a wilful invasion for the plaintiff's right in real estate has no equity to set up against the plaintiff's claim to have his property restored to him as it was before the wrong was done.' This view was taken by the *Bombay High* Court in *Jithalal* v. *Lalbhai* (4)".

The plaintiff and the defendant, being owners respectively of two adjoining houses and verandahs immediately in front of them, agreed that they should keep the *verandahs* open and not build upon them or divide them by a wall. *Held* that the mere fact that the defendant, when re-building his house, built its new front wall in advance of the plaintiff's, thus encroaching on the defendant's own verandah in violation of the agreement, was insufficient *per se* to justify the Court in granting a mandatory injunction ordering its removal. It should also be satisfied that a new wall so materially interfered with the comfort and convenience of the plaintiff that the consequences of the breach of agreement were not adequately to be compensated by damages. It should further satisfy itself whether the plaintiff protested against the new wall being built, whilst in course of erection, or quietly acquiesced in what the defendant was doing, and only objected when the wall was completed. If he had waited till the

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(1) *Ramshashi* v. *Bolai Lal*, 53 Ind. Cas. 890.

(2) See also *Alagappan* v. *Karuppa Chetty*, 25 Ind. Cas. 503; *Ayoob* v. *Nur Mahomed*, 28 Ind. Cas. 169.

(3) 12 A. L. J. 1026.

(4) 28 B. 298.

completion of the wall, the court should only award damages (1). The defendant encroached on an abuttment (*dhora*) of the wall of the plaintiff, which stood on a piece of ground belonging to the plaintiff. The wall divided the properties belonging to the parties. The abuttment was on the defendant's side of the wall. The lower appellate court awarded compensation for this encroachment, on the ground that there was a merely technical encroachment on the part of the defendant because only a foot or so of the plaintiff's ground was covered thereby. *Held* that relief by way of injunction was the proper remedy in such a case, for to allow compensation would be to let a trespasser put a value or money's worth on another man's property and deprive him of it against his will (2).

A trespasser has no right to ask the owner of land to pay him compensation for constructing building without the owner's consent ; he is only entitled to remove the materials (3).

Trespass by over hanging branches and roots of trees.—"It cannot be disputed" observes *Mookerjee J.* in *Lakshmi* v. *Tara Prosunna* (4), "that the owner of land which is overhung by trees growing on his neighbour's land, may without notice if he does not trespass on his neighbour's land cut the branches so far as they overhang—and however previously they have overhung his land (5). It is equally clear that no prescriptive right can be acquired to compel a man to submit to the penetration of his land by the roots of a tree planted on his neighbour's soil and a man may consequently abate any such encroachment upon his property by cutting the roots in the same manner that he may remove the overhanging branches. *Gale* on *Easements*, 7th Ed, p. 445, *Norris* v. *Baker* (6). It follows therefore that the party who is so affected may ask for a mandatory injunction, for in the language of *Lord Coke*, 'there are two ways to redress a nuisance, one by action, and that is to recover damages and have judgment that the nuisance shall he removed, cast down or abated, as the case requireth ; or the party grieved may enter and abate the nuisance himself.' *Baten's case* (7). Consequently as every owner is under an obligation not to allow the boughs of tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate his neighbour's land, to the detriment of the latter, in case of breach of such an obligation it is open to the court to grant a mandatory injunction for the removal of the nuisance under section 55 of the Specific Relief Act. Section 55 of the Specific Relief Act provides that when to prevent the breach of an obligation, (which under section 3 includes every duty enforceable by law) it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of and also to compel performance of the requisite acts ; in other words the court may

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(1) *Ranchhod* v. *Lallu*, 10 B. H. C. R. 95.
(2) *Jethalal* v. *Lalubhai*, 28 B. 298, see *Goodson* v. *Richardson*, L. R. 9 Ch. 221.
(3) *Barkat Ali* v. *Abdul Rahman*, 114 Ind. Cas. 696.
(4) 8 C. W. N. 710.
(5) *Lemmon* v. *Webb* (1895) App. Cas. 1 ; *Hari Krishna* v. *Shankar*, 19 B. 420.
(6) 1 Rol. Rep. 393.
(7) 9 Rep. 53 at p. 55.

not only forbid the repetition of an injurious act but also with a view to restore the *status quo*, direct that what has been done be undone. That such an injunction is ordinarily the proper remedy in cases of continuing actionable nuisance is clear from the case of *Shelfer* v. *City of London Electric Co.* (1). But it is argued by the learned vakil for the Appellants that the proper injunction to be granted is one, not for the removal of the trees but for the removal of the offending branches and roots. We are of opinion that this contention ought not to prevail. When a mandatory injunction is granted under section 55 of the Specific Relief Act two elements have to be taken into consideration, in the first place, the court has to determine what acts are necessary in order to prevent the breach of obligation ; in the second place, the requisite acts must be such as the court is capable of enforcing.

"Now let us consider these tests in their application to the facts of the present case. It has been conceded by the learned vakil for the Respondents, that if the nuisance and the damage of which the Plaintiffs complain, had been due solely to the four hanging brances a mandatory injunction for their removal would have afforded sufficient protection to the Respondent. But he contends, and we think rightly, that in-as-much as injury has been and is likely to be caused by the penetration of the roots into the foundation of their building and wall, it is necessary within the meaning of section 55 of the Specific Relief Act to compel the defendants to remove not merely the roots but the trees themselves. A mandatory injunction is granted generally upon the same principles and subject to the same conditions as a perpetual injunction (2). Now if a perpetual injunction were granted restraining the defendants from causing the penetration of the foundation of the Plaintiffs' building and wall, it would be obviously unworkable ; the plaintiffs would not be in a position to discover whether the injunction had been disobeyed till their own property had been actually damaged. More over this would be hardly consistent with the principle laid down in *Bindu basani* v. *Janhabai Chaudhurani* (3) that an injunction might be asked for and granted not merely when the injury had actually taken place but also when it has been threatened, in other words, it might be granted to prevent not merely the recurrence but also the concurrence of the injury. It appears to us, therefore, to be reasonably clear that a case has been made out for the grant of a mandatory injunction for the removal of the trees under section 55 of the Specific Relief Act ; we hold that the portion of the decree which makes an order for such removal is correct and must be affirmed (4)" The fact that the party complaining has merely a lease-hold and not a free-hold would not appear in any manner to alter the case. Further it would not seem to make any difference whether plaintiff had built a house or not, so long

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(1) (1895) 1 Ch. 388.
(2) *Smith* v. *Smith*, L. R. 20 Eq. 500.
(3) 24 C. 260.
(4) See also *Kempayya* v, *Bettaiya*, 3 Mys. L. J. 143 ; *Maung Po. Thaung* v. *Ma Gyi* 76 Ind Cas. 812=1 Rang. 281=2 Bur. L. J. 136 ; *Mahabali* v. *Manu* 74 Ind. Cas. 828 ; *Bhudeb* v. *Kalachand*, 34 C. L. J. 315 ; *Behari Lal* v. *Ghisa Lal*, 24 A. 499=A. W. N. 1902, 169.

as the branches over hang his land (1). A person has the right to cut those portions of the trees which overhang his land. He can sue to obtain an injunction to remove the growth even if he is unable to prove actual damage (2). An action for an injunction will lie against a person who allows the branches of his trees to overhang his neighbour's land, whereby his neighbour's trees are damaged (3).

Joint wall.—Where the plaintiffs and the defendants had their houses adjoining each orher, and the wall between the two houses was a party wall, and the defendant raised the height of the wall at his expense and opened new windows in the raised portion of the wall, the plaintiff at first having acquiesced in such construction: *Held* that the raised portion of the wall assumes the the same character as the old party wall on which it stands. Neither party has a right to commit a trespass on the party wall so raised in height, and the defendant's action in opening the windows in the raised part of the party wall will amount to trespass and as such the plaintiff is entitled to an injunction restraining the defendants from making an opening in the party wall (4).

Suit for permanent injunction—Second suit for possession barred.—A suit by an owner, out of possession, for a permanent injunction against the defendant, who holds the property in dispute adversely to him, bars a subsequent suit for possession on the same cause of action (5). In the above case the Court observed: "So far I am aware there is no authority for the proposition that a suit by an owner out of possession for a permanent injunction against the defendant who holds the property in dispute adversely to him does not bar a subsequent suit for possession on the same cause of action; such a suit on principle must be barred. In the previous case between the parties it was found that the plaintiff was out of possession and that the fact was known to him when he instituted the previous suit. The relief sought by him in that suit was a permanent injunction to which he was not entitled on the cause of action brought about by dispossession and the entire relief of possession to which he was entitled on that cause of action was omitted by him. With reference to those facts, I hold that his present suit for possession is barred by the principle on which section 43 is founded. It may be contended that the cause of action in the previous suit was different from the cause of action in the subsequent suit and that, therefore, section 43 has no application. Having regard to the findings of fact in the previous suit that the plaintiff was not in possession and that he knew that he was not in possession and to the facts that in the present suit the relief sought is based on the same cause of action which had arisen before the institution of the present suit and that no fresh cause of action save the former

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(1) *Maung P. O.* v. *Ma Gyi.* 76 Ind. Cas. 81=1 Rang. 281=2 Bur. L. J. 136.

(2) *Vishnu Jagannath* v. *Vasudeo,* 20 Bom. L. R. 826=47 Ind. Cas. 629.

(3) *Smith* v. *Giddy,* 73 L. J. K. B. 894 =(1904) 2 K. B. 448.

(4) *Imambhai* v. *Rahimbhai,* 27 Bom. L. R. 503=49 B. 586=87 Ind. Cas. 977= A. I. R. 1925 Bom. 373.

(5) *Gokul Misir* v. *Bonide Ali,* 8 Ind. Cas. 9.

is alleged, I have no hesitation in holding that the cause of action in both suits is one and the same."

Mandatory Injunction.—The plaintiff brought a suit for a permanent injunction to restrain the defendant from erecting a *khadi* and immediately afterwards applied for an *interim* injunction which was refused. At this, the defendant who had not till then proceeded with his building erected the door. At the hearing the Court being of opinion that under the circumstances the preventive relief would be of no avail to the plaintiff, dismissed the suit. *Held*, that the suit was rightly framed in the light of circumstances which existed when it was brought; that it is defendant's subsequent conduct which rendered it necessary that the plaintiff should be given, as prayed for in his plaint, such other relief as the Court might think fit; and that therefore the plaintiff was entitled under the circumstances to a mandatory injunction if he proved the right alleged in his plaint (1). A mandatory injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him (2). The defendant having built a wall on the plaintiff's land, the plaintiff brought a suit in which he asked for damages for the trespass, and an injunction, and a decree was passed for damages and for a mandatory injunction directing the defendant within two months to remove the wall, and to restore the plaintiff's premises to their former condition (3). In such a case monetary compensation is not a proper remedy (4).

Estoppel, laches and Acquiescence.—The general equitable rules as to estoppel, laches and acquiescence also apply to the subject of his chapter. In connection with injunction against trespass, the law of acquiescence was elaborately discussed by *Kinkhede Og, A. J. C.* in *Mararilal* v. *Balkishan* (5). In that case the plaintiff was the *Malguzar of Mahal* No. 1 of *Mouza Neora Bazar in Tahsil Baloda Bazar* of Raipur District and the defendants were shopkeepers residing there. In the *abadi* of that village one *Behari Bania* had a house. His mother sold that house to the defendants some years ago. They demolished that old house and built thereon as also on the adjoining *malguzari abadi* land a new house about a year and a half before the suit in question. The plaintiff's case was that the purchase of *Behari's* house was without his consent and that the defendants had encroached upon the adjoining *malguzari abadi* lying on three sides of the house *i. e.* to the north, south and west. The Court of first instance found that the plaintiff objected to the construction of the house on the encroached portions at the very time when the foundations were laid. The finding of the Court of first instance was to this effect: "The defendants' action in building on land other than *Bihari's*

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(1) *Maganlal* v. *Chhotalal*, 3 Bom. L. R. 542=26 B. 136.

(2) *Navroji Manekjee* v. *Dastur Kharsedji*, 28 B. 20.

(3) *Jawatri* v. *Emilie*, 13 A. 98.

(4) *Jethu bai* v. *Lalabhai*, 28 B. 298; *Ganga* v. *Gagat*, 25 Ind. Cas 198; *Dipnaran* v. *Jagmohan*, 87 Ind. Cas. 15.

(5) A. I. R. 1926 Nag. 416=95 Ind. Cas. 636.

was strenuonsly opposed by the plaintiff from the very beginning and if the defendants persisted in it, they did so at their risk and plaintiff cannot be made to pay the price of the house for their wrongful action." The defendants preferred an appeal to the Court of the District Judge, and took exception to the decree as passed in regard to the encroached portions on the ground (*i*) of their title by purchase, both as regards the *factum* and validity thereof; and (*ii*) of estoppel against the plaintiff. There was no mention of "laches" as distinguished from 'acquiescence' in the construction of the house on the plaintiff's part. All that was urged therein was "that the plaintiff having taken no legal step if it had any real grievance until the house costing about Rs. 15,000 had been completed, his conduct amounted to acquiescence and in this view his oral representations to some public officers and that too after a good portion of the house had been built, could not avail him, and it ought to have been held that at least he was liable to fully compensate the defendants before he could obtain a decree for demolition of such a valuable structure. The District Judge has found it as a fact that the construction of the house, which is a large one began, before the rains in 1919 and that it was finished before the rains of 1920. He also held it proved that the plaintiff complained to a Famine charge officer and the Sub-divisional officer in July or August, 1919, to another Sub-divisional officer at the end of that year or early in the next, and also to the Sub-Inspector of Police. He observes in granting the appeal: "All these protests were made to people who had no power to interfere, and although advised as far back as 1919 the plaintiff took no steps to pursue his proper remedy. Nor till the house was finished did he have a notice served on the defendants and then he brought no suit for a year. The plaintiff as P. W. No. 9 gives his reasons for the delay that the defendants were big people and he owed them money and so did not like to proceed against them at once. Any reasons holding good then would hold good now and yet the suit has been brought' The plaintiff says that he has had to borrow money by pledging ornaments to bring his suit, an indication, if true, of his anxiety to bring it. He alleges refusal to give up the land by the defendants themselves as far back as the time of digging the foundation, *i. e.*, before the rains of 1919 and yet he brought no suit." Against this decision the plaintiff filed an appeal to the court of the Judicial Commissioner. The final court of appeal in British India in allowing the appeal observed: "I must at once say that this finding cannot at all be supported as a finding of fact. The conclusion arrived at are clearly based upon a misconception not only of the law on the point, but also the pleadings and the effect of the evidence adduced in the case.....The District Judge thinks it inequitable to order demolition of a costly building, and all this because the plaintiff refrained from bringing a suit which he was fully entitled to bring when the defendants first started the building and continued its construction in spite of plaintiff's protests against the encroachment and the further progress of the work. At this stage it is desirable to state what is meant by 'acquiescence' or 'laches'

and when and how they bar a legal remedy. In *Collet's* Law of Specific Relief page 429 of the 5th Edition, meaning of acquiescence is thus stated with reference to the provision of s. 56 (h) of the Specific Relief Act : 'If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and makes no objection while the act is in progress he cannot afterwards complain. That is the proper sense of the word acquiescence. (Halsbury's Laws of England Injunction, Vol. 17, pp. 210-220) Hence, there should be shown to have been knowledge as well as of the acts committed as of the rights involved, or as has been said, the acquiescence must be such as, in the view, of the court, would make it a fraud afterwards to insist on the strict legal right.....The doctrine will apply, that if a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.....Generally speaking, if a party has an interest to prevent an act being done and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice, than he would have had if it had been by his previous license (1)'.

"The word 'acquiescence' is used in two senses ; sometimes it is used to denote conduct which is evidence of an intention by the party conducting himself to abandon an equitable right ; sometimes to denote conduct from which another party would be justified in inferring such an intention, *i. e.* it is sometimes employed as equivalent to conduct which amounts to a release and sometimes as equivalent to conduct which creates an estoppel or constitutes a promise, for which the acts of the defendant supply a consideration. Acquiescence, properly speaking, relates to inaction during the performance of an act ; laches relates to delay after the act is done . . . . So to fix acquiescence upon a party it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded, and to which it refers (2). I have already stated above that there is nothing in the pleading regarding laches, that is delay, after the act is done, and still the District Judge has based his judgment upon that. Laches to bar the plaintiff's right must amount to waiver, abandonment, or acquiescence and to raise a presumption of any of these, the evidence of conduct must be plain and unambiguous. *Peer Mahomed Dewji* v. *Mahomed Ebrahim* (3) and *Kissen Gopal Sadaney* v. *Kally Prosonna Seth* (4). Delay may imply and be evidence of release or

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(1) *Per Lord Campbell L. C.* in *Cairncross* v. *Lorimer*, 3 Macq. H. L. 827 ; *De Bussche* v. *Alt.*, 47 L. J. Ch. 381=8 Ch. D. 286=38 L. T. 370 ; Vide pp. 94, 98 *supra*.

(2) Collet page 60.

(3) 29 B. 234=6 Bom. L. R. 1013.

(4) 33 C. 633.

abandonment of right. Two circumstances always important in such cases, are the length of the delay and the nature of the acts done during the interval which might affect either party and cause the balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. *Lindsay Petroleum Co.* v. *Hurd* (1). The delay in filing the suit after the service of the notice cannot be taken into consideration for depriving the plaintiff of such relief as he may be entitled to on the facts as they stood before such written protest was sent to the defendants. We must therefore, look to the plaintiff's conduct during the progress of the building, and not to conduct after its completion which clearly goes against the defendants.

"On the findings as given by both the Courts there were protests at every stage of the building beginning from the foundations, in April 1919, in July or August 1919, November or December 1919 or early January 1920, and to crown all a written protest in June 1920 through a pleader. Besides these protests in the presence of public officers, P. W. No. 7, P. W. No 5, P. W. No. 3, there is also evidence of P. W. No. 2, who speaks of a protest to the defendant's *munim* D. W. No. 3, and the plaintiff as P. W. No. 9 speaks of his protests to the defendants in person. This clearly negatives all possible inference of any waiver of his right by the plaintiff either during the progress of the building or after its completion . . . . . The only view which under such circumstances is possible to take was and is that the defendants being big wealthy people did not care for the protests of a poor *maiguzar* who had the misfortune of also being their debtor. They went on with their work in spite of the verbal protests made from time to time. They took full advantage of the circumstances that the plaintiff was in straightened circumstances, and they fancied that they could overcome those protests by their own high-handedness. They pushed the work through with full knowledge of the risks they were running, and took no heed of even the written protests sent on 16th June 1920 through a pleader, the building having just been finished. Had there been silence on the plaintiff's part at the time when he ought to have been very active in protesting as he did, that is while the construction was going on and in addition to that inaction, there were laches or delay in filing this suit, the matter would have been different :

"The law does not cast upon an owner the duty of at once running to Court for redress as soon as there is an encroachment. The statute of Limitation has prescribed certain period within which he can enforce the remedy. The force of the evidence about the protests being made in the presence of officers who had no power to interfere does not appear to have been properly appreciated by the District Judge. I do not think a Judge of the Civil Court was expected to witness the protests. The object was to have unimpeachable testimony as to the fact of the protests having been made . . . . I cannot help saying that this case affords a striking example of the contemptuousness with which the rights

(1) (1874) 5 P. C. 221=22 W. R. 492 ;
Collet page 78.

of a *malguzar* are trampled down by money lenders, simply because the former happens to be helpless or short of funds, or the latter consider it below their dignity to take notice of the protests made against the infringement of other's rights by themselves. This is how a man having a just claim but not the means and the pluck to enforce it against a big man in a Civil Court, goes without redress, and the high-handedness of the bigman receives the support of a Civil Court's finding which gives effect to a beguiling plea of acquiescence or estoppel set up against the claimant. On the contrary, it is the duty of the Civil Court to see that the just rights of a man are not infringed in any way, and that his just claim is not defeated on mere technicalities. For these reasons I think that the conduct of the plaintiff affords no room for the inference of acquiescence or consent on his part, much less could it lead to one of laches, or either, be evidence of an intention to waive his right as *malguzar*, or induce the defendants to act to their prejudice in the matter of the construction of their house on the encroached portion of the *abadi*, so as to raise a bar of estoppel against him. Acquiescence is not a question of fact, but of legal inference from the facts found: *Narsingdas* v. *Rohiman Bibi* (1), per *Mookherjee J.* in *Ananda Chandra* v. *Parbati Nath* (2), where the case of *Beni Ram* v. *Kundan Lal* (3), is quoted in support of his view that acquiescence is not a question of fact but of legal inference from facts found, and it is open, therefore, for the appellant to invite this Court to consider whether the question of acquiescence has been properly decided by the District Judge. I, therefore, hold that there was no acquiescence on the part of the plaintiff, nor was there laches in filing the suit.

"The defendants were rank trespassers upon those portions of the *abadi* upon which they had encroached while constructing their building They had absolutely no right to continue the trespass in face of the protests. Their (defendants) conduct was most reprehensible. They stooped to get forged documents prepared to support their false defence, tampered with their own account books, and adduced perjured evidence. It was their good luck that the Courts below did not order any prosecution against them. In view of their high-handedness there could absolutely be no equity in their favour, and I am not prepared to allow the wrong done to the plaintiff by their high-handedness, coupled with their contempt for protests, to remain unredressed, by permitting the latter either to maintain the offending building intact, or to claim compensation from plaintiff for removing it from land belonging to him, simply because the building is a costly one."

In *Kazi Mahomed* v. *Narotam* (4), it was laid down, following *Peer Mahomed* v. *Mahomed Ebrahim* (5), that mere delay is no bar to a legal remedy, unless it amounts to a waiver or an abandonment of the rights sought

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(1) 28 B. 440=6 Bom. L. R. 440.
(2) 4 C. L. J. 198.
(3) 28 A. 496=26 I. A. 58=3 C. W. N. 502=1 Bom. L. R. 400 (P. C.).
(4) 9 Bom. L. R. 1117.
(5) 29 Bom. L. R. 234.

to be enforced, or to acquiescence in the act complained of, and that where there is a vested right or interest in any party, he cannot waive or abandon that right except by an act equivalent to an agreement or a license (1). In case of encroachments, to refuse injunction to restrain further alteration of property requires a strong case; but mandatory injunction to restore to original condition is very exceptional (2).

In April 1900, Babu Lal Misser and others, apparently believing that a certain piece of land belonged to the Municipal Board of *Gorakhpur*, applied to the Board for permission to build thereon. The Board gave permission to the applicants to build "on their own responsibility." The building was commenced and raised as far as the plinth in April 1900. After that it was stopped, but it was recommenced in April, 1901, and completed by the end of the month. The owners of the land, who lived within a few yards of the building in question, raised no opposition until the 15th of May 1901, when they filed a suit asking for the ejectment of the defendants from the land, which they valued at Rs 5, and for demolition of the building, which was found to be upwards of Rs. 100 in value. *Held*, that, under the circumstances above set forth, the Court below used a right discretion in not ordering the removal of the building erected by the defendants (3).

Suit for injunction-Limitation.---In a suit for a perpetual injunction directing defendants to restore to its original condition certain land encroached upon by them, which was originally reserved for the common use of the proprietors, it is for the plaintiffs to prove that the encroachments were made within six years before the suit (4). In delivering the judgment *Rattigan J.* said: "Be this as it may, the question is whether the present suit has been instituted within 6 years from the date when the right to sue accrued [Article 120 of the Indian Limitation Act: Cf. *Kanakasabai* v. *Muthu* (5) aud *Waziran* v. *Babulal*, (6).] Even if the encroachments took place only a few years before suit, the case for plaintiffs could be greatly weakened, and it might well be argued that plaintiffs, who had patiently allowed such encroachments to take place and had not taken action within a reasonable time, had not suffered such injury as would justify the court in interfering on their behalf under section 54 of the Specific Relief Act (7)."

Trespass by officers of crown.—An aggrieved person may sue an officer of the crown to restrain a threatened act in alleged pursuance, of an Act of Parliament, but really outside its limits. The Attorney general is not a

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(1) *Murarilal* v. *Balkissen*, A. I. R. 1926 Nag. 416; see also *Seth Mohanlal* v. *Choudhri Chuni Lal* 2 N. L. R. 14.

(2) *Jagabandhu* v. *Rajmohan*, A. I. R. 1925 Cal. 538.

(3) *Shama Charan* v. *Babu Lal*, A. W. N. (1904) 70; see also *Haji Syed* v. *Gulab Rai*, 20 A. 345; *Benode Coomaree* v. *Soudaminy*, 16 C. 252.

(4) *Gonda Singh* v. *Nathuram*, 13 Ind. Cas. 661=151 P. L. R. 1912.

(5) 13 M. 445.

(6) 26 A. 391.

(7) But see *Sheo Prasad* v. *Mangor Manior*, 12 A. L. J. 1150.

necessary or proper party to such an action (1). An action for trespass committed or intended is not maintainable against officials of the crown or government sued in their official capacity or as an official body. Such an action will, however, lie against such officials in respect of acts actually done or directed by them if sued in their individual capacity, even although such acts be done by the authority of the government (2). The Post-Master General is not liable in his official capacity as head of the telegraph department of the Post-office, for wrongful acts down by his subordinates in carrying on the business of the department (3). So an action will not lie against a crown official, as such, for wrong done in purported exercise of a statutory authority (4).

Injunction against trespass by public companies or public bodies.—Persons obtaining from the Legislature powers to interfere with the rights of property for their own purposes (whether of a local nature or merely private) are bound strictly to adhere to the powers conceded to them--to do no more than the Legislature has sanctioned, and to proceed only in the mode in which the Legislature has pointed out ; but any one seeking the assistance of a court of equity is bound to show that he has an interest in preventing the defendants from doing what is, in fact, or may be called, a violation of their contract with the Legislature, he must shew not only that the defendants are committing, or intend to commit, a wrong, but also that the wrong complained of does occasion, or will occasion, loss or damage to himself ; that he has a special or private interest in confining the defendants within the limits of their parliamentary powers (5). In such a case an injunction will issue notwithstanding the fact that no case is made out of a destructive trespass or irreparable damage (6). In *Chabildas v. The Municipal Commissioners* of *Bombay* (7), decided in 1871, before the passing of the Specific Relief Act, *Sarjent J.* laid down the principles upon which the court would interfere by injunction to restrain acts of public functionaries in excess of their statutary powers. In delivering his judgment the learned judge said : "I must notice an objection that was taken *in limine* by *Mr. Green*—that even assuming the facts to be as stated by the plaintiff and his contention to be correct, the act complained of was a simple act of trespass, and that it is contrary to the practice of courts of equity to restrain acts of trespass, unless the injury apprehended from them is of such a nature that its repetition would cause irreparable loss to the plaintiff. That may be true when the tresspass complained of is the act of a private individual, but the rule does not apply, I apprehend, when the act, as here, is the act of a public company. For the correct exposition of the law applicable to public companies, and persons in a similar position, I cannot do better than refer to

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(1) *Nireaka Tamaki* v. *Baker*, 70 L. J. P. C. 66=(1901) A. C. 561.

(2) *Raleigh* v. *Goschen* (1898) 1 Ch. 73=67 L. J. Ch. 59.

(3) *Bainbridge* v. *Post Master General*, 75 L. J. K. B. 366.

(4) *Huttton* v. *War Secretary*, 43 T. L. R. 106.

(5) *Liverpool* (*Mayor of*) v. *Charley Water Works*, 2 De G. M. & G. 852.

(6) Kerr on Injunction p. 99.

(7) 8 B. H. C. R. 85,

Mr Kerr's work on Injunction at page 295 (1) where he says : "The principles upon which the Court acts in restraining trespass on the part of companies or bodies of functionaries incorporated by Act of Parliament, and having compulsory powers to take or enter lands, differ in some respects from those upon which it acts in restraining trespass by individuals. A private person who applies for an injunction to restrain a public incorporated company or body of fructionaries from entering illegally on his land is not required to make out a case of destructive trespass or irreparable damage. The inability of private persons to contend with those powerful bodies which have often large sums of money at their disposal ; and are often too prone to act in an arbitrary and oppressive manner, raises an equity for the prompt interference of the Court to keep them within the strict limits of their statutory powers, and prevent them from deviating in the smallest degree from the terms prescribed by the statute which gives them authority. If they enter upon a man's land without taking the steps required by the statute, the Court will at once interfere. A man has a right to say that they shall not affect his land by stirring one step out of the exact limits prescribed by the Statute. The principle upon which the Court interferes in such cases is, not so much the nature of the trespass, as the necessity of keeping them within control (2). It is incumbent on them to prove clearly and distinctly from the statute the existence of the power which they claim a right to exercise. If there is any doubt with regard to the extent of the power claimed by them, that doubt must undoubtedly be for the benefit of the land owner, and should not be solved in a manner to give the company any power that is not clearly and expressly defined in the statute (3). The Court has not only jurisdiction to interfere to restrain a company from affecting a man's land by the stirring out of the exact limits prescribed by the statute which gives them authority, but is almost bound to interfere (4) unless the damage is so slight that no injury has arisen or is likely to arise or unless the injury, if any has arisen, is so small as to be hardly capable of being appreciated by damages (5), or unless the remedy by damages at law is adequate and sufficient, or is, under the circumstances of the case, the proper remedy (6), or unless the trespass is one merely of a temporary nature (7)." But if a railway company acting *bona fide* has made a mistake as to the lands they have valued and taken possession of, and the question between the company and the land owner is merely one of value, a Court of Equity will not grant an injunction to stay

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(1) *Vide* page 99 of the 6th Edition where the passage occurs.

(2) *Kemp* v. *London and Brighton Railway* 1 Ra Ca. 495, 504 ; *Frewin* v. *Lewis*, 4 M. & C. 249 ; *Pinchin* v. *London and Blackwell Ry.*, 5 De. G. M. & G. 860 ; *Sutton* v. *Mayor* of *Norwich*, 27 L. J. Ch. 741, 742 ; *Raynor* v. *Stepney*, (1911) 2 Ch. 312.

(3) *Simpson* v. *South Staffordshire*, 34 L. J. Ch. 380, 387 ; *Lamb* v. *North London*, L. R. 4 Ch. 522.

(4) *Vide River Dee* v. *North. Midland Ry.*, 1 Ra. Ca. 154 ; *Att Gen.* v. *London etc. Ry.* (1900) 1 Q. B. 78.

(5) *Warden* of *Dover* v. *South Eastern Ry.* 9 Ha. 493 ; *Ware* v. *Regent's Canal*, 3 De. G. & J. 212 ; *Wandsworth* v. *Londond and South Western Ry.*, 31 L. J. Ch. 854 ; *Dowling* v. *Pontypool*, 9 Ch. 221.

(6) *Turner* v. *Blamire*, 1 Drew. 202.

(7) *Standish* v. *Mayor* of *Liverpool*, 1 Drew. 1.

the works on the property taken ; in such cases the Court has regard to the injury which may be due to the public (1).

Trespass to perso 1.—Four persons of the *Chitpavan* caste brought a suit in 1876, alleging that the members of their caste, in common with certain other castes, possessed the exclusive right of entry and worship in the sanctuary of a temple, and that the defendants, members of the Parsee caste, not being of the privileged caste, infringed that right in 1871 and thereafter by entering the sanctuary and performing worship therein. They prayed for a declaration of their right and an injunction restraining the defendants from interfering with it. The defendants contended (*inter alia*) that the suit as constituted was not maintainable ; that the question was within the meaning of section 21 of Regulation II of 1827, and not, therefore, within the cognizance of the Civil Courts ; and that the suit was barred by the law of limitation. *Held* that the plaintiffs could maintain the suit for the personal injury alleged to have been suffered by themselves by the pollution of their sanctuary ; *Held* further that this case was within the cognizance of the Civil Courts. The right of exclusive worship of an idol at a particuiar place set-up by a caste is a civil right for the adjudication of the Civil Court and not a caste question (2). But "it must be established that the juxtaposition of the two sets of persons is so repugnant to the habits of men that the entrance of the one set into the temple extends the departure of the other, so that it is, as it were, trespass to the person (3).

CHAPTER XIX

Injunctions against Nuisance—General Principles.

Nature and extent of jurisdiction.—The term "nuisance" has in equity no different signification from that given it in law. Anything which is a nuisance in law is also a nuisance in equity, and, on the other hand, "it is true that equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law ; there is no such thing as an equitable nuisance (4). This is not saying that the jurisdiction of law and that of equity are co extensive ; it is simply pointing out that equity in the determination of what constitutes a nuisance follows the law (5). In case of nuisance by the defendant, the plaintiff is entitled to damages under the common law. Whether, assuming a nuisance to exist, equity will take jurisdiction to enjoin it, is another question, a question which

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(1) Joyce on Doctrines p. 318 citing *Wood* v. *Charing Cross Ry. Co.*, 33 Beav. 290.

(2) *Anandrav* v. *Sankar Daji*, 7 B. 323.

(3) *Saklal* v. *Bela* A. I. R. 1925 (P. C.) 298=23 A. L. J, 1016=49 M. L. J. 821 (P. C.) 30 C. W. N. 289.

(4) *Per Kindersly V. C.* in *Soltau* v. *De Held*, 2 Sim. N. S. 133, 151.

(5) *Banies* v. *Banker*. 1 Amb. 158.

is answered in every particular case by determining whether there is a need of equity interposing; whether, in the usual phrase, the legal remedy is adequate (1). The principles governing courts of equity in the exercise of this jurisdiction are closely allied to those which control their action in restraining trespasses. The distinction between trespass and nuisance consists in the former being a direct infringement of one's rights of property, while in the latter the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from it. In the one case the injury is immediate, in the other it is consequential, and generally results from the commission of an act beyond the limits of the property affected (2).

Nuisance—Definition of.—An excellent definition of a nuisance is "any thing which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal or basin, or any public park, or square, street or high way (3)" A nuisance may therefore be generally defined as anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the enjoyment of his legitimate and reasonable rights of person or property; or that which is unauthorized, immoral, indecent, offensive to the senses, noxious, unwholesome, unreasonable, tortious or unwarranted and which injures, endangers or damages one in an ess.ntial or material degree in, or which materially interferes with, his legitimate rights to the enjoyment of life, health, comfort or property, real or personal (4). "The term 'nuisance' as used in law" says *Lord Halsbury* "is not a term capable of exact definition (5). It has been used with meanings

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(1) Pomeroy's Eq. Jur. § 1926.

(2) *Reynolds* v. *Clarke*, 2 Ld. Raym 1399; *Weston* v. *Woodcock*, 5 M. & W. 587; High on Injunctions § 739.

(3) *Devering's An. Civ. Code.* Cal. section 3479, cited in Spelling on Injunction and other Extraordinary Remedies § 373.

(4) Joyce on Nuisance § 2.

(5) *Bamford* v. *Turnbey* (1862) 2 B. & S. 62, 66, Ex. Ch. per Pollock C. B. at p. 79. "It is true that a legal nuisance is rather an evasive, sifting and intangible thing hard to be pinned down by a verbal definition. It must always be conditioned by time and place and circumstances; and it is little better than truism to say as *Lord Thesiger* said in the case of *Sturges* v. *Bridgman*: 11 Ch. D. 852, that what would be a nuisance in *Belgrave square* would not necessarily be so in *Bermondsey*. It is still more difficult in a city like *Bombay* where the modes of life, the habits and the whole sanitary apparatus of about 80 per cent of the vast population would hardly be accessible to what is ordinarily meant by nuisance in the English Law at all, to put any thing like precise and legal limits to the notion of nuisance. Doubtless what would be a very real nuisance in a select and refined residential quarter would not be a nuisance in a slum; and what possibly ten per cent of the population of Bombay might genuinely feel to be a nuisance would never occur to the minds of ninety per cent. of the population to be a nuisance at all. There is probably hardly any part of this city, except specially select residential quarters outside what may be called the native limits, where the bulk of the inhabitants are not daily and hourly exposed to

varying in extent by the old writers and even at the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort. Nuisances may be broadly divided into (i) acts not warranted by law or omissions to discharge a legal duty, which act or omissions obstruct or cause inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects ; (ii) acts or omissions which have been designated or treated as nuisances by statute ; (iii) acts or omissions connected with user or occupation of land which cause damage to another person in connection with the latter's user or occupation of land. The first two divisions include acts and omissions of great variety, which hardly admit of classification. The third division also includes many acts or omissions of different kinds, such as (a) interference with the specific rights of property known to our law as easements or servitudes ; (b) interference with material rights to the use and enjoyment of property arising out of the management and use of neighbouring property ; (c) the user of property in such a way that injury is caused to individuals exercising rights as members of the publie (1)." In order to constitute a nuisance in law it is essential that there should exist either actually or impliedly (i) *injuria* or wrongful act constituting or causing damage, and (ii) *damnum* or damage, loss, or inconvenience. The latter alone—*damnum absque injuria*—gives no right of action (2).

"It appears to be of the essence of a nuisance that there should be some duration of mischief ; a wrong producing damage instantaneously, as in the case of an explosion, could hardly be a nuisance. And then further to

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malignant odours and incessant noises. Considerations of this kind make a decision of such a case as I have before me one of mnch difficulty. It is also one of considerable importance, I think to the public. Such a consideration does not really arise in a court of law. That was very emphatically laid down in the case of *Attorney General* v. *Town Council of Brough of Birmingham*, 6 W. R. 811 (Eng.).....Now in all nuisance which endanger life ; there must be many degrees. There may be nuisance which endanger life ; there may be others which endanger health ; and there may be again nuisances which do no more than diminish the comforts of the plaintiffs. But the last class, no less than the first two, are undoubtedly nuisances, and there is no distinction whatever in principle between these that I can see beyond this, that I apprehend that where the nuisance was of the kind to injure the health or seriously to imperil the life of those complaining of it, the court would not hesitate to prevent it by an injunction ; but where the nuisance was of the third kind, going no further than diminishing the comforts of the human life, there would always be a question whether the court would proceed against him who causes that nuisance by injunction or compensate the sufferer in damages." *Per Beaman J.* in *Bhai Bhaicaji* v. *Perojshaw*, 40 B. 412=33 Ind. Cas. 195. In its legal sense, nuisance may be described as any wrongful and substantially prejudicial interference (not being trespass) with the enjoyment of public or private rights through the act or omission of a person, either in the use of or dealings with, public property, or in the purported exercise of his rights and powers. Ency. of L. G. Law Vol. V pp. 571-2. A nuisance *per se* has been defined as, any act or omission or use of property or thing which is of itself hurtful to the health, tranquility, or morals or outrages the decency, of the public, and which is not excusable under the circumstances. *Lewis and Spelling on Injunctions* § 286.

(1) Halsbury's Laws of England Vol. 21 p. 507.

(2) Halsbury Vol. 21 p. 508.

determine what constitutes a nuisance, so as to render the author of it liable to a neighbour in damages, a variety of other considerations must often be taken into account ; especially where the act in question has been committed in a populous neighbourhood, in the prosecution of a manufacturing business. And even if the business itself be unlawful, it does not follow that a private individual can call for redress by way of a civil action for damages. Whether he can do so or not will depend upon the question whether he has sustained special damage, by reason of the thing alleged to be a nuisance (1)." A suit for injunction was brought to prevent the user of certain premises as a slaughter house on the ground of nuisance and the probable consequence of danger to health, material discomfort and inconvenience to the plaintiffs. *Held* that unless it is clearly proved that the above consequences would ensue, injunction would not be granted and even if proved, the court has full discretion to grant or refuse it, also that the exercise of a lawful business, if is not on other grounds a nuisance will not amount to a nuisance merely because it diminishes the value of the property. Diminution of the value of one's property without injury to property by a legitimate use of one's own property is at best a "*damnum absque injuria* (2).

Foundation of an action on nuisance.—The law regarding nuisance public or private is founded on the well known maxim *sic utere tuo ut alienum non lædas* (3). A man must enjoy his own property in such a manner as not to invade the legal right of his neighbour ; *expedit republicæ ne sua re quis male utatur* (4). "Every man" observed *Lord Truro* (5), "is restricted against using his property to the prejudice of others ;" and "the principle embodied in the maxim, *sic utero tuo ut alienum non lædas*, applies to the public in at least as full force as to individuals. There are other maxims equally expressive of the principle : *nihil quod est inconveniens est licitum* (6) and *solus reipublicæ suprema lex* (7)." Though a man do a lawful thing, yet if damage thereby befalls another, he shall answer it, if he could have avoided it (8). Accordingly, "in considering whether a defendant is liable to a plaintiff for damage which the latter has sustained, the question often is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned damage" and this doctrine "is founded on good sense. For when one person in managing his own affairs causes, however, innocently, damages to another, it is obviously only just that he should be the party to

(1) Bigelow on Torts p. 282.

(2) *Rattigan* v. *Municipal Commissioners*, 106 P R. 1888.

(3) 9 Rep. 59 Enjoy your own property in such a manner as not to injure that of another person.

(4) It is to the interest of the public that no one should use his property badly ; Broom's Legal Maxims p. 281.

(5) *Egerton* v. *Earl Brownlow*. 4 H. L. Cas. 195.

(6) Nothing which is inconvenient is law. Co. Lit 97. But Coke really quotes this maxim only as meaning that an argument drawn from inconvenience is forcible in law. For although he says "the law cannot suffer anything that is inconvenient" yet he continues "it is better to suffer an inconvenience which is peculiar to one than an inconvenience that may prejudice many.', Byrne's Law Dictionary.

(7) Bacon Max. reg. 12. The welfare of the people is the paramount law.

(8) *Lambert* v. *Bessey*, T. Raym. 422.

suffer. He is bound *sic ute suo ut non laedat alienum* (1)." *Mr. Justice Millor* in summing up to the jury in *Tipping* v. *St. Helens Smelting Company* (2) told the jury that the law does not regard trifling nuisance. Every thing must be looked at from a reasonable point of view, and that the nuisance, in order to be actionable, must be such as visibly diminishes the value of the property and the comfort and enjoyment of it ; that in determining that question, time, locality and all the circumstances must be taken into consideration ; and lastly, that in places where great works had been carried on, persons must not stand on extreme rights, and bring actions in respect of every annoyance, and' if so, business could not be carried on in such places. This summing up was approved by the House of Lord (3)".

A discomfort to be actionable should be substantial. It should be substantial not merely with reference to the plaintiff ; it must be of such a degree that it would be substantial to any person, occupying the premises of the plaintiff, irrespective of his position in life, age or state of health (4). In *St. Helen's Smelting Co.* v. *Tipping* (5), *Lord Westbury* said : "My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produced material injury to property and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomforts or injuriously affects the senses or nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man live in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property ; then there unquestionably arises a very different consideration. I think, my Lords, that in a case of

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(1) *Per Lord Cranworth* in *Rylands* v. *Fletcher*, 3 H. L, 341. cited in *Lambert* v. *Bessey*. supra ; Broom's Legal Maxim p. 282.

(2) L. R. 1 Ch. Ap. 62.

(3) *St. Helens Smelting Co.*, v. *Tipping*, 11 H. L. 642.

(4) *Beharilal* v. *Mac Lean*, 78 Ind. Cas. 507=46 A. 297=22 A. L. J. 165.

(5) 11 H. L. C. 642 (651)=35 L. J. Q, B. 66=145 R. R. 348.

that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances, the inmediate result of which is sensible injury to the value of the property."

So whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself but with reference to its circumstances ; and where a locality is used for the purpose of carrying on a trade or manufacture, the fact that such trade or manufacture does exist elsewhere, not far from the place, cannot be left out of account (1). As pointed out by *Clerk* and *Lindseli*, the affairs of life in a dense neighbourhood cannot be carried on without mutual sacrifices of comfort ; and in all actions for discomfort the law must regard the principle of mutual adjustment ; and the notion that the degree of discomfort, which might sustain an action under some circumstances, must therefore, do so under all circumstances is an untenable as the notion that if the act complained of was done in a convenient time and place, it must, therefore, be justified, whatever was the degree of annoyance that was considered thereby (2).

In *Walter* v. *Selfe* (3) *Knight Bruce V. C.* said : "Both on principle and authority the important point next for decision may properly, I conceive, be thus put—ought this inconvenience to be considered in fact is more than fanciful, more than one of mere delicacy or fastidiousness, or an inconvenience materially interfering with the ordinary comfort physically, of human existence, not merely according to elegant or dainty modes and habits of being, but according to sober and simple notions among the English people." "The real question in all these cases is whether the annoyance is such as materially to interfere with the ordinary comfort of human existence (4)."

The doing of certain acts by a person in the use of his premises as a dwelling house which do not amount to a nuisance in themselves, may, when done wantonly and maliciously, for the mere purpose of annoying a neighbour and destroying the peace and quiet of his home, and which have that effect, amount to a nuisance which a court of equity will restrain (5). It is not necessary that an act should be unlawful to constitute a nuisance. One may exercise a lawful right in such a way as to entitle another to an injunction against its continuance (6). On the other hand, the mere fact that a business is unlawful does not alone constitute it a nuisance or authorize an injunction (7).

Public and Private Nuisance.—Nuisances are classified into those which are public, general, or common, and those which are private (8).

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(1) Vide *Polsue* v. *Rushmer*, (1906) 1 Ch. 234, on appeal (1907) A. C. 121 ; *Sturgess* v. *Bridgman*, (1879) 11 Ch. 865.

(2) Clerk and Lindsell on Torts 6th Ed. p. 419 cited in *Beharilal* v. *Maclean*, 78 Ind. Cas. 506=46 A. 297=22 A. L. J. 165.

(3) 4 De G. & Sm. at p. 322.

(4) *Per Lord Romilly*, in *Ball* v. *Ray* L. R. 8 Ch. 467.

(5) *Medford* v. *Levy*, 31 W. Va 649.

(6) Spelling on Injunctions and other Remedies § 373.

(7) *Babcock* v. *Ner Jersey etc. Co.*, 20 N. J. Eq. 296.

(8) Halsbury Vol. 21 p. 511.

Public Nuisance.—A public or common nuisance is an act which interferes with the enjoyment of a right which all members of the community are entitled to, such as rights to fresh air, to travel on the high ways, not to be exposed to danger to health from infectious deseases, unwholesome food etc. "I conceive" said *Kindersley V. C.* in *Soltau* v. *De Held* (1). "That to constitute a public nuisance, the thing must be such as in its nature and consequences is a nuisance, an injury, or damage to all persons coming within the sphere of its operations, though it may be so in a greater degree to some than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of smoke or of noxious effluvia are emitted. To all persons who are at all within the range of its operations, it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that to those who are nearer to it, it may be a greater nuisance, a greater inconvenience, than it is to those who are more remote from it ; but still to all who are within the reach of it, it is more or less a nuisance or an inconvenience. Take another ordinary case, the most ordinary case of a public nuisance, the stopping of the King's Highway, that is a nuisance to all who may have occasion to travel on that highway. It may be a much greater nuisance to a person who has to travel on it once a year or once in five years ; but it is more or less a nuisance to every one who has occasion to use it. If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operation, but is no nuisance or inconvenience whatever, or is even advantagious or pleasurable to those who are more removed from it, then, I conceive, it does not come within the meaning of the term public nuisance. The case before me is a case in point. A peal of bells may be and is no doubt an extreme nuisance to a person who lives within a very few feet or yards of them ; but to a person who lives at a distance from them, although he is within the reach of their sound, it may be a positive pleasure, for I cannot assent to the proposition that in all circumstances and under all conditions the sound of bells must be a nuisance (2)" But if a person carries on a manufacture from which noxious fumes are emitted, or exposes for sale unwholesome food, or stops up or obstructs a high way, or allows buildings belonging to him near a highway to became ruinous, he commites a public nuisance (3). A public nuisance cannot be legalised by long user like a private nuisance (4). In *R.* v. *Cross* (5), *Ellenborough C. J. said* : "It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance. A shell fishery across a river had been established for a vast number of years, but *Butter J*, held that it continued unlawful, and gave judgment that it should be abated."

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(1) 2 Sim N. S.=21 L. J. Ch. 153=89 R. R. 245.

(2) Cited in Kerr on Injunction pp. 132, 133.

(3) Byrne's law Dictionary,

(4) *Weld* v. *Hornby*, 7 East. 195 ; *Flowers* v. *Sanders*, Cro. Jac. 446; *De Well* v. *Sanders*, Cro. Jac. 490 ; *Simpson* v. *Wells*, L. R. 7 Q. B. 214=41 L. J. M. C. 105 : *Foster* v. *Warblington*, (1906) 1 K. B. 665.

(5) 3 Camp. 227.

Private nuisance.—A private nuisance is such a continuous infringement of a natural right of property as would in process of time give the wrongdoer an easement or prescriptive right to do an act which was originally tortious. Thus if a man builds a house so close to mine that his roof over hangs mine, and the warter flows off his roof upon mine, this is a nuisance, for which an action will lie. Similarly, if my neighbour carries on a noisy or offensive trade, or if any one injuriously interferes with my water course, market, ferry, or the like. This remedy for a nuisance is either by abatement, or by action for damages, injunction, or mandamus (1).

Importance of the distinction between private and public nuisance.—Ordinarily an individual has no right to sue in case of public nuisance, unless some special damage is sustained by him (2). Annoyances caused by infringement of natural rights are called private nuisances. Repeated acts amount to nuisances and may, in course of time, confer prescriptive easements inconsistent with natural rights. If the transmission of impure air from A's land is submitted to for twenty years by his neighbour B, A acqueisces on easement inconsistent with B's right (3), "Twenty years' user," said Park, J., "would legalize the nuisance (4)." In the same case *Tindal, C. J.* says "The plaintiff came to his house clothed with all the rights appurtenant to it ; one of which, at the common law, is a right to wholesome untainted air, unless the business which creates the nuisance has been carried on there for so great a length of time that the law will presume a grant from his neighbours in favour of the party who causes it." But there can be no prescription to make a common nuisance, which is prejudicial to all people, because it cannot have a lawful beginning, by license or otherwise, being against the common law (5). The crown cannot grant to a person a right to commit a public nuisance (6).

Nuisance and trespass distinguished.—Some varieties of nuisance closely resemble acts which are called trespass. The distinction between the two is that in trespass the immediate act which constitutes the offence occasions a prejudice or an injury to the sufferer's person or property or amounts to dispossession, whereas in the case of nuisance itself often does not directly affect the person or property of another, but the consequences of such act become or are prejedical to his person or property (7).

Public nuisance both a tort and a crime.—A public nuisance is actionable as a tort and can be punished as a crime. Chapter XIV of the Penal code deals with cases of public nuisance. Section 268 of the Penal Code says : "A person is guilty of a public nuisance, who does any act, or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy,

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(1) Byrne's Law Dictionary,
(2) *Soltau* v. *De Held*, 2 Sim. N. S. 151.
(3) Mitra's Limitation and Prescription p. 473 (Vol. I.)
(4) *Bliss* v. *Hall*, 4 Bing. N. C. 183.
(5) Gale on Easements p. 440.
(6) Halsbury Vol. 21, citing *A. G.* v. *Burridge*, 10 Price, 350.
(7) Halsbury Vol. 21 p. 506.

property in the victinity, or which must necessarily cause injury, obstruction danger, or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage." To constitute a public nuisance there must be some act or illegal omission, injurious, dangerous, or annoying, not merely to an individual or a small number of persons, but to the public at large or to some class of the public—such as the neighbouring community, or those who dwell or occupy property near the place. There are many things, which may be nuisances and are offences when done in populous places; although they are either innocent or not deemed deserving of punishment when done in a retired locality. Suppose a house in the country is used for the purpose of carrying on a dangerous trade, or one which renders the air unwholesome or disagreeable to the senses;—or suppose a private way leading to a house is obstructed or made dangerous—the injury or annoyance, if it affects only the residents of two or three other houses, will not necessarily make this public nuisance.

"It is not easy to say how many persons must suffer, or be in danger of suffering, to make a nuisance public or common. But it seems the thing done, though the general public need not be actually injured by it, must be of a nature to produce injury, annoyance, etc., to all and must do so in fact to all who are in the particular locality or otherwise within the influence of the act. He who indecently exposes his person to a single indiyidual, though it be in a public place, yet not within public view, is not punishable for a nuisance. But if the exposure were to several, or if many could have seen it, being public, if they had looked, the offence here defined would be committed. The nuisance may be caused by doing a thing which is injurious or annoying, or by neglecting to do that which the public health or safety requires to be done, for example, by keeping a house, etc., in a filthy state, neglecting ordinary precautions, during repairs, etc. In the latter case the omission must be 'illegal.'

"The following are instances of public nuisances, obstructions of high ways, navigable rivers, and the like injuries to such ways and places, neglect or refusal by those whose duty it is so to do, to keep them in repair; the carrying on, in populous localities or near a high way of trades or occupations injurious to health or comfort; making great noises to the disturbance of the neighbourhood; keeping large quantities of gun-powder in populous places to the danger of the public safety; and other acts of a similar tendency (1)."

Public Nuisance and Relief under the criminal Procedure Code.—"Whenever a District Magistrate, a sub-divisional Magistrate or a Magistrate of the first class considers on receiving a police report or other information and on taking such evidence (if any) as he thinks fit,

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(1) Morgan and Macpherson's Penal Code.

that any unlawful obstruction or nuisance should be removed from any way, river, or channel which is or may be lawfully used by the public, or from any public place, or

that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated, or

that the construction of any building, or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by and that in consequence the removal, repair or support of such building, tent, structure, or the removal or support of such tree, is necessary, or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent damages arising to the public, or

that any dangerous animal should be destroyed, confined or otherwise disposed of,

Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order,

to remove such obstruction or nuisance ; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation ; or

to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed ; or

to prevent to stop the erection of, or to remove, repair or support, such building, tent or structure ; or

to remove or support such tree ; or

to alter the disposal of such substance ; or

to fence such tank, well or excavation, as the case may be, or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order ; or if he object so to do,

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided.

"(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.—A public place includes also property belonging to the state, camping grounds and grounds left unoccupied for sanitory or recreative purposes (1).

Person to whom order is addressed to obey or show cause or claim jury.—"The person against whom such order is made shall—

(*a*) perform within the time (and in the manner) specified in the order, the act directed thereby ; or

(*b*) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper (2).

Consequence of his failing to do so.—If such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by section 135, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code, and the order shall be made absolute (3)."

Where he appears.—Then section 137 lays down the procedure where he appears and shows cause. If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case. If the Magistrate is not so satisfied, the order shall be made absolute. Section 138 lays down the procedure where he claims jury. If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute, subject to such modification (if any) (4).

Procedure where existence of public right is denied.—Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or damage to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and, if he does so, the Magistrate shall, before proceeding under section 137 or section 138, inquire into the matter. If in such enquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court ; and, if he finds that there is no such evidence, he shall proceed as laid down in section 137 or section 138, as the case may be (5). Where the party causing obstruction to a right of way adduced reliable evidence in support of his denial of the existence of the public right in respect of the way by producing the revenue records, the Magistrate is bound to stay proceeding under this section (6).

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(1) Vide S. 133 of the Cr. Pro. Code.
(2) Vide S. 135 of *Ibid.*
(3) Vide S. 136 of *Ibid.*
(4) Section 138 of the Cr. Pro. Code.
(5) Vide section 139 A. Cr. Pro. Code.
(6) 100 Ind. Cas. 119=28 Cr. L. J. 247.

By passing an order to stay under this section the Magistrate ousts his own jurisdiction to decide anything about the question of title including the onus of proof (1). The court has not to consider whether a denial is *bona fide* or not but only whether there is reliable evidence in support of it (2).

Procedure on order being made absolute.—When an order has been made absolute under section 136, section 137 or section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code (3).

Injunction pending inquiry.—If a Magistrate making an order under section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter (4).

Prohibition of repetition of public nuisance.—A district Magistrate or Subdivisional Magistrate, or a Magistrate specially empowered, may order any person not to repeat or continue a public nuisance, as defined in the Penal Code or any special or local law (5).

Criminal and Statutory nuisance.—The jurisdiction of equity over nuisance is essentially a civil jurisdiction, "The plaintiff insisted that it was illegal for Roman Catholics to ring and toll bells in a steeple annexed to their place of worship," said *Lord Cramworth V. C.* in *Soltu* v. *De Held* (6). "It appears to me that whether that be so or not, is perfectly immaterial in this case ; because, if it be illegal, I am not to grant an injunction to restrain an illegal act merely because it is illegal. I could not grant an injunction to restrain a man from smuggling, which is an illegal act. If it be illegal, the illegality of it is no ground for my interfering." In accordance with this language the law is settled that an act will not be enjoined as a nuisance merely because it is criminal, even though prohibited by statutes, whether at the suit of a private person or the public. The converse of this is not true ; indeed it is well established that it is no defence to a bill to enjoin that which is a nuisance to show that it is also a crime, if it were otherwise, public nuisances which at common law are public offences, could never be enjoined (7).

Public nuisance when restrained.—A Court of Equity has jurisdiction to restrain existing or threatened public nuisance by injunction, at the suit of the Attorney-General in England, and at the suit of the Advocate General or

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(1) 28 Cr. L. J. 363=100 Ind. Cas. 971
(2) *Manohor* v. *Emperor*, 27 A. L. J. 385=116 Ind. Cas. 756.
(3) Vide S. 140 of the Criminal Procedure Code.
(4) Vide S. 142 of Ibid.
(5) Section 143 of the Criminal Procdure Code.
(6) 2 Sim. N. S. 133.
(7) Pom. Eq. Jur. § 1941.

two or more persons who have obtained his consent in writing (1) in this country. A public nuisance must be established by clear evidence, before the preventive remedy will be granted (2). A public nuisance will also be restrained at the suit of a private person who suffers therefrom a special and particular injury distinct from that suffered by him in common with the public at large: but this injury must be real, and such that the legal remedy of damages would not be adequate (3). "In regard to public nuisances the jurisdiction of the Courts of Equity" says *Justice Story* "seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances strictly so called, but also to purprestures upon public rights and property. Purpresture, according to *Lord Coke*, signifies a close or enclosure, that is, when one encroaches or makes that several to himself which ought to be common to many as where one appropriates to his own use a public thoroughfare as a river, harbour, high way or street (4). In cases of public nuisances properly so called an indictment lies to abate them and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction. The instances of the interposition of the court however are (it is said) rare, and principally confined to informations seeking preventive relief. Thus informations in equity have been maintained against a public nuisance by stopping a high way (5). Analogous to that there have been many cases in the Court of Exchequer of nuisance to harbours,

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(1) C. P. Code s. 91.

(2) *Att. Gen* v. *Cleaver*, 18 Ves. 211, 217; *Att. Gen* v. *Forbes*, 2 Mylne & C. 123; *Earl of Ripon* v. *Hobbart*, 3 Myl & K. 169, 170; *Att. Gen* v. *Great East Ry.* L. R. 6 Ch. 572.

(3) *Soltau* v. *De Held*, 2 Sim. N. S. 133; *Att. Gen* v. *Shaffied Gas*, 3 De G. M. & G. 302; *Att. Gen* v. *Cambridge Gas*, L. R. 4 Ch. 71, 80; *Att. Gen* v. *Gee*, L. R. 10 Eq. 131; *Original Hartlepool* v. *Gibb*, L. R. 4 Ch. 71.

(4) "This definition is rather broad, and covers not only purprestures proper but many forms of encroachments now dealt with and treated as a trespass or simple nuisance. Accordingly a more restricted definition has been adopted, and the term is now applied only to cases of encroachment upon easements of a public character, such as highways, rivers, and harbours. It is no ground for refusing an injunction in such a case that a statute makes such inclosure a penal offence, and provides for its prosecution and punishment, where such statute does not apply to persons inclosing land not their own, in good faith since a public nuisance may be enjoined though indictable. The distinction between a public nuisance and a purpresture for the present purpose is of but little importance. A purpresture becomes a nuisance where it becomes an annoyance to the public, and as such its further continuance will be enjoined at suit of an individual when special injury is shown, as in other cases. But a purpresture does not always constitute a nuisance. A purpresture may exist without actual injury to either private individuals or inconvenience to the public. *Prima facie* however, the appropriation of a portion of a street or highway, river, or harbour to a party's exclusive use without legal authority is a nuisance and places the burden of proving the contrary on the party claiming the right. And an action by the attorney-general to abate and enjoin it is maintainable without proving annoyance or injury either to the public or individuals. Nor is the distinction between public and private nuisances important in this connection, since the same allegations are necessary and the same proofs are required for the granting of an injunction against the one as against the other." Spelling on Injunction and other Extraordinary Remedies § § 373, 374.

(5) *Att. Gen* v, *Sherewsbury bridge*, 21 Ch. D. 752.

which are a species of highway. If the soil belongs to the Crown. there is a species of remedy for the perpresture above mentioned for that. If the soil does not belong to the crown, but it is merely a common nuisance to all the public, an information in equity lies. But the question of nuisance or not must, in cases of doubt, be tried by a jury ; and the injunction will be granted or not, as that fact is decided. And the court in the exercise of its jurisdiction will direct the matter to be tried upon an indictment, and reserve its decree accordingly (1). The ground of this jurisdiction of Courts of Equity in cases of perprestures as well as of public nuisances undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations. In the first place they can interpose where the courts of law cannot, to restrain and prevent such nuisances as are threatened or are in progress, as well as to abate those already existing (2). In the next place by a perpetual injunction the remedy is made complete through all future time ; whereas an information or indictment at the common law even only disposes of the present nuisance, and for future acts new prosecutions must be brought. In the next place the remedial justice in equity may be prompt and immediate before irreparable mischief is done ; where as at law nothing can be done except after a trial, and upon the award of judgment. In the next place a Court of Equity will not only interfe[r]e upon the information of the attorney general, but also upon the application of private parties directly affected by the nuisance ; whereas at law in many cases the remedy is or may be, solely through the instrumentality of the attorney general (3)" (4).

In *Att. Gen* v. *Forbes*, (5). *Lord Cottenham* said : "With respect to the question of jurisdiction, it was broadly asserted that an application to this court to prevent a nuisance to a public road was never heard of. A little research however would have found many such instances. Many cases might have been produced in which the court has interfered to prevent nuisances to public rivers and to public harbours. And the Court of Exchequer, as well as this Court, acting as a Court of Equity, has a well-established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbours and public roads, and in short generally to prevent public nuisances. In *Box* v. *Allen*, this court interfered to stay the proceedings of parties whose jurisdiction is quite as high as that of the court of quarter sessions over bridges, namely the commissioners of Sewers. Those commissioners possess a jurisdiction founded on Acts of Parliament, and they have a right, within the due limits

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(1) But see *Earl of Ripon* v. *Hobart*, 1 Copper Sel. Cas. 33 S. C. 3 Myl & Ken. 164, 179, 180.

(2) *Att. Gen* v. *Johnson*, 2 Wilson. Ch. R. 101, 102.

(3) Eden on Injunction Ch. 11 p. 230 ; *Crowder* v. *Tinkler*, 19 Ves 617.

(4) Story's Jurisprudence §§ 1248 1249, 1250, 1251. The fact that the creation of the nuisance constitutes an indictable offence whether by staute or by the common law, does not affect the jurisdiction of a court of equity to grant injunction. Lewis & Spelling on Injunctions § 284.

(5) 2 Mylne & Cr. 129, 130.

of their authority, to do all necessary acts in the execution of their functions. Nevertheless if they so execute what they conceive to be their duty as to create or occasion a public nuisance, this court has an undoubted right to interpose. The same question occurred in *Kerrison* v. *Sparrow*, before *Lord Eldon*, in which his lordship, under the circumstances of the case, considered that he ought not to interfere ; but the jurisdiction of the court was not there denied or disputed. In *Att. Gen* v. *Johnson* the objection to the jurisdiction was attempted to be raised. The defendants in that case, the corporation of the city of London, were authorized by act of Parliament to do what was necessary to be done in the exercise of their duty as conservator of the river *Thames*. But in that particular instance they had assumed to themselves a right to carry on or sanction operations which created a nuisance to the king's subjects ; and the court accordingly interfered to prevent them from so exercising their undoubted legal powers'. To say that this court, when it interferes in such a case, is acting as a court of appeal from the Court of quarter sessions, is any thing but a correct representation of the fact. The jurisdiction is exercised not for the purpose of overruling the power of others, by way of appeal from their authority, but for the purpose of exerting a salutary control over all for the protection of the public (1)."

Injury to the rights of the Public must be undoubted.—But in all cases of this sort courts of equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence. For if the evidence be conflicting and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition (2). In the above case *Lord Brougham* said : "In considering more generally the question which is raised by the present motion, I certainly think we shall not go beyond what both principle and authority justify, if we lay down the rule respecting the relief by injunction as applied to such cases as these. If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial, and will, according to the circumstances, direct an issue or allow an action, and if need be, expedite the proceedings , the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable, which would be very slow to interfere, where the

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(1) See also *Spencers* v. *London and Bihmingham Ry. Com.* 8 Sim. R. 193 ; *Sampson* v. *Smith* 8 Sim. R. 272 ; Stroy's Eq. Jur. § 1251.

(2) *Earl of Ripon* v. *Hobart*, 1 Cooper Sel. Cas. 333=3 Mylne & Ken 169 ; cited in Story's Eq. Jur. § 1252.

thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt in those modes of enjoying or improving their property which are *prima-facie* harmless or even praiseworthy is equally manifest. And it is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant. All that has been said in the cases where this unwillingness has appeared may be referred to in support of the proposition which I have stated ; as in the *Attorney Gen* v. *Nicholl* (1) *Attorney Gen.* v. *Pleave* (2) ; and an anonymous case before *Lord Thurlow* in 1 Ves. Jr. 140, and others. It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the interposition by injunction in the cases of what we have been regarding as eventual or contingent nuisance. But some authorities approach very near the ground upon which I have relied. *Lord Hardwick* in *Attorney Gen.* v. *Doughty* (3) speaks of plain nuisances, and a plain case of nuisance as contradistinguished from others, and entitling the court to grant an injunction before answer. *Lord Eldon* appeared at one time [*Att. Gen.* v. *Cleaver* (4)] to think that there was no instance of an injunction to restrain nuisance without trial. But though this cannot now be maintained, it is clear that in other cases where there appeared a doubt, as in *Chalk* v. *Wyatt* (5), the injunction was said only to be granted because damages had been recovered at law. The course which has been persued at law with respect to different kinds of obstruction and other violations of right furnishes a strong analogy of the same kind. *Lord Hale*, in a note to *Fitzherbet's Nat. Brev.* 184a, speaking of a market holden in derogation of a franchise, says that if it be kept on the same day, it shall be intended a nuisance ; but if it be on another day, it shall be put to issue whether it be a nuisance or not. And the case of *Yard* v. *Ford* (6), seems to recognize the same distinction."

The same doctrine is equally applicable to cases of private nuisance. But when private individuals suffer an injury quite distinct from that of the public in general in consequence of a public nuisance, they will be entitled to an injunction and relief in equity, which may thus compel the wrong-doer to take active measures against allowing the injury to continue (7).

Injunctions in cases of public nuisance is based on the same principle as in the cases of private nuisance.—Public nuisance, as a subject of equity jurisdiction does not require a separate discussion in as much as equitable doctrines applicable are essentially the same as those applied to

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(1) 16 Ves. 338.
(2) 18 Ves. 211.
(3) 2 Ves. 453.
(4) 18 Ves. 211.
(5) 3 Mer. 688.
(6) 2 Saund. 172.
(7) Story's Eq. Jur. § 1252.

private nuisances (1). "It is on the ground of injury to property that the jurisdiction of this court rests ; and taking it to rest upon that ground, the only distinction which seems to me to exist between cases of public nuisance and private nuisance is this,—that in cases of private nuisance the injury is to the property of the mankind. I think, therefore, that the same principle must govern the question as to the interference of the court, whether the case be one of public or private nuisance. What, then, is the principle by which the court ought to be governed ? I take it to be this : whether the extent of the damage and injury be such that the law will not afford an adequate remedy (2)." Here too, as in cases of private nuisance, the chief causes of inadequacy lie in the fact that the injury is irreparable or will occasion multiplicity of suits (3). To entitle a plaintiff to relief by injunction who is sustaining, or about to sustain a peculiar injury from a public nuisance, it is also necessary that the injury should be such as cannot be well or adequately compensated in damages at law or such as from its continuance or permanent mischief must occasion a constantly recurring grievance which cannot be otherwise prevented by injunction (4). If there is a substantial dispute as to fact or, law, and the question is in doubt, a trial at law will be required before equity will intervene (5). In British India in such a case no temporary injunction should issue. A purely threatened public nuisance may be enjoined, if it is shown to be imminant and serious (6). All public nuisances are crimes, and so, as before pointed out, the entire jurisdiction of equity over them is a denial of the contention that the mere criminality of an act precludes eqaitable intervention (7). Public nuisance may be created by statute, and, conversely, common-law public nuisances may be legalized by statute (8). The balance of injury doctrine is subject to the same differences of holding as in the case of private nuisance (9). The relief given is adjusted to the needs of the particular case ; though usually prohibitive, it may be by mandatory injunction. Temporary injunctions are also granted here as elsewhere subject to the general rules governing their use (10). In as much as a prescriptive right to commit a nuisance against the public cannot arise, the public cannot be precluded by laches at all from procuring an injunction (11). *Lord Chancellor Chlemsford*, in speaking of the effect of delay in a suit by a private individual for an injunction said : "Upon the question whether I am to grant the injunction, I cannot avoid being influenced by the delay which has occurred in the institution of the proceedings *by the plaintiff*, which though not amounting to absolute proof of acquiescence, yet is caculated to throw considerable doubt upon the reality of his alleged injury, and

(1) Pom Eq. Jur, § 1956.
(2) *Per Turner L. J.* in *Att. Gen.* v. *Sheffild etc. Co.*, 3 De G. M. & G. 304.
(3) *Att. Gen.* v. *Sheffild* etc. Supra ; *Att. Gen.* v. *Cambridge etc. Co*, 17 W. R. 145 ; *Att. Gen.* v. *Gee.* L. R. 10 Eq. 131.
(4) *Milhan* v. *Sharp*, 84 Am. Dec. 314.
(5) *Att. Gen.* v. *Cleaver*, 18 Ves. 217 ; *Earl of Ripon* v. *Hobart*, 3 Myl. & K.169.
(6) *Att. Gen.* v. *Steward*, 20 N. J. Eq. 415.
(7) Prom Eq, Jur. § 1956.
(8) *Ibid.*
(9) *Ibid.*
(10) *Earl of Ripon* v. *Hobart*, 3 Myl & K. 169.
(11) Clerk & Lindsell, The Law of Torts pp. 349, 350.

compels me to weigh the amount of inconvenience which he will sustain by my refusal of his particular remedy against the serious consequences which must result to the company from an order which will oblige them to alter the state and condition of their works."

The parties who may enjoin a public nuisance are, first, the public, through the proper public official (1), secondly private parties (2). While the public which acts is generally the state, yet by virtue of legislative delegation, often implied, it may be a municipality that files the information (3). Public nuisances may also be enjoined by private iudividuals who suffer damage (4). Unless an actual injury results to private individual himself from the exercise of the powers of a company, he is not entitled to an injunction ; and where there has been an excess of the statutory powers granted to a company, but no injury has been occasioned to any individual' and there is none which is imminent or of irreparable consequence, the Attorney General in England can alone obtain an injunction to restrain the exorbitance (5).

Injunction to restrain private nuisance.—There are as many forms and degrees of nuisances as there are things which render life less peaceful or less secure. But it is well understood that it is not every nuisance coming within this literal definition which is of judicial cognizance. Nevertheless, a great number of adjudications have resulted, but only a cursory examination of the authorities is necessary to learn that the same well-settled principles govern all the cases. Anciently, equitable jurisdiction to deal with nuisances was unknown. Subsequently Courts tardily recognized the jurisdiction, but until a comparatively recent date, reluctantly exercised it, and, except to meet the necessities of extreme cases, refused injunction as means of abatement, leaving parties to such powers of abatement as they rightfully held in their own hands, and beyond that to actions at law for damages. All the time the English Crown might abate by suitable proceedings, as well as prosecute criminally all cases of public nuisance. But at length the superior effectiveness of the remedy in equity by injunction was recognized in England even in cases of public nuisance ; and the jurisdiction to enjoin public as welll as private nuisances is now well settled and freely exercised both in England and in British India (6).

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(1) C. P. Code S. 91.

(2) Pom. Eq. Jur, § 1956.

(3) Ibid.

(4) *Bhagwan Singh* v. *Narottom*, 6 A. L. J. 499=2 Ind. Cas. 205 ; *Viruppanappa* v. *Sheriff Sabunulla*, 11 Bom. L. R. 372=2 Ind. Cas 494 : *Ram Tarak* v. *Dinanath*, 7 B. L. R. 184= 24 W. R. 414 note ; *Soltu* v. *De Held*, 2 Sim. N. S. 151 ; *Att. Gen* v. *Logan* (1891) 2 Q. B. 100 ; *Cook* v. *Mayor*, L. R. 2 Ex. 316 ; *Benjamin* v. *Strorr*, L. R 9 C. P. 400 ; *Campbell* v. *Paddington-car.* (1911) 1 K. B. 689 ; *Att Gen* v. *Brighton*, (1900) 1 Ch. 276 ; *Smith* v. *Wilson*, (1903) 2 Ir. R. 75 ; *Sheringham* v. *Holsey*, 91 L. T. 225. Though a party may be injured in some respects by the structure or improvement complained of, yet if in other respects he is greatly benefited, the benefits enjoyed may be considered by the Court in determining whether upon the whole the injury is of such a character as to entitle him to an injunction. Spelling on Injunction § 388.

(5) *Ware* v. *Regent's Canal Company*, 3 De G. & J. 212.

(6) Lewis and Spelling on Injunction § 280.

It is well settled doctrime now that equity will restrain a private nuisance at the suit of the injured party (1). The right to abate nuisance is based on the maxim that the owner of property must use it as not to materially injure another (2). The superior adaptability of the equitable remedy by injunction to give more complete, convenient, and perfect relief than any attainable at law is universally recognised (3). Before a legal remedy could be given effect to, irreparable mischief must ensue; besides, a resort to law would in many cases result in a multiplicity of suits and interminable litigation without reching the end most desirable, namely, the suppression of the grievance (4). So this remedy will not, however, be granted in every instance of alleged nuisance. The present or threatened injury must be real, not trifling, transient, or temporary; it must be ore for which, either on account of its essential irreparable nature, or its repetition or continuance. the legal remedy of damages is inadequate (5). The reason in favour of the superiority of the equitable remedy are well summarized by Mr. Eden, as follows: "In the first place, by a perpetual injunction, the remedy is made complete through all future time; whereas, an information or indictment at common law can only dispose of the present nuisance; and for future acts new prosecutions must be brought. In the next place, the remedial justice in Equity may be prompt and immediate, before irreparable mischief is done, whereas at law nothing can be done except after a trial, and upon award of judgment. In the next place, a Court of Equity will not only interfere upon the information of the Attorney-general, but also upon the application of private parties, directly affected by the nuisance; whereas at law, in many cases the remedy is, or may be, solely through the instrumentality of the attorney general (6)." In *Lyon* w. *Mc Laughlin*, (7), the court observed: "Where the invasion of a right of this kind of property is threatened and intended, which is necessarily to be continuing and operates prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the writ of injunction is not only permissible, but is the most appropriate means of remedy. It affords in fact the only adequate and sure remedy. The very doubtfulness is to the extent of the prospective injury, and the impossibility of ascertaining the measure of just reparation renders such a remedy irreparable in the sense of the law relating to this subject." Thus equity enjoins a nuisance only where the injury will cause a constantly recurring grievance. An injunction will not be granted to restrain an apprehended nuisance, unless it is inevitable that the proposed use of property will result in a nuisance. But though an injunction will not issue to allay mere fears, yet if there is reasonable ground to apprehand the establishment

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(1) Pom. Eq. Jur. § 1350.

(2) Lewis and Spelling on Injunctions § 284.

(3) Spelling on Injunctions and other extraordinary Remedies § 376.

(4) Ibid.

(5) Pomeroy's Eq. Jur. § 1350.

(6) Eden on Injunction Ch. 11 p. 230; *Crowder* v. *Tinker*, 19 Ves. 617 623; *Att Gen* v. *Forbes*, 2 Myle &, Cr. 129, 130; *Spenceer* v. *London & Birmingham Ry Co* 8 Sim. 193; *Sampson* v. *Smith*, 8 Sim. 272.

(7) 32 Vt. 423.

of a nuisance which the defendant has power to commit, which nuisance will be reasonably certain to impair the health and comfort of those complaining, an injunction will issue (1). In order to enable the court to grant a temporary injunction the title of the plaintiff must also be clear, or at least not subject to any substantial doubt or question. The equitable jurisdiction is therefore based upon the motion of restraining irreparable mischief, or of preventing vaxatious litigation, or a multiplicity of suits (2). According to the modern decisions, a mere denial of the plaintiff's title in defendant's pleading will prevent a temporary injunction ; but if the plaintiff's title is really disputed, or is in any real doubt, it must first be established by a verdict, before equity will interfere with its preventive relief (3)

(1) Lewis and Spelling on Injunctton § 284. "In regard to private nuisance the interference of Courts of Equity by way of injunction is undoubtedly founded upon the ground of restraing irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicaty of suits. It is not every case which will furnish a right of action against a party for a nuisance which will justify the interposition of Courts of Equity to redress the injury or to remove the annoyance. But there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction. Thus it has been said that every common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary. But if it is continued so long as to become a nuisance, in such a case an injunction ought to be granted to restrain the person from committing it. So a mere diminution of the value of property by the nuisance without irreparable mischief will not furnish any foundation for equitable relief." Story's Eq. Jur. § 1253. "In restraining a private nuisance by injunction a court of equity may act from one or more of these motives ; the restraint of irreparable mischief, the supression of oppressive and interminable litigation, or. preventing a multiplicity of suits. One or more of these evils must be either present or imminent to warrant a court of equity in granting the relief ; for it is not every case wnich furnishes a right of action against a party which will warrant a court of equity in assuming jurisdiction to redress the injury or to remove the annoyance. The injury complained of must be such as from its nature is not susceptible of being adequately compensated by damages at law, or it must be apparent that from its continuance permanent mischief or a constantly recurring grievance must result which cannot be otherwise prevented than by an injunction. Such interference is in every case a furtherance of justice for the protection of substantial rights ; and because numerous actions at law for the same cause would furnish no compensation." Spelling on Injunctions and other Extraordinary Remedies § 377.

(2) Pom. Eq. Jur. § 1350.

(3) *Att Gen* v. *Nichol*, 16 Ves. 338, 342 ; *Wynstanley* v. *Lee*, 2 Swanst 333, ; 335 ; *Fishmonger's Co.* v. *East India Co.* 1 Dick. 163 ; *Black more* v. *Glamargonshire canal Navigation* ; 1 Mylne & K. 154 *Squire* v. *Campbell*, 1 Myl & C. 453 465, 467 ; *Tylor* v. *Davies*, 3 Beav. 388, note ; *Whitta ker* v. *Howe*, 3 Beav 383, 387, 395 note ; *Spencer* v. *London* etc. *Ry.* 8 Sims. 193 ; *Soltu* v. *De Held*,, 2 Sim. N. S. 133 ; *Wood* v. *Sutcliffe* 2 Sim. N. S. 163 ; *Walte* v. *Selfe*, 4 De G & S. 315 ; *Bostook* v. *North Stafford shire* Ry. 5 De G. & S. 584 ; *St. Helen's Smelting Co.* v *Tipping*, 11 H. L. Cas. 642 ; *Broad bent* v. *Imperial Gas Co*, 7 De G. M. & G. 436, 461, 472 ; 7 H, L. Cas. 600 ; *Att Gen* v. *Sheffield Gas* etc. 3 De G. M. & G. 304 ; *Crossly* v. *Lightowler*, L. R. 2 Ch. 478 ; *Robson* v, *Wittingham*, L. R. 1 Ch. 442 ; *Att Gen* v. *Cambridge etc. Gas Co*, L, R. 4 Ch. 71 : *Good son* v, *Richard son*, L. *R.* 9 Ch. 221, 223, 226 ; *Stanford* v. *Hurlstone*, L. R. 9 Ch. 116, 118, 119 ; *Inch bold* v. *Robinson*, L. R. 4 Ch. 388, 395, 397 ; *London etc. Ry.* v. *Lancashire etc. Ry.* L. R. 4 Eq. 174, 178 ; *Mayor* v, *Cardiff Water Co*, 4 De G, & J. 596, 597—599 ; *Elmhirst* v. *Spencer* 2 Mac & G. 45, 50. Formerly in England, the question of title was decided by courts of common law and injunction was granted by the

Public Nuisance and suit by Advocate General.—In case of a public nuisance in British India, the Advocate General, or two or more persons having obtained the consent in writing of the Advocate General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case (1). But nothing in section 91 of the Civil Procedure Code shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions (2). So it is clear from the above provision that in British India a public nuisance may be stopped either by punishing the offender under Chapter XIV of the Indian Penal Code, or by taking action under Chapter X of the Criminal Procedure Code, or by taking action under s. 91 of the Civil Procedure Code. In addition to these remedies, a person who commits a public nuisance may also be sued by a private person for damages as well as for injunction if that private person suffers special damage by reason of the nuisance, that is, damage beyond what is suffered by him in common with all other persons affected by the nuisance (3). In *Ricket* v, *Metropolitan Ry. Co.* (4), *Lord Chelemsford* observed : "As far as I have been able to examine the cases, in all of them except two, in which an individual has been allowed to maintain an action for damage which he has specially sustained by the obstruction of a high way, the injury complained of has been personal to himself, either immediately or by immediate consequence. The two excepted cases are those of *Baker* v. *Moore*, mentioned by *Mr. Justice Gould* in *Iveson* v. *Moore* (5) and *Wilkes* v. *The Hungerford Market Company*." After describing those cases, *Lord Chelmsford* continued : "The case of *Baker* v. *Moore* appears to me to be even more doubtful than that of *Wilkes* v. *The Hungerford Market Company*." The Indian Courts have adopted the English law on this subject. In *Baroda Prosad* v. *Gora Chand* (6), *Peacock C. J. and Mitter J.* held that even a person, who was one of several who had dedicated a road to the public, could not maintain a civil suit, in respect of an obstruction of that road, unless he had sustained some particular inconvenience in consequence of that obstruction.

It seems all the remedies available against a person committing a public nuisance are concurrent. The institution of a criminal prosecution will not bar a suit instituted under section 91 of the Civil Procedure Code, nor does

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Court of Chancery, hence the above mentioned cases, although authorities of the proposition that a Court of Equity would not be debarred from issuing a writ of injunction by a mere denial of the plaintiff's right but would stay its hands in cases of real dispute, until the plaintiff's right would be established in a court of law are useful guides to British Indian Courts (which are simultaneously courts of common law as well as courts of equity) in granting temporary injunction. At the time of the grant of perpetual injunction, the right of the plaintiff must be established.

(1) Vide s. 91 of Civil Procedure Code of 1908.

(2) *Ibid*,

(3) *Herbert* v. *Groves*, 1 Esp. 148 ; *Winter bottom* v. *Lord Derby*. L. R. 2 Eq, 316 ; *Satku* v. *Ibrahim*, 2 B. 457.

(4) L. R. 2 Eng. and Ir. App. 175.

(5) 1 Ld. Raymond 486=12 Mod. 262.

(6) 12 W. R. 160 C. R.

the institution of a suit under this section bar a criminal prosecution, though cases may be conceived where the Advocate General may, in the exercise of his discretion, refuse his consent under this section where a criminal prosecution is pending in respect of the same act or omission (1). It has been held in some American cases that a Court of Chancery may grant an injunction against an act threatened which, if committed, would be punishable under the criminal law as a nuisance (2), where the complainant shews that acts about to be done by the defendant, amounting to a public nuisance, will also cause special damage to himself (3); as, if they will produce extraordinary injury to his property, irreparable in damages, or without a multitude of suits (4).

To entitle a private individual to sue for a public nuisance, it must be shown that he seeks some particular damage beyond that suffered by the public, and the particular damage must be both direct and substantial (5). A private action cannot be maintained in respect of a public nuisance, save by a person who suffers particular damage beyond what is suffered by him in common with all other persons affected by the nuisance (6). So it is clear that no individual or class of individuals can sue in respect of a public right unless the obstruction caused has resulted in special damage (7). But such special damage must be direct and consequential (8). In *R* v. *Dewsnap* (9), *Lord Ellenborough C. J.* said: "I did not expect that it would have been disputed at this day that though a nuisance may be public, yet that there may be a

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(1) Mulla's C. P. Code notes under s. 91.

(2) *The People* v. *St. Louis*, 5 Gilm. 351 (Am).

(3) *Walker* v. *Shepardson*, 2 His. 384; *Mississippi Co* v. *Ward* 2 Black 485; *Zobriskie* v. *Jersey*, 2 Beast. 314 (Am).

(4) *Parrish* v. *Stephens*, 1 Oreg. 73 (Am.)

(5) *Sadu* v. *Suka*, 5 Bom. L. R. 116.

(6) *Bhagwan Singh* v. *Norottom Singh*, 6 A. L. J. 499=2 Ind. Cas. 365.

(7) *Viruppanappa* v. *Shriff Sab Mulla*, 11 Bom. L. R. 372=2 Ind. Cas. 494; See also *Ram Tarak* v. *Dino* 24 W R. 414 Note; see also *Saktu* v. *Ibrahim*, 2 B. 457; *Kaji* v. *Madhava Das*, 18 B.693. In *Duncan* v *Thwaits's* B. & C. 584, *Abbott C. J.* said: "I take it to be a general rule, that a party who sustains a special and particular injury. by an act which is unlawful on the ground of public injury, may maintain an action for his own special injury" see also *Monilal* v. *Ishwar bhai*, 87 Ind. Cas. 934=27 Bom. L. Ry 21=A. I. R. 1925 Bom. 367, *Peary Lal* v. *Surendra Nath*, 88 Ind. Cas. 505= A. I. R. 1925 Cal. 1233. Section 91 of the C. P. Code is a provision for procedure. It does not purport to create a right which does not exist before. It does not purport to deprive any body of a right derived from the general law of the land. It merely prevents a person from asserting a right except in a particular way. If a plaintiff brings a suit for damages and injunction against the defendant in respect of the latter's obstruction of a high way, without reference to s. 91 C. P. Code, the plaintiff must prove that he has sufferred a more particular kind of obstruction or inconvenience beyond that of the general public by reason of the act of the defendant. *Mahomed* v. *Mahomed*, 46 A. 470=22 A. L. J. 729=1924 A. 599. A person or body of persons who claim a right to go in procession along a public high way can bring a declratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage. *Valan Pakkiri* v. *Subayan Sanbon*, 49 Ind. Cas. 533=36 M. L. J. 79=22 M. L. T. 39 F. B.; *Raj Lukhee* v. *Chandra Kant*, 14 W. R. 173; *Khaji Sayyad* v. *Edige*, 16 Ind. Cas. 962=23 M. L. J. 539.

(8) Bull. N. P. 6.

(9) 16 East. 19.

special grievance, arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influence of it. In the case of stopping a common highway which may affect all the subjects ; yet if a particular person sustain a special injury from it, it has an action."

In cases of public nuisanee, in England, the remedy is by action in the nature of an information at the suit of the Attorney General (1). In British India, the Advocate General in the Presidency towns represents the Attorney General in England and has all his powers, and those powers are not restricted to the language and to the intention of section 91 of the Code of Civil Procedure but cover many cases which could not fairly be called public nuisance within the meaning of that section (2). Under this section an action is maintainable by the Advocate-General or by his consent by two or more persons even when no special damage is sustained by any one.

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(1) Kerr on Injunction p. 133 citing *Soltu* v. *De Held*, 2 Sim. N. S. 151 ; *Tottenham* v. *Williamson*, (1896) 2 Q. B. 353 ; *Att. Gen* v. *Scott*, (1904) 1 K. B. 407.

(2) *Advocate General* v. *Haji Ismail*, 5 Ind. Cas. 213=12 Bom. L. 274. In the above case *Beaman J* said ; "Before taking up and disposing of that matter and so anwering the question I have just stated, it may be convenient to consider whether the Advocate General in Bombay has all the powers of the Attorney General in England ? This is a claim put forward now in perfectly definite form for the first time in the history of our Indian Courts. The defendant strenuously contends that the Advocate General has not all the powers of the English Attorney-General. I am inclined however, to think that he has. These powers are derived from section 111 C. 155 Geo : III re-enacted in section 2 of 3 and 4 Will. IV C. 85 and again in section I C. 95. 16 and 17 Vict. It is true that on a first reading of that section and having regard to the existing conditions, it might appear as though it were intended merely to empower the Advocate General or principal law officer for the time being of the company to act in all the company's courts for and on behalf of the King to recover debts due to the Crown And it is to be remembered that at that time the Government of this country was not in the hands of the King but was delegated to and in the hands of the company. There was, therefore, a very strong reason for empowering some officer to move in the company's court, for the recovery of the king's debts. It is quite conceivable that the interests of the King and the company in such matter might have been conflicting. And in view of these considerations it might have been thought that such powers as wereconferred upon the Advocate-General of Bombay could not, without further special enactment, when the king took over the Government of the country, have constituted either him at that time or since virtually the Attorney-General, in the English sense, of the Bombay Presidency. Relatively to the company this clearly could not have been so. But when the company disappeared, and the Government of India was taken over by the Crown, we might have expected that some special Legislature would have cured the some what anomalous position held by the Advocate General under section, 111, C. 155. Geo. III and have definitely and unambiguously created him in all respects the King's Attorney General of Bombay. In attempting to trace his lineal descent from the king's Advocate under the company, the Advocate General has not, so far as I can see, been able to bridge this chasm. As a mere matter of constitutional law, the point possesses some importance and certainly a curious interest. The Advocate General, whe treated this part of the case very lightly, appears to have thought that enough had been done when he referred the court to section 111 C. 155, Geo III and mentioned, I thick, without comment, section 79 of the Civil Procedure Code.....But in the first place that section does no more than recognize the powers conferred by section 111 of the East Indian Company's Act 1813, and in the next place it may be doubted whether any act of the Indian

There are two kinds of public nuisances, actual and constructive, or public nuisances in fact and public nuisances in law. What is meant by a constructive or public nuisances in law is that which is only wrong because it contravenes the provisions of an Act, and the test in all those cases is whether if there were no Act the public nuisances complained of would not exist at all. Section 91 of the Code of Civil Procedure is restricted in terms to public nuisances in fact. Therefore, a constructive public nuisance can be no ground for a suit under that section, but the Advocate General in India, like the Attorney-General in England, has special power to take proceedings in respect of the latter class of nuisances. In all such cases this activity ought to be applied (*a*) either against the offending local authority ; (*b*) or where powers conferred upon the local authority are inadequate for enforcing compliance with the provisions of the Act, to supplement those provisions by his special remedies (1).

In *Baines* v. *Baker* (2), *Lord Hardwicke* admits that against a public nuisance a court of chancery will enjoin and says the application should be by the Attorney-general. In that case *Lord Chancellor* said : "I cannot make any order in this matter.....Two things are to be considered. First whether it is a nuisance at common law, secondly, if it is, whether it is a public or a private nuisance.....I cannot call this a private nuisance, If any it is a public one. The former is to one person only as building against lights. Nuisance *at vicinatum* is a public nuisance.....If a public it should be by an information in the name of the Attorney General and then it would be for his consideration whether he would file such an information or not and that was the case for stopping a way behind the exchange in the city. *Lord King* recommended it to the Attorney General to prefer an information in the King's Bench to try whether it was a nuisance or not." So persons who belong to the public and have a right to use a public high way may even maintain a suit to establish his right ; only he must do so in consonance with the provisions of section 91 of the C. P. Code *i. e.*, after obtaining the sanction of the Advocate General (3). But an encroachment on a village road raises question of the right of covenant of the residents and proprietary right of the Zemindars and section 91 would not be applicable to issues which arise on encroachment being made on a road of this nature. A suit, therefore lies

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Legislature would suffice to create an officer corresponding in all respects with the English Attorney-General, and holding his office under the Letters Patent. While such considerations have much academic interest and while I still entertain doubts whether the Advocate General of Bombay was ever intended to have in this Presidency all the powers exercised by the Attorney General in England. I am bound by the decision of the Privy Council in *Attorney-General* v. *Brodie* (4 M. I. A. 190). As far as that decisien reaches, I doubt however, whether it covers the whole ground. That judgment was delivered in 1846 before the sovereignty of the crown was substituted for the old East Indian Company".

(1) *Advocate General* v. *Haji Ismail*, 5 Ind. Cas. 213=12 Bom. L. R. 274.

(2) Ambl. 158.

(3) *Ardeshire* v. *Aimai*, 53. B. 187= 31 Bom. L. R. 97=A. I. R. 1929 Bom. 94.

without the permission of the Advocate General (1). Section 91 of the C. P. Code does not apply to a representative suit by certain inhabitants of a locality for the establishment of their right to use the land in suit for the enjoyment of certain civil rights as members of the village community which forms the public of that place *viz.*, a right of way or a right to hoist up a Jhanda (2).

Where in a suit under s. 91 of the C. P. Code, the plaintiff relies on special damage, he must allege special damage in the plaint giving particulars and details of the special damage which accrued to him (3). Where proceedings are had to enjoin a public nuisance, such as the pollution of a river by a board of municipal officers in violation of an Act of parliament under which they are acting, a distinction is drawn, as to the necessity of proving an actual injury, between the case of an information filed by an Attorney General on behalf of the public, and a bill filed by private citizens in their own behalf. And in the former case it is held to be unnecessary for the Attorney-General to establish any actual injury, the statute having prohibited the act complained of, while in the latter case in is held to be necessary for plaintiffs to prove that the act which they seek to enjoin is in fact a nuisance (4). So the proper public officers may enjoin the unlawful obstruction of a public high way irrespective of the question of the damage inflicted. But the rule as thus announced has been limited to cases of relief sought upon final hearing and it has accordingly been held that an injunction should not be granted upon an interlocutory application unless substantial injury to the public be shown (5).

When the legal remedy is adequate.—An injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in the case of breach of trust (6). The grounds on which equity enjoins nuisances are chiefly two, *viz.*, irreparable injury to plaintiffs, and the prevention of multiplicity of suits (7). Those which will not be enjoined, therefore, are such nuisances only as do not fall within either of the above classes. But this necessarily means a comparative small number of cases, for it is the characteristic of nuisances in general that they are either continuous or recurring, or else they cause irreparable injury, and in many cases, indeed, they are of character to bring them within both of the reasons for equity's intervention (8). It is said in one case (9): "It is not in every case of nuisance that this Court should interfere. I think that it ought not to do so in cases in which the injury is merely temporary or trifling;

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(1) *Sahdeo* v. *Ram Nawal*, A. I. R. 1929 All. 790.

(2) *Shridhar* v. *Rajabhan*, 105 Ind. Cas. 113.

(3) *Raj Chandra* v. *Mahim Chandra*, 91 Ind. Cas. 728 = A I. R. 1926 Cal. 549.

(4) *Att. Gen* v. *Cocker mouth Local Board*, L R 18 Eq. 172; *Att. Gen* v. *Shrews bury Bridge Co.*, 21 Ch. D. 752; *Att. Gen.* v. *Act on Local Board*, 22 Ch. D. 221.

(5) High in Injunction § 764.

(6) Specific Relief Act S. 56, Cl. (i).

(7) Specific Relief Act s. 54, clauses (b), (c), (d) and (e).

(8) Pom. Eq. Jur. § 1927.

(9) *Goldsmid* v. *Tunbridge etc. Commissioners*, L. R. 1 Ch. App. 349, 354, 355.

but I think that it ought to do so in cases in which the injury is permanent and serious." The language of another Court is that nuisances which are temporary and occasional only, are not grounds for the interference of this Court by injunction, except in extreme cases (1)". These two extracts taken together probably contain a complete statement of the kinds of nuisances for which legal remedy is considered adequate. There are (*i*) Nuisances which are temporary and single and which do not cause irreparable injury, (*ii*) Nuisances which, not doing irreparable injury, are yet repeated, but only occasionally, not so often that the suit at law to redress causes a vexatious or oppressive amount of litigation (2).

Irreparable and continuing or Recurring Nuisance.—An injunction will not be granted for every offensive act which is only contingent and temporary; but if it be continued so long as to become a permanent source of annoyance, and a constantly recurring injury and evil so as to fall within the full meaning of a nuisance, an injunction ought to be granted to restrain the party responsible for it from its further maintenance (3). In *Att. Gen* v. *Cambridge etc. Gas Co.* (4), *Wood L. J.* said: "Whenever this Court interferes by way of injunction in the shape of prevention rather than allow an injury to be inflicted, it does so in cases where the act complained of is one in respect of which there is also a legal remedy, upon two grounds (they being a totally distinct character)—first, where the injury is irreparable in the eye of this Court, as the cutting down of a tree, although its value may be paid for; and secondly, where the act is continuous, and so continuous that this Court acting on the same principle as it acted on in olden times with reference to bills of peace by restraining actions after repeated trials, so now will restrain repeated acts which can only end in incessant actions being brought (5), will restrain them at once on account of the continuous character of the wrong, which continuous character in itself makes the injury to be grievous, and so far in the eye of this Court irreparable (6)" These two grounds of jurisdiction do not readily, if at all, admit of separate treatment, however. The definitions of nuisance very generally agree in including as one of its elements that it is something which interferes with one's comfort in, or enjoyment of, his property, and it is the loss of this comfort and enjoyment in the use of his property which gives right of action. Now "comfort" and "enjoyment" are almost ideal illustrations of the sort of thing for the pernament loss of which damages will not be fair or just compensation. They are not to

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(1) *Swaine* v. *Great Northern Ry. Co.*, 4 De. G. J. & S. 211, 216.

(2) Pom. Eq. Jur. § 1927; see also *Att. Gen* v. *Sheffield Gas etc.*, 3 De. G. M. & G. 304; *Harrison* v. *Southwork*, (1891) 2 Ch. D. 409.

(3) *Coulson* v. *White*, 3 Atk. 21; Speling on Injunctions etc. § 385.

(4) 17 W. R. 145=L. R. 4 Ch. App. 71.

(5) See also *Appaji* v. *Appa*, 26 B. 735=4 Bom. L. R. 534; *Gur Prashad* v. *Khudu Bux*, 8 Ind. Cas. 687; *Kripa Dayal* v. *Rani Kishore*, 10 A. 80.

(6) Where the nuisance is recurring the Court grants injunction, even if it be of a trivial nature. *Att. Gen* v *Sheffield*, 3 De. G. M. & G. 304; *Att. Gen* v. *Consumers' Gas Co.* 4 Ch. 81; *Thorpe* v. *Brumfitt*, 8 Ch. 656.

be paid for in money. They are in this respect essentially of the same character as the *pretium affectiones* which the Courts sometimes have made the basis for decreeing specific performance of contracts to sell chattels, or for injunctions against trespasses to chattels. Hence it follows that most nuisances when permanent, or when continuing for any considerable length of time, or when frequently repeated, are properly to be classed as irreparable in their nature. Besides this feature of nuisance (which pertains only to its effect on the person injured, it is to be remembered that the property affected is usually land, which is regarded as peculiarly within the protection of equity; and so far as one's enjoyment of his land is destroyed, it is a destruction, if not physical, yet at least in the character in which it has been held and enjoyed, of what is generally regarded in equity as property so peculiar as not properly to be made a subject of compensation by the tribunal. In brief, then, a continuing nuisance is in general an irreparable injury, for two distinct reasons: (*i*) From its effect on the person injured. (*ii*) From the destinctive nature of the injury to the use of the property of a peculiar character (1). But in both

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(1) Pom. Eq. Jur. § 1928. The argument of the text is well illustrated by the fact and language of the court in *campbell* v. *Seaman*, 63 N. Y. 568. where *Earle* J said: "The plaintiff had built a costly mansion and had laid out their grounds and planted them with ornamental and useful trees and vines, for their comfort and enjoyment. How can one be compensated in damages for the destruction of this ornamental trees and the flower and vines which surround his home? How can a jury estimate their value in dollars and cents? The fact that trees and vines are for ornament or luxury, entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself only with articles of necessity. The law will protect a flower or a vine as well as an oak. The damages are irreparable, too, because the trees and vines cannot be replaced, and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health.

"Here the injunction also prevents a multiplicity of suits. The injury is a recurring one and every time the poisonous breath from the defendant's brick kiln sweeps over plaintiff's land they have a cause of action. Unless the nuisance be restrained the litigation would be interminable. The policy of the law favours, and the peace and good order of the society are best promoted by the termination of such litigation by a single suit. The fact that this nuisance is not continual, and that the injury is only occasional furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from the plaintiff's land. Nuisances causing damages less frequently have been restrained." "It is important to keep in view the distinction between a merely anticipated injury or damage, and an injury which is of a continuing character or being constantly repeated. A continuing nuisance is very correctly defined as not necessarily an unceasing and constant injury but one which occurs from time to time, as where a land owner habitually by means of a ditch, causes the water which accumulates in a pond to his farm to be thrown upon the premises of an adjoining owner." *Lewis and Spelling on Injunctions* § 283. In an English case the Court said: 'The very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot in damages compensate the injury or stop the wrong furnishes the best possible reason for the interference of a court of equity and the fact that the actual injury resulting from the violation of the right is small and the interest to be affected by the injunction is large, is not to weigh against the interposition of preventive

as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sougt, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction. There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by this section (1). In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction, the court may award damages in its place So, again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damage in lieu of an injunction, assuming a case for an injunction to be made out. In my opinion. it may be stated as a good working rule that—

(*i*) If the injury to the plaintiff's legal right is small (2).

(*ii*) And is one which is capable of being estimated in money.

(*iii*) And is one which can be adequately compensated by a small money payment.

(*iv*) And the case is one in which it would be oppressive to the defendant to grant an injunction :—

then damages in substitution for an injunction may be given.

"There may also be cases in which, though the four above mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's right, has disentitled himself from asking that damages may be assessed in substitution for an injunction.

"It is impossible to lay down any rule as to what, under the differing circumatances of each case, constitutes either a small injury, or one that can be estimated in money or what is a small money payment. or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. For instance, an injury to the plaintiff's legal right to light to a window in a cottage represented by £ 15 might well be held to be not small but considerable ; whereas a similar injury to a ware house or other large building represented by ten times that amount might be held to be inconsiderable. Each case must be decided upon its own facts ; but to escape the rule it must be brought within the exception. In the present case it appears to me that the injury to the plaintiff is certainly not small, nor is it in my judgment capable of being estimated in money, or of being adequately compensated by a small money payment.....In my judgment, for the reasons above, this is clearly not a case in which damages should be granted to the plaintiff in substitution for the injunction which he asks for, which is an injunction to restrain the continuance of the existing nuisance" An injunc-

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(1) By section 2 of the Lord Carin's Act of 1858 (21 & 22 Vict, 27).

(2) See also *Att. Gen* v. *Sheffield Gas Co.*, 3 De. G. M. & G. 304, 322 ; *Webster* v. *Bakewell* 86 L. J. Ch, 89 ; *Behrens* v, *Richads*, (1905) 2 Ch. 614 ; *Att. Gen* v. *Mayor*, 13 T. L. R. 14 ; *Gosnell* v. *Aerated*, 10 T. L. R. 661.

tion should not be granted where it has been discontinued and there is no apprehension of its recurrence.

In *Rapier* v. *London Tramways Co* (1) *Kekewich J* said : "There was very little doubt about the sources of the noises complained of. I am not alluding to the evidence about the shouting of the men, either at their horses or at each other ; I should not be disposed to attribute much weight to the evidence on that part of the case, or to think that what has occurred up to this time, or upto a four weeks ago would have been sufficient to justify the interference of the Court. The noise which, I think, does justify interference, or would have done so if it had continued, is that of the metal pails being dropped on the pavement, and the barrows, which were also of metal, being wheeled up and down. And then the ordinary work of the day, the loose mangers and the chains by which the horses were attached to their stalls, were a frequent source of complaint. The defendants seem to me to have done their very best to remedy what was complained of. They have provided other pails and other barrows, and they had fixed the moveable mangers substituted leather straps for the metal chains. It has been conceded on the part of the plaintiff that there is no longer any noise to complain of ; what then is the duty of the court under such circumstances ? Is it to grant an injunction, with or without nominal damages, merely to give the plaintiff the costs of the action, and so, while admitting their right to relief in the first instance to give them none of a substantial character ? I do not think it is possible to lay down any rule on the point, and I could with very little difficulty state many cases in which it would be right, and the imperative duty of the court, to grant an injunction to restrain the repetition of wrongful acts, even though these wrongful acts had already ceased--. On the other hand, ...it is also somewhat severe against the defendants where they have shown a desire to cope with an evil and remedy it as far as possible without attempting to lay down any rule. I think this case falls within the class in which it is better not to grant injunction."

Illustrations.—" The cases in which nuisances were enjoined were not frequent before the middle of the last century, but since that time they have become very numerous, covering a wide variety of states of fact. Illustrations are injunctions against the pollution (2), diversion (3), obstruction (4) or abstraction (5) of running water ; the pollution, taking or waste of percolating water (6) ; noises of various kinds (7) ; vibration from machinery or from

(1) (1893) 2 Ch. 591, 592. This was a case for nuisance, of noise, where the defendant has discontinued the nuisance, and the question was whether an injunction should issue.

(2) *Crossby* v. *Lighttowler*, L. R. 2 Ch. App. 478 ; *Holt* v. *Corporation* of *Rochdale* L. R. 10 Eq. 354 ; *Mc Intyre* v. *Mc avin*, (1893) A. C. 268.

(3) *Pugh* v. *Golden etc. Ry. Co.*, L. R. 15 Ch. D. 330.

(4) *Mckee* v. *Delaware, etc.*, 125 N. Y. 353.

(5) *Mostyn* v. *Atherton*, (1899) 2 Ch. 360.

(6) *Ballard* v. *Tomlison*, L. R. 29 Ch. D. 115.

(7) *Soltu* v. *De Held* 2 Sim. N. S. 133 ; *Walker* v. *Brewster*, L. R. 5 Eq. 25 ; *Bellamy* v. *Wells*, 60 L. J. Ch. 156 ; *Ball* v. *Ray*, L. R. 8 Ch. App. 467.

pounding (1); unpleasant odours from urinals, privies, horses, stables, slaughter houses, and the like (2); noxious vapours, gases or smoke from brick kilns, factories, black smith shops and the like (3); objects or acts which are dangerous to those in their vicinity, such as powder magazines (4); hospitals for contagious diseases, (5), blasting (6) and similar dangers; things which offend the moral sense, such as brothels (7); obstruction of highways (8); or navigation (9); removal of support to land (10); acts which cause a physical invasion of the plaintiff's land, such as overflowing it, (11) or casting refuse matter upon it (12)." (13).

Injunctions on sole ground of preventing Multiplicity of suits.—"In the cases" says *Prof. Pomeroy* "in which the only reason of equity's intervention to enjoin has been to prevent the necessity of a multiplicity of suits at law because of a continuing or recurring nuisance, the Courts have shown the same lack of unanimity that is always common to this ground of jurisdiction whether it arises from a trespass, nuisance or other tort. Consonant to principle,

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(1) *Sturges* v. *Bridgman*, L. R. 11 Ch. D. 852.

(2) *Vernon Vestry* v. *Westminister*, L. R. 16 Ch. D. 449; *Rapier* v. *London* etc. (1893) 2 Ch. 589.

(3) *Walter* v. *Self*, 4 De. G. & S. 325 on appeal 20 L. J. Ch. 433; *Bamford* v. *Turner*, 31 L. J. Q. B. 286; *Beardmore* v. *Treadwell*, 3 *Giff.* 683; *Crawford* v. *Hrnsea*, 45 L. J. Ch. 432; *Samson* v. *Smith*, 8 *Sim.* 272.

(4) *Hegg* v. *Licht*, 80 N. Y. 579. In this case the injunction was sought to restrain the defendant from manufacturing and storing upon his premises fire works or other explosive substances. In pointing out that the existence of a nuisance does not depend at all upon any negligence of the defendant, the Court per *Miller J.* said: "Most of the cases cited rest upon the maxim *sic utero tuo*, etc., and where the right to the undisturbed possession and enjoyment of property comes in conflict with the rights of others, that it is better as a matter of public policy, that a single individual should surrender the use of his land for especial purposes injurious to his neighbours or to others, than that the latter should be deprived of the use of their property altogether or be subjected to great danger, loss and injury, which might result if the rights of the former were without any restriction or restraint. The keeping of gun powder or other materials in a place, or under circumstances, where it would be liable, in case of explosion, to injure the dwelling houses or the persons of those residing in close proximity, we think rest upon the same principle, and is governed by the same rules. An individual has no more right to keep a magazine of powder upon his premises, which is dangerous, to the detriment of this neighbour, than he is authorized to engage in any other business which may occasion serious consequences."

(5) *Metropolitan Assylum* v. *Hill*, L. R. 6 App. Cas. 196.

(6) *Hill* v. *Schneider*, 4 N. Y. Am. Cas. 70.

(7) *Crawford* v. *Tyrrel*, 128 N. Y. 341; *Hamilton* v. *Whitridge*, 11 Md. 128. These cases do not, of course, hold that immorality is *per se* is a basis for an injunction; such further characteristics as will bring it within the usual definitions of nuisance must be shown. In *Crawford* v. *Tyrrel*, *Gray J.* said: "The rule of law requires of him who complains of his neighbour's use of his property, and neeks for redress and to restrain him from such use, that he should show that a substantive injury to property is committed. The mere fact of a business being carried on, which may be shown to be immoral and, therefore, prejudicial to the character of the neighbourhood, furnishes, of itself, no ground of equitable interference at the suit of a private person.'

(8) *Campbell* v. *Williams*, 127 Ala. 320.

(9) *Pennsylvania* v. *Wheeling etc. Co.* 13 How. (U. S.) 518.

(10) *Trowbridge* v. *True*, 52 Conn. 190.

(11) *Dayton* v *Drainage Commissioners*, 128 Ill. 271.

(12) *Logan* v. *Driscoll* 19 Cal. 623.

(13) Pom. Eq. Jur. § 1929.

the weight of authority holds that the mere existence of a continuing or recurring nuisance, however trivial, provided only it is sufficient to sustain an action at law for damages, will support a bill for an injunction (1). There are authorities however, which hold that this is not enough to base an injunction upon, and that the only multiplicity of suits which equity will interfere to prevent is that in which there are number of parties to the controversy on one side or the other. It may be added further, though the matter calls for no discussion in this place, that the subject of nuisance is the most fruitful field in furnishing the questions of greatest difficulty under the head of bills of peace, viz, questions as to the propriety of joining as plaintiffs or defendants parties between whom there is no 'community of interest in the subject matter of the suit.' (2)"

Other grounds of exercising the jurisdiction.—It has already been stated that the two grounds of exercising the jurisdiction of a Court of Equity are, (*i*) that the injury is irreparable or it is of a recurring nature. In most cases the two grounds of jurisdiction are usually found together in the same case. But as injunction may also be granted where there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion of the plaintiff's right by the defendant, or where the invasion is such that pecuniary compensation would not afford adequate relief, or where it is probable that pecuniary compensation cannot be got for the invasion, there may be cases which are outside the two grounds mentioned above. Hence inadequacy has been found in the fact that independent acts of several defendants combine to produce the injury to the plaintiff so that the particular share of damage done by each one is incapable of ascertainment (3). In the above case the Court observed: "There is a very great difference between seeking to recover damages at law for an injury already inflicted by several parties acting independently of each other, and restraining parties from committing a nuisance in the future. In equity the Court is not tied down to one particular form of judgment. It can adopt its decrees to the circumstances in each case, and give a proper relief as against each party, without reference to the action of others, and without injury to either. Each is dealt with, with respect to his own acts, either as affected or as unaffected by the acts of others. It is not necessary for the prevention of future injury, to ascertain what particular share of the damages each defendant has inflicted in the past or is about to inflict in future. It is enough to know he has contributed and is continuing to contribute to a nuisance, without ascertaining to what extent, and to restrain him from contri-

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(1) By section 54 of the Specific Relief Act, the Court may grant a perpetual injunction where the injunction is necessary to prevent a multiplicity of judicial proceedings.

(2) Pom. Eq. Jur. § 1930.

(3) *Woodruff* v. *North Bloomfield Gravel Mine*, 16 Fed. 25, cited in Pom. Eq. Jur. § 1931; see also section 54, Cl. (b) of the Specific Relief Act. The acts of several persons may together constitute a nuisance, which the Court will restrain, though the acts occasioned by the acts of any one if taken alone, would not be a nuisance. *Thorpe* v *Brumfitt*, 8 Ch. 650, 656; *Lambton* v. *Mallish*, (1894) 3 Ch. 163; Kerr on Injunction p. 137.

buting at all." This reason may apply equally to different states of fact whenever, for any cause, the amount of damage is unascertainable (1). Its substance is simply the obvious proposition that whenever the estimate of damages recoverable at law must be based largely, and to a considerable degree upon conjecture, the legal remedy is inadequate (2). "Other unusual reasons for granting injunctions have been in a bill to enjoin the obstruction of a public street by municipal officers, that the social standing, and character and reputation, of the defendants would make indictment ineffectual, while abatement would not be an adequate remedy because the expense of abating would fall on the tax-payers (3)" (4).

Trivial Nuisance and Injunction.—Where a nuisance or damage is trivial, the Court will not grant an injunction (5). But although it is not enough to show a nuisance to constitute a case for an injunction, yet if it be a continuing nuisance, an injunction will not be refused because the actual damage arising from it is slight (6). A nuisance by noise (supposing malice to be out of the question, is emphatically a question of degree ; it ought beyond question to be such as would be regarded as exceptional and unreasonable (7). It is not every occasional or accidental noise that will entitle a plaintiff to an injunction, if a general case of habitual nuisance is not satisfactorily proved (8) An injunction cannot be granted to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance (9). It is also a well established rule that for a nuisance wh ch results in a mere diminution of the value of property without irreparable mischief equitable relief is not available (10).

What nuisances are restrained.—Nuisance against which Courts of Equity grant an injunction must be such as are a material injury to property, or to the comfort of the existence of those who dwell in the neighbourhood (11) With respect to the considerations of comfort and canvenience, the material question, in all cases of nuisance involving those considerations, is whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence (12). A court of equity cannot enjoin a business which is in itself lawful and carried on reasonably, so as not to affect the health or comfort of the neighbourhood, or preclude the ordinary uses

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(1) The very difficulty of obtaining substantial damages was stated to be a ground for relief by injunction in *Clowes* v. *Stafford Shire Potteries*. L. R. 8 Ch. App. 125.

(2) Pom. Eq. Jur. § 1931.

(3) *Major etc. of Columbus* v. *Jaques*, 30 Ga. 506.

(4) Pom. Eq. Jur. § 1931.

(5) *Att Gen* v. *Sheffield Gas*, 3 Deg. M. & G. 304; *Att. Gen* v. *Cambridge Gas*, L. R. 4 Ch. 71.

(6) *Gaunt* v. *Fynney*, L. R. 8 Ch. 8, 12, 14.

(7) *Gaunt* v. *Fynney*, L. R. 8 Ch. 8, 12, 14.

(8) *Ibid. Cooke* v. *Forbes*, L. R. 5 Eq. 166 ; Joyce Doctrines p. 102, 103.

(9) Section 56 clause (g).

(10) *Wynstanley* v. *Lee*, 2 Swanst. 336 ; *Harrison* v. *Good*, L. R. 11 Eq. 338.

(11) *Luscombe* v. *Stur*, 17 L. T. (N. S.) 229.

(12) *Crump* v. *Lambert* L. *R.* 3 Eq. 407 ; 17 L. T. (N. S.) 133.

and enjoyments of property (1). A nuisance against which a court of equity will grant an injunction mu-t be a material injury to property, or inimical to the comfort or the existenee of those who dwell in the neighbourhood (2); yet where the nuisance causes substantial and permanent damage to an individual, the court will not refuse an injunction, even though the act causing the nuisance may in its results be beneficial to the public (3). The circumstances that the injury done is accidental and occasional only; that careful precautions are taken, and that there is no exceptional risk, such as arise, from the storage of gunpowder or highly inflamable materials, are ground for refusing an injunction, and leaving the plaintiff to his remedy by action (4). In cases involving nuisances the irreparable injury which will warrant an injunction is not necessarily such as is beyond the possibility of reparation or compensation in damages, but an injunction will be granted to restrain any species of injury by which a right of the complainant has been unlawfully violated, and such violation is, or is likely to be, continuous (5). Upon the well-established principle that an existing evil irreparable at law must be shown, an allegation that a structure may be in the future become an annoyance or obstruction is not sufficient to sustain a bill (6). It is important to keep in view the distinction between a merely anticipated injury or danger, and an injury which is of a continuing character or is being constantly repeated. A continuous nuisance is very correctly defined as not necessarily an unceasing and constant injury, but one which occurs at stated times, as where a landowner habitually by means of a ditch causes the water which accumulates in a pond on his farm to be thrown up on the premises of an adjoining landowner (7). In *Att Gen* v. *Kingston upon Thames* (8) the court said: "The very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot in damages compensate the injury or stop the wrong, furnishes the best possible reason for the interference of a court of equity, and the fact that the actual injury results from the violation of the right is small, and the interest to be affected by the injunction is large, is not to weigh against the interposition of preventive power, when on the one hand a right is violated, and on the other a wrong is committed." Occurrences of nuisances, if temporary and occasional only, are not grounds for interference by injunction except in extreme cases (9).

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(1) Spelling on Injunctions and other Extraordinary Remedies § 385.

(2) *Luscombe* v. *Stur*, 17 L. T. N. S. 229.

(3) *Broad bent* v. *Imperial Gas*. 3 Jur. N. S. 32.

(4) *Cook* v. *Forbes*, L. R. 5 Eq. 166.

(5) *Wood* v. *Sutcliff*, 2 Sim. N. S. 165; Spelling on Injunctions etc § 386.

(6) Spelling on Injunctions ete. § 387.

(7) *Davis* v. *Lodgrem*, 8 Neb. 43; Spelling on Injunctions and other Extraordinary Remedies § 392.

(8) 11 Jur. N. S. 596.

(9) *Swaine* v. *G. N. Ry*, 4 De G. J. & S. 211; *Coulson* v. *White*, 3 At. K. 21; *Att. Gen.* v. *Metropoliton Board of Works*, 9 L. T. 139; *Att. Gen* v. *Cambridge Consumers' Gas Co*, 38 L. J. Ch. 94.

What makes life less comfortable and causes sensible discomfort is a proper subject of injunction (1).

What the Plaintiff must allege.—A plaintiff who seeks an injunction against a nuisance must allege his own right clearly and definitely in order that the court's order for the protection of it may be certain and without ambiguity ; otherwise the decree will, of course, be impossible of intelligent enforcement (2). He must also, for obvious reasons, allege that the defendant is doing or threatening to do the acts complained of (3). It is not necessary for the plaintiff to allege that his injury will oe irreparable or that the legal remedy is otherwise inadequate, as that is a mere conclusion of law ; he must, however allege facts which will show the injury to himself (4), and the inadequacy of his legal remedy (5). The bill should set forth such a state of facts as leaves no doubt upon either of the question of nuisance (6) or of its injurious results. In case of doubt upon either of these points the benefit of it will be given to the defendant. A mere allegation of great and apprehended danger is not sufficient. The pleading should state the facts which show the danger to exist. And the allegations must be direct and positive, clear and unambiguous. To warrant an injunction against a threatened nuisance all the facts on which the right to relief is based should be set forth in the bill, and if the facts are denied in the answer they must be sustained by proof on the trial (7). An injunction to restrain a nuisance will issue only where the fact of nuisance is made out upon determinate and satisfactory evidence, and if the evidence be conflicting, and the injury be doubtful, that will constitute a ground for withholding the injunction, and if the nuisance be merely apprehended, it must appear that apprehension of material and irreparable injury is well grounded, upon a state of facts which show the damage to be real and immediate (8). But if the allegations are not controverted, they must be taken as true ; and in such case it is not necessary, in order for the plaintiffs to recover, to introduce any evidence whatever (9). Where the allegations in a statement of claim are insufficient, no interlocutory injunction can be granted (10)

Whether rights of the plaintiff should be determined before the issue of temporary injunction.—The purpose of a temporary injunction generally is to keep matters in *status quo* while some disputed question of law or fact is being settled. So the granting of or refusal of it, does not depend upon the determination of the plaintiff's right (11). The Supreme Court of the

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(1) *Falming* v. *Hilsop*, 11 App. Cas. 697, per Halsbury L. C.
(2) *Fisk* v. *Wilber*, 7 Barb. 395.
(3) *Ploughe* v. *Boyer* 38 Ind. 115.
(4) *Chartney* v. *Ackland*, (1895) 2 Ch. 389.
(5) Pom. Eq. Jur. § 1932.
(6) Section 56 of the Specific Relief Act Cl. (g).
(7) *Imperial Gas Co.* v. *Broad bent.* 7 H. L. Cas. 600 ; Spelling on Injunction etc. § 410
(8) Spelling on Injunctions and other Extraordidary Remidies § 411.
(9) Ibid.
(10) *Hawley* v. *Steel*, 46 L. J. Ch. 782=6 Ch. D. 521
(11) Pom. Eq. Jur. § 1934.

United States in a comparatively early case on this subject said: "The true distinction in this class of cases is that, the prospect of irremediable injury by what is apparently a nuisance, a temporary or preliminary injunction may at once issue, but not a permanent or perpetual one till the title, if disputed, is settled at law (1)"

Coming to Nuisance.—"It was at one time held that if a man came to the nuisance, as was said, he had no remedy; but this has long ceased to be law as regards both the remedy by damages and the remedy by injunction. *Tipping* v. *St. Halens Smelting Co.* (2). The defendant may in some cases justify by prescription or the plaintiff be barred of the most effectual remedies by acquiescence. But these are distinct and special grounds of defence, and if relied on must be fully made out by appropriate proof (3)". In *London and Brighton Railway Co.* v. *Truman* (4), *Lord Halsbury* also observed that the old notion of people losing their rights of complaint because they come to a nuisance has long since exploded (5). In *Attorney General* v. *Corporation of Manchester* (6), the court said: "The necessity for caution is all the greater because the doctrine of coming to a nuisance has long since been exploded."

Threatened nuisances ; Imminent danger.—In one sense all injunctions against nuisances are injunctions against threatened nuisances. The only purpose of giving equitable relief at all is the prevention of future harm; but this harm, being future, cannot be a matter of absolute certainty and therefore is only threatened. If however, at the time the bill is filed a nuisance is actually being committed, there will, in general, be no question that the threatened danger is sufficiently made out to justify an injunction, if the case, in other aspects, is sufficient. But when the nuisance has not yet come into existence, and the plaintiff, therefore, must make out his case of apprehended danger by other means than by pointing to an existing nuisance, a question may be raised concerning the rules by which the Court is to be guided (7). What is believed to be a proper statement of these rules was thus formulated in a leading English case (8): "There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended statement will, if it comes, be very substantial. I should almost say, it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and

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(1) Per *Woodbury J* in *Irwin* v. *Dixion*, 50 U. S. (9 How.) 10.

(2) (1865) 1 Ch. 66.

(3) Pollock on Torts, cited in *Ebrahim* v. *Gangaram*, A. I. R. 1930 Sind 310=123 Ind. Cas. 289; see also *Sturges* v. *Bridgman*, 11 Ch. D. 852; *Bliss* v. *Hall*, 7 L. J. C. P. 122.

(4) 11 App. Cas. 45=55 L. J. Ch. 354.

(5) *Rangoon Municipality* v. *Burma Ry. Co.* 52 Ind. Cas. 823=13 Bur L. T. 136.

(6) (1893) 2 Ch. 87 (95).

(7) Pom. Eq. Jur. § 1937.

(8) *Fletcher* v. *Beally*, L. R. 28 Ch. D. 688, *per Pearson J.*

under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet action* (1)" In a word, the threatened danger must be imminent, and of a character to do irreparable injury (2). A Court of Equity restrains such nuisances only as are nuisance at law ; the fears of mankind, though reasonable, will not create a nuisance (3). In cases of nuisance the mere apprehension of damage is not sufficient to entitle a party to an injunction, actual damage must be established (4). The court will interfere *quia timet* in a case of merely prospective injury and alleged nuisance, the actual existence of the nuisance must be proved (5). The court will not restrain a merely contingent nuisance (6); or where it is uncertain whether or not mischief will happen (7). Although a prospective nuisance is not in itself a ground for the interference of the court yet if some degree of present nuisance exist, the court will take into account its probable continuance and increase, and restrain the nuisance before it has become permanent and continuous (8). But if there is a probability of immediate prospective nuisance, a court of Equity will interfere and grant an iniunction (9). In a bill to enjoin the erection of an engine to pump water into

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(1) The facts of this case were as follow "The defendants proposed to deposit refuse matter from their *alkali* mills on the bank of a stream about a mile and a half above the plaintiff's paper-mills, in which the water from the river was largely used. It was admitted that after a time there would flow from this 'vat waste' a greenish liquid of such noxious character, that any considerable amount of it in the water of the river would be very destructive to the plaintiff's manufacture and the Court thought this liquid, in the natural course of events, might begin to flow into the river in the course of ten years. The plaintiff also contended that the bank where the refuse matter was to be deposited was in danger of slipping into the river. The defendants insisted that they were going to take precautions to provide against both dangers. The Court refused the injunction. On the first ground the Court said : "I have no doubt that at the end of ten years the water would be sufficiently polluted to do a great amount of injury to the plaintiff.....I think that at ten years' time it is highly probable that science (which is now at work on the subject) may have discovered some means for rendering this green liquid innocuous. But even if no such discovery should be made in that time, I cannot help seeing that there are contrivances, such as tanks and pumps and other things of that kind, by which the liquid may, as the defendants say, be kept out of the river altogether. Therefore, upon that ground alone, I do not think the action can be supported.....I think the danger is not imminent, because it must be some years before any such quantity of the liquid will be found issuing from the heap as would pollute the *Irwell* to the detriment of the plaintiff." On the claim that the bank was in danger of slipping the Court said : "I think that if any slip does take place, there will be some premonitory symptoms which will worse the plaintiff and the defendants, and give the defendants time to do whatever may be necessary to prevent the heap from slipping into the river, and at the same time enable the plaintiff, if he should think it right to do so, to bring an action against the defendants on the ground of positive and imminent danger at that time."

(2) Pom. Eq. Jur. § 1937.

(3) *Banies* v. *Baker*, Amb. 158.

(4) *Brown* v. *Gugy*, 2 Moo. P. C. C. N. S. 361.

(5) *Att. Gen* v. *Kingston upon Thames*, 11 Jur. N. S. 596 ; Joyce Doctrines, 100.

(6) *Hanies* v. *Taylor*, 2 Ph. 209=10 Beav. 75 ; Joyce on Doctrines, 100.

(7) *Ripon* (*Earl of*) v. *Hobart*, 3 Myl & K. 169.

(8) *Goldsmid* v. *Tumbridge Wells Improvement Com*, L. R. 1 Eq. 161.

(9) *Att. Gen* v. *Kingston upon Thamas*, 11 Jur. N. S. 596 ; see also *Att. Gen* v. *Corparation of Manchester*, (1893) 2 Ch. 87 ; *Att, Gen* v. *Rath mines*, 1 Ir. R. 161 ; *Slack* v. *Leeds Industrial*.

a river which the plaintiffs were cleansing and improving, the court dismissed the suit for injunction denying the nature of the imminent danger as follows : "If, indeed, this be a work which not only gives the power of doing mischief, but cannot be used or can hardly, in the common course of thing, be used without working mischief, if, in short, it be a thing which can hardly be used without being abused, the case comes to be very different. For in matters of this description the law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibilty that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further according to the same practical and rational view, and balancing the magnitude of this evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming. Accordingly, if it appeared that the works in question could hardly be used without damage to the inferior districts, I might hold that erecting them was, in itself, a beginning of injury, though there might be a possibility of otherwise using them : and if the damage, should it happen at all, were the destruction and the subjecting of the lower districts to a deluge, I might scrutinize less narrowly the probability of the engines being injuriously worked (1)."

(1923) 1 Ch. 465. In *Att. Gen* v. *Corporation of Manchester*, supra, *Chitty J.* observed : "The foundation of the motion is an apprehended public nuisance, the nuisance being not an actual existing nuisance, but a future nuisance, which it is alleged, will arise if the hospital be opened. The action, then, is what is technically known as *quia timet* action. The question as to the principle on which the court proceeds in granting or refusing an injunction in such actions has been the subject of numerous decisions, among which are *Crowder* v. *Tinkler* (19 Ves. 617) ; *Earl of Ripon* v. *Hobart* (3 My & K. 169, 176) ; *Haines* v. *Taylor* (2 Ph. 209) ; *Hepburn* v. *Lordan* (2 H. & M. 345) ; *Att. General* v. *Mayor Kingston* (34 L. J. Ch. 481) ; *Salvin* v. *North Brancepeth Coal Co.*, (L. R. 9. Ch. 705) ; *Fletcher* v. *Bealey* (28 Ch. D, 688). The principle appears to be the same whether the alleged future nuisance is public or private. In one of the cases to which I have referred, the alleged nuisance was a public nuisance ; in other private nuisance. In some, acts had been done which, it was alleged, would result in future mischief or injury but which had not already resulted in injury or substantial damage ; in others, there was mere threat or intention. But in regard to all such cases the principle is the same. Where it is certain that the injury will arise, the court will at once interfere by injunction ; as, for instance, in the case of a threat to cut a permanent ditch across a public high way. But the Court does not require absolute certainty before it intervenes ; something less will suffice.....In *Fleet* v. *Metropolitan Asylum Board* (1 T. L. R. 80 ; 2 T. L. R. 361, 362), where the hospital was in actual operation. the court refused the injunction, *Lord Justice Cotton*, in his judgment laying it down that the plantiffs must make out that there was no danger, otherwise, however much they might feel the hospital to be an annoyance, they could not get an injunction.' The principle which I think may be properly and safely extracted from the *quia timet* authorities is, that the plaintiff must show a strong case of probability that the apprehended mischief will in fact, arise." See also *Amarendra Nath De* v. *Baranagar Jute Co.*, 49 C. 1059.

(1) *Earl of Ripon* v. *Hobart*, 3 Myl & K. 169. 176. The injunction was refused the court saying as its conclusion on the score of imminence of the danger : "But upon carefully examining the evidence, and indeed it might be enough

This case states and illustrates clearly the principles which guide the Courts in this matter. On the one hand, a mere possibility of a future nuisance will not support an injunction ; it must be probable (1). On the other hand, the plaintiff—who, of course, has the burden of proof—does not need to establish this probability by proof amounting to virtual certainty that the nuisance will occur, nor even proof which establishes it beyond a reasonable doubt ; it is sufficient if he show that the risk of its happening is greater than a reasonable man would incur. And the balance of these two rules will be affected by the seriousness of the nuisance feared, the strength required of the plaintiffs' proof diminishing somewhat as the greatness of the apprehended damage increases (2).

An injunction will not be granted for every offensive act which is only contingent and temporary ; but if it be continued so long as to become a permanent source of annoyance, and a constantly recurring injury and evil so as to fall within the full meaning of a nuisance, an injunction ought to be granted to restrain the party responsible for it from its further maintenance (3). A bill and information filed by a mill-owner, to restrain the local board of health of a town from discharging sewage into a river, was dismissed with costs, on the ground that the injury proved was trifling (4).

To obtain an injunction to restrain the commission of a prospective nuisance it is necessary to show a strong case of probability that the apprehended mischief will in fact arise (5). While, as has been stated, the plaintiff must show a present and material injury in order to entitle him to relief, yet he will not be denied relief against a nuisance merely because his property to be affected by it is of small value or because his interest in the property is proportionately small. And if it be necessary to prevent a permanent injury to property, or its ruin from the erection and continuance of a nuisance, and the law cannot prevent the evil, equity will interfere, although the property itself may be of small value (6).

Must threatened injury be irreparable ?—" On the second branch of the rule " says *Prof. Pomeroy* " quoted above concerning injunctions against threatened nuisances ; *viz.*, that the injury must be irreparable, little needs to be said. The significance of it is, of course, that it excludes wholly from the class of cases in which an injunction may be granted against a purely threatened, as distinguished from existing, nuisance, all those in which the basis of the

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to say, upon attentively considering the nature of the case, the kind of works and of working in question, and the sort of mischief apprehended, there is no reason for holding that the danger is either certain or very imminent, or that mischief of a very overwhelming nature is likely to be suddenly done ; or, indeed, that as serious injury can be done, without time being afforded for coming to the court with a case free from the present defect." Pom. Eq. Jur. § 1937.

(1) *Vide Haynes* v. *Taylor*, 2 Ph. 209 ; *Lichfield Speer* v. *Queen Anne's Gate*, (1919) 1 Ch. 412 ; *Elwell* v. *Crowther*, 31 Beav. 169 ; *Att. Gen* v. *Nottingham Cor.* (1904) 1 Ch. 677.

(2) Pom. Eq. Jur. § 1937.

(3) *Coulson* v *White*, 3 Atk. 21.

(4) *Att. Gen* v. *Gee*, L. R. 10 Eq. 131.

(5) *Anandrao* v. *President, Municipal Committee*, A. I. R. 1926 Nag. 50 ; *Att. Gen* v. *Manchester*, (1893) 2 Ch. 87.

(6) *Mc Cord* v. *Iker*, 12 Ohio, 388 ; Spelling on Injunctions and other Extra Ordinary Remedies § 389.

intervention of equity is solely to prevent a multiplicity. In favour of the rule thus limited, it can be said that there is little, if any, reason for granting relief *quia timet* with the lack of certainty that any wrong will ever be done which is inherent in such cases, except where there is strong ground for believing that, unless *quia timet* relief is given, an adequate remedy will be impossible should the anticipated wrong occur. Negatively, the fact, that almost all the cases of bills for injunction against threatened nuisances conform to the restricted rule, supports this reasoning (1)".

In order to maintain a *quia timet* action to restrain an apprehended injury the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable (2). A bill to restrain nuisances extends to such only as are nuisances at law, and the fears of mankind, though reasonable, will not create a nuisance (3). The Court would be loath to stop great commercial works where there is contradictory evidence as to the nuisance or damage occasioned by them, except on the verdict of a jury who had visited the locus in quo, and before whom the witnesses had given their evidence *viva voce* (4). It is not correct, as a proposition of law, to say that the Court will not interfere prospective damage; but it is correct with respect to particular kinds of nuisances, where it is known by experience that it is impossible to be certain that substantial damage will be sustained, unless it has actually been sustained (5). Where the existence of an actual nuisance had been proved, it was held, to be no objection to a bill to restrain an anticipated nuisance that the nuisance was prospective only until after the date of replication being filed (6). Where the defendant contended that he had a right to do the act complained of and refused to give any undertaking, the Court inferred there would be a repetiton of the nuisance and granted the injunction (7).

Damages Necessary to justify an injunction.—"The question what amount or character of damage is necessary to sustain an injunction will require only brief treatment, as, in the main, the question, when, it arises, is settled by simply applying the rule which is applied on the same point in an action at law. If the injury is irreparable, or such that the damages given by a jury would be conjectural, it is clear, of course, that the question of the extent of damage will not need to be gone into. The class of cases, then, in which it will arise is chiefly, if not exclusively, that in which the reason for coming into equity is to put an end to a permanent or continuing nuisance in order to avoid multiplicity of suits. In this situation the Courts generally require no more, but just the same, damage that will sustain at law. 'The result of a careful review of the evidence upon my mind,' said the Court in a leading American

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(1) Pom. Eq. Jur. § 1939.
(2) *Fletcher* v. *Bealy*, 54 L. J. Ch. 24; *Att. Gen* v. *Manchester*, (1893) 2 Ch. 87.
(3) *Barnes* v. *Baker*, Amb. 158.
(4) *Per James L. J.* in *Salvin* v. *North Brancep Coal Co.*, 44 L. J. Ch. 149.
(5) *Per Mellish* L. J. *Ibid.*
(6) *Umfreville* v. *Johnson*, 44 L. J. Ch. 752 = L. R. 10 Ch. 580.
(7) *Phillips* v. *Thomas*, 62 L. T. 793.

case (1), is to lead me to the conclusion that the degree of injury is such as to entitle the complainant to damages in an action at law, with the result that he is entitled to an injunction in this Court.' This is the only logical result of the rule that to prevent multiplicity of suits is a head of equity jurisdiction; to hold otherwise would be to say that equity will prevent multiplicity of suits only when damages are according to some standard of the equity courts, and this would be to do away with just so much of the salutary result of the rule as was affected by applying this different standard. It follows equally that in the cases of nuisances in which an action at law may be maintained without showing any damages, because a legal right is invaded, as the interference with water rights, or the right to lateral support, or over flowing the plaintiff's land, and the like, that equity should also enjoin on the same showing ; and such is the rule (1)."

Motive for suit usually immaterial.—It is no bar to an injunction restraining the construction of side tracks in streets, that plaintitf may have acquired his title to adjacent property from collatral motive, and very recently before the work complained of began (3). And where the grievance complained of was the laying of water-pipes in the soil of the highway, the fee of which was in complainant, it was held to be immaterial that the soil under the high-way was of no value to the owner, and that his motive for applying to the court was not connected with the enjoyment of his land, and was no reason against granting the injunction (4). But although the motives with which a suit is instituted are not generally to be regarded if they are not wholly immaterial when the complaint is of alleged public injury: and the views of the majority of the inhahitants of a town, and of their governing body, are not without weight on such questions (5) So also court will not grant an injunction when it is shown that the suit has been instituted for the purposes of another (6).

The Defendant's motive.—"How far the defendant's motive," says *Prof. Pomeroy* "may be of importance in cases of nuisance is, strictly, a matter of substantive law, and not of the equitable remedy (7)." If an act or thing causes material and constant annoyance to another so as to coustitute it in fact a nuisance, the motives of the party in doing the acts for maintaining the obnoxious things are immaterial as regards the complain-

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(1) *Per Pitney V. C.* in *Hannerry* v. *Harmony*, 50 N. J. Eq. 616. To the same effect are *Salvin* v. *North Brancefeth Coal*, L. R. 9 Ch. App. 705, in which the Court applied the rule given to the jury in *St. Helen's Smetting Co.* v. *Tipping*, 11 H. L. Cas. 642, which was an action at law for damages ; *Bostock* v. *North Stafford-Shire Ry.* 5 De. G. & S. 584 ; *Broder* v. *Saillard*, 2 Ch. D. 692.

(2) Pom. Eq. Jur. § 1940.

(3) Spelling on Injunctions and other Extraordinary Remedies § 384.

(4) *Goodson* v. *Richardson*, L. R. 9 Ch. 221.

(5) *Att Gen* v. *Sheffield etc*, 3 De M. & G. 304 ; see aiso *Att. Gen* v. *Cambridge*, 4 Ch. 71

(6) Kerr on Injunction p. 134 ; *Pentney* v. *Lynn Commissioners*, 13 W. R, 983 (Eng.)

(7) Pom. Eq. Jur. § 1942.

ant's right to have it enjoined (1). Where the party complained against had acted in good faith, and sought to abate the nuisance before the institution of the suit, it was held, that a preliminary injunction was properly denied (2). But after suit to abate and enjoin a nuisance, has been actually began, the defendant cannot, by partially abating the nuisance, pending the suit, defeat the complainant's right to that complete redress to which he was entitled when he sought his remedy (3). In *Christie* v. *Davie* (4) motive of defendant in making a noise was considered in granting an injunction (5).

Balance of Injury.—"The question how far courts of equity, in dealing with cases of admitted or established nuisances, should be influenced, in their determination whe:her to grant an injunction or to turn the plaintiff over to his remedy at law, by the balance between the injury to the plaintiff from refusing, and to the defendant from granting an injunction, has received considerable attention from the courts, and has met with conflicting answers—often from courts within the same jurisdiction. It is to be noted that the question as here raised excludes certain situations in which its consideration is, beyond all doubt, proper and even necessary. The first of these is on application for temporary injunctions, in which, the questions in dispute being undetermined, the courts must take account of the possibility of injury in a course of action which the hearing may prove to be the wrong one. The second, is in the determination of the wrongfulness of the defendant's act—the fact of nuisance or no nuisance—in that large class of cases in which there is no invasion of a clearly defined right of the plaintiff—such as, say, the right to have water-flow in its accustomed channnel—but. rather, if a right which is determined by all the circumstances of the case, place, time, degree, and the like—nuisances such as noise, vibration and pollution of air. In cases of this short a balancing of injury—the plaintiff's comfort and enjoyment against the public benefit from the prosecution of the business complained of, the defendant's advantage in carrying on his offending business against the plaintiff's welfare—is, of course, an essential factor in the decision whether any nuisance exists or not. But this point having been determined in the plaintiff's favour, the question now to be discussed is, whether, on an application for a permanent injunction against an admitted or proved nuisance, the courts of Equity should carry this balancing of injury admittedly furthar than the courts of law carry it, and make it a test for the granting or withholding of their peculiar relief (6)"

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(1) *Olmstead* v. *Rich*, 9 N. Y. S. 826 ; Spelling on Injunction. and other Extraordinary Rdmedies § 415.

(2) Spelling on Injunctions § 415.

(3) *Carlish* v. *Cooper*, 21 N. J. Eq. 576 ; *Chester* v. *Smelting Co.* 87 L. T. 765 ; *Att Gen* v. *Staines Rural District Council*, 73 J. P. N. C. 545 ; *Barbar* v. *Penley*, (1893) 2 Ch. 460, 461 ; *Batcheller* v. *Tunbridge*, 84 L. T. 765.

(4) (1893) 1 Ch. 316.

(5) See also *Jawand* v. *Muhammad*, 51 Ind. Cas. 728=1 lah 140.

(6) Pom. Eq. Jur. 1943.

Balance between private parties.—The balance of injury which may determine the granting or refusing of an injunction arises in two forms, which however, may appear together in the same case. In the first of these the balance is between the injuries to the plaintiff, a private individual, and to another private individual, in the second, between the injuries to the plaintiff, a private individual, and to the public, which benefits from the defendants' wrongful enterprise (1). In cases of private nuisances a court of equity will balance the inconvenience likely to be incurred by the respective parties in exercising its discretion to grant or withhold relief; and where greater harm would result from enjoining them from refusing to enjoin the injunction will be refused (2). In determining whether relief ought to be granted, regard will be had not only to the comfort and convenience of the occupier of the land for the time being, but to the prospective effect of the nuisance in diminishing the value of the land (3). After quoting several American cases *Prof. Pomeroy* says: "The suggestion of these last two quotations that a balancing of injury is given effect to once in the determination of the fact of nuisance and, hence, does not need to be made a second time in determining a proper remedy, and that it is anomalous to deny the equitable relief in a case where the legal wrong and the inadequacy of the legal remedy are established, is very hard to meet. Denying the injunction puts the hardship on the party in whose favour the legal right exists instead of on the wrong doer. If relief intermediate between the radical relief of injunction and the insufficient one of repeated actions at law for damages as they accrue is desirable, it would seem that a legislative provision is necessary to supply it. The weight of authority is against allowing a balancing of injury as a means of determining the propriety of issuing an injunction (4)".

Balance Between the Plaintiff and the Public.—"A discretionary power is however vested in the court where the alleged nuisance is of a public character; and the court will consider the injuries which may result to the public by granting the injunction as well as the injuries to be sustained by complainant in refusing it. Where the public benefit derived from the thing complained of outweighs the private inconvenience, an injunction will not be granted; and courts habitually exercise great caution in enjoining acts alleged to constitute public nuisances, at the suit of private

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(1) Pom. Eq. Jur. § 1944.
(2) Spelling on Injunctions § 417.
(3) *Goldsmid* v. *Tunbrtdge Wells Impr Co.* L. R. 1 Eq. 161=12 Jur. N. S. 308; Spelling on Injunctions etc. § 417.
(4) Pom. Eq. Jur. § 1944. In *Evans* v. *Reading etc. Fertilizing Co*, 160 Pa. St. 206 the court said: "But where upon final hearing, the mind of the Chancellor is satisfied that the complainant's right is clear, and the injury sustained by him is substantial, so that his claim to damages at law is indisputable, and where, moreover, such damages could not give him adequato redress except by an endless repitition of suits, a refusal of an injunction upon the ground that plaintiff cannot suffer as great a loss from the continuance of the nuisance as defendant would from its interdiction would be as far from equity as can be. There is, to my mind, no more offersive plea than that by which one seeks to justify an act injurious to his neighbour on the ground that it is advantageous to himself."

parties, lest in protecting the latter much greater injury be done to the public" (1). Where the evidence is conflicting and the public injury doubtful, that alone constitutes good reason for withholding the extraordinary relief (2). In *Ripon* (*Earl of*) v. *Hobert* (3) *Lord Brougham* gave the following able exposition of the true policy by which the courts of equity should be governed in granting and refusing injunctive relief in cases of suits by private parties against public nuisances: "In considering more generally the question which is raised by the present motion, I certainly think we shall not go beyond what both principle and authority justify, if we lay down the rule respecting the relief by injunction, as applied to such cases as these. If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial, and will according to the circumstances, direct an issue, or allow an action, and if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seams undeniable which would be very slow to interfere, where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property which are *prima facie* harmless, or even praise-worthy, is equally manifest. And it is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it even in cases where the thing or the act complained of was committed to be directly and immediately hurtful to the complaint (4)". In America an extreme case occurred by which the rule was fully tested. There the defendant was a *quasi* public corporation engaged in supplying the city with water or other necessity. In that case the nuisance complained of was the smoke from the defendant's waterworks, which, in a material degree, deprived the plaintiff of the enjoyment of their property. In denying the injunction the court said: "If the defendants were enjoined even for a time, the result might be disastrous; for the water supplied by it is the only efficient means of extinguishing

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(1) Spelling on Injunctions and other Extraordinary Remedies § 417. But the statement of law contained in the above passage cannot be accepted as a good statement of law.

(2) Ibid; see also *Earl of Ripon* v. *Hobart*, 1 Coop. Sel. Cas. 333; *Spencer* v. *London & Birmingham Ry Co.* 8 Sim. 193.

(3) 3 Myl & K. 169.

(4) Spelling on Injunction etc. § 417.

conflagrations at the command of the city or its citizens. Besides this, a daily and hourly supply of water used for many purposes would be cut off. We think it may be safely assumed that the rule in equity is, that where the damages can be admeasured and compensated, equity will not interfere where the public benefit greatly outweighs private and individual inconvenience (1)."

On the otherside, it has been said by an able Chancellor on substantially similar facts: "If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market garden, I have come to the conclusion, that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on. That might be a good ground for the legislature to declare that the company might make gas if they indemnified the plaintiff: but, unless the company had such a right I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say where a party is substantially damaged, that he can only be compensated by bringing an action *toties quoties*. That would be a disgraceful state of the law; and I quite agree with the Vice-Chancellor, in holding that in such a case this Court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and district which this company supplies with gas. (2)". In *Att. Gen.* v. *Council etc. Birmingham* (3), *Wood V. C.* said: "It has been urged upon me more than once during the argument by the counsel for the defendants, that there are 250,000 inhabitants in the town of Birmingham, and that this circumstance must be taken into consideration in determining the question of the plaintiff's right to an injunction, it appears to me, that, so far as this Court is concerned, it is matter of almost absolute indifference whether the decision will affect a population of 250,000 or a single individual carrying on a manufactory for his own benefit. The rights of the plaintiff must be measured precisely as they have left by the legislature. I am not sitting here as a committee for public safety, armed with arbitrary powers to prevent what, it is said, will be great injury, not to Birmingham only, but to the whole of England,—that is not my function."

"On its merits, as well as on authority" says *Prof. Pomeroy*; "the superiority of this latter view seems hardly to admit of doubt. The refusal of the injunction, in the first place, leaves the plaintiff to suffer an admitted legal wrong and to obtain his only redress by an admittedly inadequate remedy. And, in the second place, so far as the interests of the public are considered, that case is not to be distinguished in principle from the taking of property for public purposes which the federal constitution forbids; true, the damage from a nuisance

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(1) Per *Seevers J.* in *Daniels* v. *Keokuk Water Works*, 61 Iowa 549, Pom. Eq. Jur. § 1947.

(2) *Lord Cranworth* in *Broadbent* v. *Imperial Gas Co*, 7 De G. M & G. 436, 462, affirmed in 7 H. L. C. 600; see also *Att. Gen.* v. *Council etc. Birmingham* L. R. 4 Ch. App. 146; *Att. Gen.* v. *Terry*, L. R. 9 Ch. App. 423.

(3) 4 Kay & J. 528, 538.

may not always be a 'taking' as defined by the authorities, and it would seem within the same reasoning ; and if the public requires it, the plaintiff's property can be taken or legislative provision made for the payment of permanent damages to him. The objection that temporary hardship to the public may result from granting the injunction at once can be obviated by allowing time for the necessary readjustment, before puting it into effect. (1)"

Nuisance easily avoided by the Plaintiff.—Closely related to the question discussed in the preceding paragraphs is another which is raised where there is offered as a defence to an action for an injunction against a nuisance, the fact that the plaintiff could prevent the nuisance by a comparatively small outlay of labour or expense. In most of cases in which the question has arisen, the defence has been rejected, some times with vigour. "Neither does it make any difference," said the court in *Paddack* v. *Somes* (2), "or in any measure operate as an excuse that the nuisance can not be obviated without great expense, or that the plaintiff himself could obviate the injury at a trifling expense. It is the duty of every person or public body to prevent a nuisance, and the fact that the person injured could, but does not prevent damages to his property therefrom is no defence either to an action at law or in equity. A party is not bound to expend a dollar, or to do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful acts of another."

Contributory Injury.—The fact that others contribute to the production of the nuisance does not excuse the defendant. But this fact does not excuse the plaintiff of the burden of proving that the defendant does in fact contribute to the creation or maintenance of the nuisance (3). On the other hand a nuisance cannot be justified by the existence of other nuisances of a similar character, if it can be shown that the inconvenience is increased by the nuisance complained of (4).

Question of Existence of Nuisance.—The question of what constitutes a nuisance is one peculiarly to be determined by the tribunal ; and usually, unless the thing complained of is *per se* or clearly shown to be a nuisance, and the right to an injunction depends upon a legal right, the right must be ascertained before any relief will be granted by the court (5). Upon application for iniunction against nuisances, courts of equity in England receive evidence, and if the same be satisfactory, act upon it, but if unsatisfactory grant an issue (6). "It is a rule of universal recognition that in doubtful cases an injunction will always be denied, or dissolved on motion when granted *ad interim*. A very strong case must, therefore, be made by the bill, and if there be a

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(1) Pom. Eq. Jur. § 1945 ; see also *Att. Gen.* v. *Coloney etc. Asylum*, 4 Ch. 146, 165, 166.

(2) 102 Mo. 226 238 ; Pom. Eq. Jur. § 1946.

(3) Spelling on Injunction and other Extra-ordinary Remedies § 390.

(4) *Crossley* v, *Light owner*, L. R. 2 Ch. 478.

(5) *Att. Gen.* v. *Unted Kingdom Electric Telegraph Co.*, 5 L. T. N. S. 338, *Cardiff* v. *Cardiff*, 4 De. G. & J. 596, Spelling an Injunctions etc. § 404.

(6) *Incbold* v. *Barrington*, L. R. 4 Ch. App. 388.

reasonable doubt as to the probable effect of an alleged nuisance, either on the proof of affidavits, or on the construction of the facts stated in the bill, there will be no interference until the matter is tested by experiment in the actual use of the property (1)" It may be stated as a general principle upon modern authority that where the injury is irreparable, as where loss of health loss of trade, destruction of the means of subsistence, or permanent ruin to property will or is likely to ensue if the injury be not abated or prevented, courts of equity will interfere by injunction in the first instance (2).

Estoppel, Acquiescence, Laches.—These subjects require no especial treatment here, being adequately discussed in connection with the general principles of issuance of temporary, perpetual and mandatory Injunctions (3). But in this connection it should be borne in mind that while no degree of acquiescence or delay in applying for relief is a valid objection to granting an injunction against a public nuisance, especially if it be a nuisance *per se*, a somewhat different rule applies in the case of private nuisances (4). Thus in an American case, it was held that the fact that the noise caused by the removal of scenery and baggage from a theatre at night disturbed the sleep of persons living near by, was not sufficient to justify the setting aside an order refusing the issuance of a preliminary injunction restraining such removal, where the said theatre had been in use for fifteen years (5). What degree of acquiescence or delay will justify a denial of relief is largely a matter of judicial discretion to be exercised according to the facts presented in each case (6). In an English case *Lord Cottenham* said that there was no fact before him to call for any opinion as to what degree of encouragement, or what circumstances leading to encouragement, would be sufficient (7). When the legal right of one who is injuriously affected by a private nuisance is settled and the more efficacious remedy of a court of equity is necessary to complete relief, delay in applying to the court for such relief is no ground fora denial thereof, unless coupled with such acquiescence in the nuisance as deprives the complainant of all right to equitable relief (8). But an injunction will not be granted when plaintiff has remained inactive, knowing that the defendant, in good faith, had incurred great expenses in prosecuting the work complained of as injurious (9). A mere threat to take legal proceedings is insufficient to exclude the consequence of laches or acquiescence (10).

Complete Relief.—"While the only ground" says *Prof Pomeroy* "for coming into equity in cases of nuisance is the right to an injunction, yet a party who has established the jurisdictional right will be given all the relief,

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(1) Wood on Nuisances §§ 796, 797; *Clean* v. *Mahany*, 9 W. R. 882.

(2) Spelling on Injunctions and other Extra-ordinary Remedies § 405.

(3) Vide Chapters III, IV and V.

(4) Spelling an Injunctions and other Extra-ordinary Remedies § 408.

(5) *Appeal of Penrose* (Pa) 21 A. 364.

(6) Spelling on Injunction and other Extra-ordinary Remedies § 408.

(7) *Williams* v. *Earl of Jersey*, Cr. & P. 9.

(8) *Carlisle* v. *Cooper*, 21 N. J. Eq. 576.

(9) Spelling an Injunctions and other Extra-ordinary Remedies § 409.

(10) *Easton* v. *N. Y. etc. R. R. Co.*, 24 N. J. Eq. 49.

both equitable and legal in nature, to which his case entitles him. The principle on which this is done is the same that always controls the action of courts of equity, viz., to prevent the obvious hardship of compelling a party to seek relief from a single wrong in two suits prosecuted in different courts. Hence, in addition to an injunction, damages for the past nuisance will be awarded. And if, after suit is brought and the jurisdiction in equity has attached, the defendant ceases to commit the nuisance, nontheless the equity court will give the plaintiff damages and not turn him out of courts and compel him to bring another action at law ; and it is sometimes held that the injunction also will issue even in this case (1)." In British India the same court exercises the common law jurisdiction as well as equity jurisdiction, and as such both damages for past nuisance and injunction for apprehending or continuing nuisance are granted by the same court, if there be no bar in other respects.

Relief given—Mandatory Injunction.—The relief sought in equity against nuisance is, of course, preventive, either to prohibit the creation of a nuisance or to prevent an existing one from continuing in the future. Ordinarily, this end is achieved by a mere prohibitive injunction. When, as is not uncommonly the case, however, the nuisance is one which exists, and will continue to exist, because of acts already done—as, for example, the building of a dam—without further acting on the defendant's part, mere prohibition will not serve to accomplish the desired result ; mandatory relief is necessary to end the wrong (2). In such a case it was said by the Court : "It is not to correct a wrong of the past, in the sense of redress for the injury already sustained, but to prevent further injury. The injury consists in the overflow of the lands of the plaintiff. It was not alone the building of the dam that caused the injury, but its maintenance, or continuance which is a part of the act complained of ; and its maintenance can only be stopped so as to prevent its injury by its removal. The removal of the dam, wrongfully constructed, is necessary for and incidentally involved in the preventive redress which the law authorizes (3)." On this ground the use of mandatory injunctions is resorted to whenever necessary to give the full relief to which the plaintiff is entitled (4). In such cases it is generally destructive acts requiring no supervision that are required, as the removal of an object that is, or causes a nuisance. Occasionally, however it may be constructive or continuing acts that are directed. Subject to the reluctance of the Equity Courts to order the doing of acts that will require supervision (5), it is no distinction between prohibitory and mandatory injunctions or between different kinds of mandatory relief that guides the Court in the form of injunction issued, but rather the nature of the relief demanded in order to give the plaintiff the protection to which he is entitled (6).

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(1) Pom, Eq. Jur. § 1950.
(2) Pom. Eq. Jur. § 1947.
(3) *Troe* v. *Larson*, 84 Iowa, 649.
(4) *Vide Lakshmi Narain* v. *Taraprosanna*, 31 C. 944=8 C. W. N. 710.
(5) *Vide* Specific Relief Act s. 21(g).
(6) Pom. Eq. Jur. § 1947.

To induce the Court to grant a mandatory injunction to restrain the carrying on of works alleged to be injurious to a neighbouring property, the plaintiff must prove that his property has sustained actual substantial damage, which is apparent to an ordinary person, and not merely such damage as can only be perceived by means of scientific or microscopic investigation (1). Where the injury sought to be restrained has been completed before the filing of the bill, and the plaintiff has, in the first instance, demanded damages, the Court will not grant a mandatory injunction, even where the injury is substantial, but will direct an inquiry as to damages (2).

Form of Injunctions.—The forms of injunction used against nuisances illustrate to an unusual degree both the flexibility of equitable procedure and also the relative nature of nuisances. In a great many cases a thing is a nuisance not because it is in itself deemed wrongful in law, but because the manner in which it is done, or the extent to which it is carried, causes it to cross the line beyond which the law will not allow one to go, even in the strict conduct of his own business. This situation is recognised by Equity Courts in granting injunctions, with the result that they are generally so framed as to prohibit only that part of the thing complained of which is injurious, saving to the defendant the right to continue his business if it can be conducted in a harmless way (3). In accordance with the same principle injunctions will not be issued, it is said, against a business which is a nuisance, when the nuisance can be remedied by the use of scientific appliances; instead the Court will direct the introduction of such appliances; and whenever necessary to prevent hardship a reasonable amount of time, in which the defendant may conform to the injunction, will be allowed (4).

Temporary Injunction.—The granting of a temporary injunction in cases of alleged nuisances does not proceed on different principles from those common to this particular exercise of equity jurisdiction in other cases. Its function is to preserve property until disputed questions concerning it are settled. A plaintiff who moves for such protection must show a *prima facie* case of right in himself (5); otherwise he makes no title in himself to relief of any kind. And, further, since the time for which the injunction is sought is limited to the period necessary for deciding the disputed question—that is till the final judgment—it is clear he must show danger of injury occurring within that interval such that the damages recoverable at law would not be an adequate remedy; which means generally, that he must show danger of irreparable injury (6). It is probably because of this that one may lose his right to a temporary injunction by delay in a shorter time than will bar him from procuring a permanent

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(1) *Salvin* v. *North Brancepeth Coal Co.*, 44 L. J. Ch. 149=L. R. 9 Ch. 705.

(2) *Gost* (*Viscounetess*) v. *Clark*, 18 L. T. 343.

(3) Pom. Eq. Jur. § 1948.

(4) *Ibid*; see also *Fleming* v. *Hislop*, L. R. 11 App. Cas. 686; see also *Dattatraya* v. *Gopisa*, A. I. R. 1927 Nag. 236=101 Ind. Cas. 810.

(5) *Hilton* v. *Earl of Granville*, 1 *Craig* & P. 283, 292.

(6) *Earl of Ripon* v. *Hobart*, 3 Myl. & K. 169.

injunction (1) ; by his delay he shows that he himself did not consider his damage so serious as to require emergency protection. For the same reason, the injunction is denied if the defendant denies all intention to do the acts which the plaintiff alleges will constitute the nuisance complained of, though it does not apply if he simply denies that they will amount to a nuisance, that being simply his opinion. It has already been suggested that since temporary injunctions must be granted while the rights of the parties are yet undetermined, and hence, whichever course the Court may pursue, a wrong may result,—from granting an injunction against a defendant whose defence may prove good, or from refusing it to a plaintiff who may prove to be entitled to it,—therefore the Courts should take into account, on applications for such injunctions, the balance of injury likely to result from the one or the other of the two courses open, and act accordingly (2). Where the question before the Court is as to the propriety of stopping a business by preliminary injunction upon an *ex parte* showing, which may or may not be substantiated by further examination of the case in due course, it is very well for the chancellor to take into account the magnitude of the defendants' investment, and compare it with the character of the plaintiff's alleged injury ; and if the latter appears trifling beside that which would result from the impairment of the former, he may well refuse to exercise his power until more fully advised (3). It is perhaps nothing more than the effect of this rule that occasions the frequent expressions of caution and reluctance in granting mandatory temporary injunctions (4). To order the removal or destruction of an object which is alleged to be or to cause a nuisance is to compel the defendant generally to lose its value, and whatever labour and expense is necessary to obey the order as well. This is often obviously more than it would be merely to order him not to do something, to refrain, by the injunction ; hence the balance in his favour against granting the injunction is by so much increased. This is apparently what *Lord Thurlow* had in mind in an early case in which he refused to order a ditch to be filled up on motion, saying : " I do not like granting these injunctions on motion. The ditch may be a mile long (5) " yet if the plaintiff's case is strong enough to make the balance of injury favourable to him, the Courts have from the time of *Lord Thurlow* himself granted mandatory temporary injunctions in his behalf ; the test for granting or refusing it is the same as for prohibitory injunctions, the difference is in the facts (6). Although a very strong case of nuisance may be established by the affidavits in support of an interlocutory motion to restrain a noxious manufactory, the Court will reserve the

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(1) *Att Gen* v. *Sheffield Gas Co.*, 3 De. G. M. & G. 304 ; *Hilton* v. *Granville*, 1 Craig & P. 283, 292, 293 ; *Turner* v. *Mirfield*, 34 Beav. 390.

(2) Pom. Eq. Jur. § 1949.

(3) *Evans* v. *Reading etc. Co*, 160 Pa. St. 209 ; see also *Hilton* v. *Earl of Granville*, 1 Craig. & P. 283, 297 ; *Wynstanley* v *Lee*, 5 Swanst. 333, 335 ; *Eden* v. *Firth*, 1 H. & M. 573.

(4) Pom. Eq. Jur. § 1949, see also *Blackemore* v. *Glamorganshire*, 1 Mylne & K. 154, 185.

(5) Anon. 1 Ves. 140.

(6) Pom. Eq. Jur. § 1949.

question until the hearing of the cause, which would be advanced for that purpose (1).

Who can sue for injunction against nuisance.—The parties who have a sufficient interest to enjoin a nuisance are, in general those who sustain legal injury. A landlord may do so if the nusiance is one which will permanently damage the reversion (2); not if it is one that will not do so, and is likely to terminate before the tenancy ends (3). A tenant may also procure an injunction even when his tenancy is very brief or shortly to end (4), though there are intimations that he must join the reversioners as a co-plaintiff (5). The owner of an ancient light, being a lessee whose lease has expired during the obstruction, but who has agreed for a renewal, can still maintain his suit for an injunction to protect his right to the access of light (6). The wife of the manager of a tenant of a premise has no interest in the premises or any right of occupation in the proper sense of the term which gave her a cause of action based upon a nuisance against the defendants (7).

As regards the right of a reversioner to sue for nuisance, *Parker J.* in *Jones* v. *Llanrwst Urban Council* (8) said: "With regard to the first point it is reasonably certain that a reversioner cannot maintain actions in the nature of trespass, including I think, actions for infringement of natural rights arising out of ownership of land without alleging and proving injury to the reversion. If the thing complained of is of such a permanent nature that the reversion may be injured, the question of whether the reversion is or is not injured is a question for the jury. [*Simpson* v. *Savage* (9)]. I take 'pernament' in this connection to mean such as will continue indefinitely unless something is done to remove it. Thus, a building which infringes ancient lights is a permanent injury within the rule for, though it can be removed before the reversion falls into possession, still it will continue until it be removed. On the other-hand, a noisy trade, or the exercise of an alleged right of way, are not in their nature pernament within the rule, for they cease of themselves unless there be some one to continue them." A nuisance of noise and smell from a Garage

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(1) *Att. Gen* v. *Charles*, 11 W. R. 253. 1017.

(2) *Wilson* v. *Townend*, 1 Dr. & Sm. 324; *Broder* v. *Saillard*, 2 Ch. D. 692; *Colwell* v. *St. Pancras Borough Council* (1904) 1 Ch. 707; *Jhonstone* v. *Hall*, 2 K & J. 414; *Wood* v. *Conway Corporation*, (1914) 2 Ch. 58; *Mott.* v. *Schoolbred*, 20 Eq 22; *Land Mortgage* v. *Ahmedbhoy*, 8 B. 62, 64, 86, 90. A suit for injunction or damages is not maintainable by non-occupying owner in respect of a nuisance alleged to be personally injurious only to the occupier. He can however sue if the nuisance is likely to injure the reversion provided the act complained of is permanently injurious and affects the property. *Alwar chetto* v. *Madras Electric Corporation* A. I. R. 1932 Mad. 719=63 M. L. J. 868=1932 M. W. N.

(3) *Jones* v. *Chappel*, L. R. 20 Eq. 539; *Broder* v. *Saillard*, 2 Ch. D. 692; *Cooper* v. *Crabtree*, 20 Ch. D. 589; *Matt* v. *Schoolbred*, 20 Eq. 22; *Simpson* v. *Savage*, 1 C. B. N. S. 347.

(4) *Broder* v. *Saillard*, L. R. 2 Ch. D. 692; *Shelfer* v. *London etc. Co.* (1895) 1 Ch. 287; *Ichbold* v. *Robinson*, 4 Ch. 388; *Jones* v. *Chappel*, L. R. 20 Eq. 539.

(5) *Broder* v. *Saillard*, 2 Ch. D. 692; *Jones* v. *Chappel*, L. R. 20 Eq. 539.

(6) *Gale* v. *Abott*, 8 Jur. N. S. 387.

(7) *Malone* v. *Laskey*, 76 L. J. K. B. 1134=(1907) 2 K. B. 141.

(8) 80 L. J. Ch. 145 at p. 150.

(9) 26 L. J. C. P. 10=10 C. B. N. S. 347.

is not "permanent" injury to the reversion withia the definition given by *Parker J.* in *Jones* v. *Llanrwst Urban District Council* (1) and accordingly an action brought by the reversioners alone is not maintainable (2).

Where a reversion in one person is devised to several as tenants in common, each has a seperate right of action for breach of a covenant runing with the land (3). The entry of a mortgagee relates back to the time when he had a right to enter, so as to support an action against a wrong doer for a trespass committed after the accrual of right before actual entry (4). It seems this rule is applicable in the case of an action against nuisance (5). A weekly tenant may maintain an action in respect of a nuisance if it is of such a nature as to be injurious to his health or comfort (6).

Who can be sued.—A land-owner may be enjoined from permiting a public nuisance to continue on his land, though he did not cause it himself (7). If the occupier of land, proceeding by the licence of the owner of the land, perform acts which amount to a nuisance, for which he would have no defence in an action, the owner will be liable as well as the occupier, for the owner is bound to see that his property is so managed that other persons are not injured (8). So also an owner is liable for the nuisance caused by his tenant (9). Where the lessor covenants that the lessee shall peacefully enjoy the demised premises without any interruption by the lessor or any person claiming under him, the effect of the covenant is that the lessor agrees to be bound by any act of interruption by himself or by any person whom he has expressly or impliedly authorized to do the act, but he is not responsible for wrongful or nigligent acts which he has not authorized (10). It has also been held that a grantee of one who has been enjoined from a nuisance connected with the use of the land, is bound by the injunction though not a party to the suit (11). That the person committing the nuisance is a tenant, is, of course, no answer to a bill against him (12), and the lessor may also in such a case be enjoined if he threatens to continue the nuisance after the termination of the tenancy (13). The Attorney-General on behalf of the public, is entitled to take proceedings to prevent the owner of vacant land from committing a breach of the duty which rests upon him at common law to prevent his land from being a

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(1) (1911) 1 Ch. 393.

(2) *White* v. *London General Ommibus Co.* (1914) W. N. 78=58 So. Jur. 339; see also *Jones* v. *Chappel*, L. R. 20 Eq. 539.

(3) *Roberts* v. *Holland*, (1893) 1 Q. B. 665.

(4) *Ocean Accident* v. *Ilford Das*, (1905), 2 K. B. 493.

(5) Kerr on Injuuction p. 159.

(6) *Jones* v. *Chappet*, supra,

(7) *Att. Gen.* v. *Tod Headly*, (1897) 1 Ch. 560.

(8) *White* v. *Jameson*, L. R. 18 Eq. 303; Joyce on Doctrines p. 109.

(9) *Jenkins* v. *Jackson*, 58 L. J. Ch. 124=40 Ch. D. 71.

(10) *Williams* v. *Gabriel*, (1906) 1 K. B. 155; *Sanderson* v. *Berwick upon Tweed* 13 Q. B. D. 547.

(11) *Ahlers.* v. *Thomas*, 77 Am. St. Rep. 820.

(12) *Broder* v. *Sillard*, L. R. 2 Ch. D. 692; *Att. Gen.* v. *Props etc. Canal*, L. R. 2 Eq. 71.

(13) *Att. Gen.* v. *Props etc. Canal* L. R. 2 Eq 71; Pom. Eq. Jur. § 1952.

public nuisance, although such nuisance may be called by the acts of other persons (1),

Joinder of Parties—"Upon the question of the joinder of parties in proceedings to restrain a private nuisance, it is held that where the grievance is common to several different property owners, they may unite it one action for an injunction. And in such case it is not necessary that the grievance complained of shall affect all of the plaintiffs precisely at the same instant and in the same degree, if they are affected in the same general period of time and in a similar way, so that the same relief may be had by all in a single suit. It is to be observed, however, that the joinder in such case is permissive merely, the various property owners being proper but not necessary parties. One owner, therefore cannot sue on behalf of all others similarly situated and the latter cannot be found by the result of another's separate action (2)."

Reasonable use no defence.—It is no defence to an action at law or a bill for an injunction against a nuisance for the defendant to say he is conducting himself reasonably in doing the thing which is complained of (3). "The application of the principle governing the jurisdiction of the court in cases of nuisance does not depend on the question wether the defendant is using his own property reasonably or otherwise. The real question is, does he injure his neighbour ? (4)" It is perhapes accurate to say, therefore, that there can be no such thing as a nuisance resulting from reasonable conduct. Nuisance is not based on any rule of negligent or willfully wrongful conduct, but rather on rules of policy which do not allow a person to do those acts which constitute nuisances. If he does so, he is not acting reasonably (5).

Nor the fact that other causes contribute.—Nor is it a defence that other persons or other causes than the defendant's wrongful acts contribute to the nuisance. If the plaintiff wishes to submit to certain nuisances, that is no reason for allowing the defendant to impose one on him against his will (6). And if the nuisance results from the combined effect of separate acts of the defendant and others, that also is no defence to a bill for an injunction (7). The acts of several persons may together constitute a nuisance, which the court will restrain, though the damage occasioned by the acts of any one, if taken alone, would he inappreciable (8).

Evidence.—The onus of proof lies on any person, who on the ground of nuisance, seeks to prevent his neighbour from dealing with his own property

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(1) *Att. Gen.* v. *Tot Heatley*, (1897) 1 Ch. 560 ; see also *Reg.* v. *Watts*, 1 Salk. 357 ; *Swene* v. G. N. Ry, 33 L. J. Ch. 399 ; *Reg.* v. *Bradford Navigation*, 6 C. & S. 631, the principles laid down in which case was applied.

(2) High on Injunction § 757.

(3) Pom. Eq. Jur. § 1953.

(4) *Rein hard* v. *Mentasti*, 42 Ch. D. 685.

(5) *Att. Gen.* v. *Cole*, (1901) 1 Ch. D. 205 ; *Broder* v. *Saillard*, L. R. 2 Ch. 692 ; Contra *Sanders-clark* v. *Gros Venor*, (1900) 2 Ch. 373 ; Pom. Eq. Jur. § 1953.

(6) *Richards* v. *Daugherty*, 133 Ala. 569 ; Pom. Eq. Jur. § 1954.

(7) *Lamberton* v. *Mellish*, (1894) 3 Ch. 163.

(8) *Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650 ; *Blair* v. *Deakin*, 57 L. T. 522 ; *Nixon* v. *Tyne mouth Rural Sanitary Authority*, 52 J. P. 504.

as he pleases (1). Under an averment of the remote cause of a nuisance and an allegation that by means of the premises the noxious matter annoyed the plaintiff's house, it is not competent to give evidence of the intermediate cause (2). An action has been brought for a nuisance caused by constantly unloading and loading vans in front of the plaintiff's business premises, obstructing the light and access thereto and rendering them unhealthy and incommodious by reason of the frequent staking of the horses. The declaration alleged that, in consequence of the nuisance complained of, the plaintiff's premises had been rendered 'unhealthy and incommodious,' as well as a house of business as also as a dwelling house: *Held* that evidence that the premises were rendered uncomfortable by reason of the offensive smells arising from the staking of the horses which were kept constantly standing opposite to them was properly admitted (3). It is not enough to prove certain facts, and then to say that from these facts the existence of the nuisance must necessarily be inferred (4).

Scientific evidence.—A party seeking the interfere on the ground of nuisance with a work carried on in a normal manner must in order to sustian his suit, show that he has incurred actual and substantial or visible damage. The primary evidence of such damage should be that of ordinary witnesses. Scientific evidence should be resorted to, not to establish the fact of the damage but only to explain the cause of it (5). But in India the rule is otherwise. In *Dattatraya* v. *Gopesa* (6), *Kin Khedi, A. J. C.* said: "A careful scrutiny of the reports of the aforesaid Madras and Calcutta cases and also the cases of this court, namely *Rama Rao* v. *Martha Sequira* (7), *Amarendra nath* v. *Baranagar Jute Factory Co Ltd.* (8). and *Municipal Committee of Saugor* v. *Nilkanta* (9) clearly shows that the bindings as to the nuisance or otherwise were based on medical or sanitory expert's evidence. This kind of evidence has not been adduced in this case. Its value cannot be under-estimated in a case of this kind. For a Court to decide rightly whether a particular nuisance is one in that the inconvenience is only to the public or there is a special injury to particular individual, such expert evidence is of very great value and is an absolute necessity. Without it the court may not be in a position to know what scientiffc or other effectual precautions must the owner of the privy be ordered to take or it would be justified in imposing on him in order to ensure the safety of the health of the inmates of the injured party's house."

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(1) *Oldaker* v. *Hunt.* 19 Beav. 485.
(2) *Fitzsimonds* v *Inglis,* 5 Taunt. 534.
(3) *Benjamin* v. *Storr.* 43 L. J. C. P. 162=L. R. 9 C. P. 400.
(4) *Ball* v. *Roy.* L. R. 8 Ch. 467=28 L. T. 346.
(5) *Salvin* v. *North Brancepeth Coal,* L. R. 9 Ch. 705; see also *Goldsmid* v. *Tunbridge Com.* 1 Ch. 349, 353.
(6) A. I. R. 1927 Nag. 236=101 Ind. Cas. 810.
(7) 42 M. 796=52 Ind. Cas 921.
(8) 49 C. 1059=A. I. R. 1923 Cal. 271.
(9) 11 N. L. R. 132=31 Ind. Cas, 62.

Difficutly of abating nuisance.—A court of equity will not be deterred from the exercise of its jurisdiction in restraint of nuisance because of the difficulty or expense attending the removal by defendants of the nuisance in question. It is proper, however where the difficulties of such removal are very great, on granting the injunction to suspend its operation for a given time to enable defendants to make the necessary arrangements for removing the nuisauce (1) or the court may refuse the injunction altogether and enter a decree simply finding and declaring the plaintiff's rights, with leave to the plaintiff to apply for an injunction if the nuisance shall not be abated by the defendant within a reasonable time named by the Court (2).

Injunction and damages.—Where the injury sought to be restrained has been completed before action brought, and the plaintiff in the first instance demanded damages, the court will not grant a mandatory injunction, even where the injury is substantial, but will direct an inquiry as to damages (3). A suit was instituted to restrain the defendants from causing a nuisance by the working of their patent for making bricks and tiles under a covered area, to the plaintiff and her dwelling house. The bill prayed for an injunction, but did not ask any inquiry as to damages. The plaintiff at the hearing was willing to take damages instead of an injunction : *Held* that a nuisance was proved, and that the plaintiff was entitled to damages although she had not prayed for them by her bill (4). Where a plaintiff in an action for nuisance by noise and vibration claims an injunction which or its equivalent undertaking, is granted by the court, and also asks for general damages as ancillary to the real remedy sought, he is not entitled to substantial damages, but is entitled to recover something, not as compensation, but as acknowledgment of the wrong he has suffered (5).

Legalized Nuisance.—Acts which at common law are nuisances may be legalized by statute, if such legislation does not amount to the taking or damaging of property forbidden by constitutional provision (6). The effect of such statutes is to take away the wrongful character of the acts legalized ; they are no longer torts, and hence, the remedy by injunction against them, of course ceases (7). But as *Mellish L. J.* says in *Clowes* v. *Stafford shire Potteries Water Works Co.*, (8), the Plaintiff's right of action "must still continue, unless it has been taken away by Acts of parliament, and the burden of shewing that it has been taken away by the Acts of Parliament, beyond all question, is upon the defendants, because, if a public company or any

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(1) *Att. Gen.* v. *Coloney Hatch, Lunatic Asylum* L. R. 4 Ch. 146.

(2) *Vestry of Islington* v. *Hornsay Council*, (1900) 1 Ch. 695; High on Injunction § 746.

(3) *Gort* (*Vis countess*) v. *Clark*, 18 L. T. 343=16 W. R. 569.

(4) *Crawford* v. *Hornsea Steam Brick and Tile Co.*, 45 L. J. Ch. 432=34 L. T. 923

(5) *Lipman* v. *Pulman*, 91 L. T. 132, per *Kake wich* J.

(6) Pom. Eq. Jur. § 1955.

(7) *Jordeson* v. *Sutton etc.*, (1898) 2 Ch. 614, (1899) 2 Ch 218. see also *Haji Ismail* v. *Trustees of the Harbour of Madras*, 23 M. 389 (400).

(8) L. R. 8 Ch. 139 ; see also *Metropolitan* v. *Hill*, 6 App. Cas. 193.

individuals obtain an Act of Parliament which they say enables them to take away the common law rights of any person, they are bound to show that it does it with sufficient clearness." But in construing such an Act of Parliament, it should be borne in mind that "the legislature cannot fairly be supposed to intend, in the absence of clear words showing such an intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle as it can override the former, if it sees fit to do so, but it is not likely that it will be found disregarding it, without plain expression of such a purpose (1)." The powers may be classified under three heads : (*i*) Where the statute authorises the commission of a nuisance ; (*ii*) where the statute authorises a particular work, provided no nuisance is caused ; and (*iii*) where the statute authorizes the carrying out of work without nuisance, if possible, but with nuisance if that becomes absolutely necessary and unavoidable (2). In the first and last cases the nuisance will be justified as having been authorised by statute, provided there is no negligence in the exercise of those powers. In the second case, the corporation would be liable for any damages caused as for a nuisance, and quite apart from any question of negligence (3). In *Mid wood & Co.*, v. *Mayor of Manchester* (4), the defendants were empowered by the Manchester Electric Lighting order, 1890, made under the Electric Lighting Acts, 1882 and 1888, and comfirmed by an Act of Parliament, to supply electrical energy in their district, and for that purpose to lay down electrical mains but it was provided by clause 70 of the order that nothing therein contained should exonerate them from any indictment, action or other proceeding for nuisance in the event of any nuisance being caused by them. One of their main fused, and the bitumen in which the main was laid in consequence became volatalized into an inflammable gas, which accumulated for some time, and then exploded, causing a fire by which the plaintiffs' goods were damaged : *Held* that apart from any question of negligence, the defendants were liable to the plaintiffs as for a nuisance by reason of the provision of clause 70 of the order. In the above case *Collins M. R.* said : 'Permission is given to the defendants to do the things provided for by the order, but if, in doing them, they occasion a nuisance, they must bear the consequences. They are not given a *carte blanche* to create a nuisance. If and so far as they can do the things authorized without occasioning a nuisance to any one they may lawfuly do them ; but, if and so far as they cause a nuisance, by doing them, they are not only not protected by the Act, but they are made liable by its express terms." But no suit for injunction or damage will lie against a Public Body for any injury cuased by the

(1) *Per Bowen L. J.* in *London, and North Western Ry. Co.*, v. *Evans*, (1893) 1 Ch. 28 ; cited with approval in *Jordeson* v. *Sutton etc*, (1898) 2 Ch. 614 ; see also *Trustees* v. *Chandra Kanta*, 24 C. L. J. 246 (264).

(2) Aiyangar's The Law of Municipal Corporation in Br. India p. 209.

(3) *Ibid.*

(4) (1905) 2 K. B. 597.

construction or improvement of such works, when such works or improvement are necessary in the interest of the public for the maintenance of the road, and there is no negligence in the carrying out of the work (1). In *East Freemantle Corporation* v. *Annois* (2), *Lord Macnaghten* said; "The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual cannot maintain an action. He is without a remedy unless a remedy is provided by the statute." Similarly in *Canadian Pacific Railway* v. *Roy* (3), the *Lord Chancellor* said: "The ground upon which the immunity of a Railway Company for injury caused by the normal use of their line is based is that the legislature which is supreme, has authorised the particular thing so done in the place and by the means contemplated by the legislature; and that cannot constitute an actionable wrong in England any more than it can constitute a fault by the Quebec Code."

Public bodies and persons with statutory powers.—When persons are incorporated by an Act of Parliament for a particular purpose, and have full powers given them to effect that purpose, if the effecting of it may occasion (not only in the course of originally executing the necessary works for the required purpose, but at recurring intervals afterwards) inconvenience or injury to others, they may be treated as under an obligation to take, from time time, measures to prevent the occurrence of such inconvenience and injury (4). In the above case *Lord Hatherly* stated: "If a company in the position of the defendants there, has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom, is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation."

In *Southwork and Vauxall Water Company* v, *Wands Worth Board of works* (5), *Collins L. J.* observed: "The point urged is that the plaintiffs have suffered

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(1) *Aiyasami* v. The *District Board*, 31 M. 117.

(2) (1902) 2 A. C. 213 P. C.

(3) (1902) 2 A. C. 220.

(4) *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430.

(5) (1898) 2 Ch. 603. In that case a water company in exercise of statutory powers laid down pipes under the surface of a street, and the high way authority of the district afterwards, in exercise of power in that behalf given by s. 98 of the the Metropolis Management Act, 1855, proposed to lower the surface of the street, and to do so without altering or disturbing the position of the pipers, but so as to leave only a few inches of soil over them. In an action by the water company to restrain the high way authority from lowering the surface of the street without at the same time lowering the piper of the company to a corresponding depth under the new surface: Held that the 98th. section of the Act of 1855 did not impose upon the high way authority, when exercising the power thereby given to them of altering the level of a street, by any express or implied duty to exercise also at their

damage by the exercise by the defendants of their statutory powers ; that the defendants were armed, by the same statute, with other powers which if used would have mitigated the damage, and that therefore they were bound to use them. I think it is quite clear, as pointed out by the Master of Rolls, that the power to move the pipes is merely ancillary to the powers of levelling the high way, and that there is no statutory duty on the defendants to exercise it unless they require it for the performance of their primary obligation. But it is not on the assertion of such a statutory duty that the argument for the defendant's liability is or must be based, but on the broader proposition that being possessed of a power of mitigating damage arising from their proceedings, under the statute, they are bound to exercise it. So stated, it is merely an assertion of the proposition so frequently affirmed that, where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers. The railway spark cases are instances of this principle. See *Vaughan* v. *Taff Vale Ry Co.* (1) ; *Hammer smith* and *City Ry Co.* v. *Brand* (2) and see also *Coats* v. *Clarence Ry Co.* (3). In *Geddis* v. *Ban Reservoir Proprietors* (4), *Lord Black burn* was dealing with a case in which the rights of adjoining owners had been in fact invaded, the statute under which the defendants acted not enabling them to flood the plaintiff's lands when such flooding might have been avoided by dredging, as the defendants had power to do, the channel by which they sought to pass their compensation water back to the river. They were under a duty to pass the water down the river, and they were given powers to make and maintain channels for this purpose, and where they had not exercised their powers they would not say that the damage to the adjoining proprietors was a necessary incident of the exercise of their statutory right. The statutory power which *Lord Black burn* thought them bound to exercise was one without which their duty of passing the water on could not be properly carried out. Here the levelling of the road could be and was effectively carried out without in any way disturbing the plaintiff's pipes or infringing any of their rights. I think the dictum of *Lord Black burn* must be read with reference to the case he was dealing with, and cannot be pressed to cover this one. But it must be admitted that the defendants are bound to exercise their statutory powers with reasonable regard for the rights of other persons. I think when it is once clear that the main purpose of the defendants could be completely carried out without recourse to the power of moving the pipes, the obligation of the statutory body must be tried by the same standard of duty as is applicable to private persons.

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own expense the power by the same section given of altering the position of the pipers there under, for the benefit of the water company, in a case where the high-way authority did not require for their own purposes to interfere with such piper.

(1) 5 H & N. 679.
(2) L. R. 4 H. L. 171.
(3) 1 Russ & My. 181.
(4) 3 App. Cas. 430.

Of course, being merely a creation of statute they cannot exercise powers if the statute has not conferred them ; but it does not follow that they are bound to use them because they possess them any more than a private person would be. They merely fall under the general principle '*sic utere tuo ut alienum non laedas*' ''

In *Hammer Smith* v. *Brand* (1) *Lord Cairns* said : "It would be repugnant and absurd piece of legislation to authorise by statute a thing to be done, and at the same time to leave it to be restrained by injunction from doing the very thing which the legislature has expressly permitted to be done." So actions of corporate bodies are not interfered with unless they are manifestly abusing their powers (2).

Injury caused by statutory powers.—Where the acts of commissioners appointed by a paving act, occasion any damage to an individual without any excess of jurisdiction on their part, the commissioners, or pavors acting under them are not liable to an action (3). The principle which imposes liabilities upon a private company, as arising in consideration of the suitable powers granted to them has no application in the case of commissioners appointed under a Public Act of Parliament, to do, on behalf of the executive government, certain things for the benefit of the public (4). The liability of a body created by statute is governed by the statutes which created it. The powers conferred when exercised at all must be executed with due care. In the absence of contrary intention, its duties and liabilities are the same as those imposed by the general law on a private person doing the same thing. But for mere none-feasance no action lie except in regard to a duty towards the plaintiff imposed by the statute, and negligently omitted (5). The use of the Act for the purpose of interfering in any way with the rights of private ownership, beyond the limited powers given to the corporation by it for the necessary protection of the public and the enforcement of proper sanitation, is much to be deprecated (6). So before fastening responsibility upon a public body for act done by it, the first thing is to ascertain whether the act complained of was done in discharge of a permissive right or of a compulsory duty (7). In *Aiyasami Aiyar* v. *The District Board Tanjore* (8), the Court observed: "There is no resemblance between the present case and the case of *Canadian Pacific Ry.* v. *Parke* (9), where *Lord Watson* makes use of the phrase in the strict sense of law 'permissive.' In that case the authority was given to the defendant for his own benefit ; here it is given solely for the benefit of the public."

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(1) L. R. 4 H. L. 171 (215).
(2) *Calcutta Corporation* v. *Bejoy Kumar* 50 C. 813.
(3) *British Plate Glass* v. *Meredith* 4 Temp. Rep. 794 ; see also *Bolton* v. *Crowther* 4 D. & R. 195.
(4) *Reg.* v. *Woods & Forest Commrs.* 19 L. J. Q. B. 497.
(5) *Gibralter Sanitary Com.* v. *Orfila*, 15 App. Cas. 400.
(6) *Khagendranath* v. *Bhupendranath*, 38 C. 296.
(7) *Aiyangar's Municipal Corporations* p. 212.
(8) 31 M. 117.
(9) (1899) A. C. 535.

In *Howley* v. *Steele* (1), which was a case where land acquired for the purpose of the defence of the realm was utilized for rifle shooting in such a way as to be a nuisance to a resident in the vicinity. *Sir George Jessel M. R.* was of opinion that "the power conferred upon the military authorities was a legal right to the use of the land for that purpose, although such a use would, without the authority of Parliament, have been illegal. If that is so, it is impossible to maintain an action for nuisance," and he pointed out that it was not for the Court to decide for what purpose any particular part of the land was to be used (2).

The power given to a Municipality to supervise erection by a private individual of a latrine must be regarded as a permisive obligation which should be exercised without unnecessary detriment to private rights and without creating an unreasonable nuisance (3). In delivering the judgment the Court observed: "Very recently we had to consider the liability of a Taluka Board for damages in the execution of a duty enjoined by the Legislature. *Krishna Murthi Iyer* v. *Taluq Board* of *Mayavaram* (4). We then pointed out that there is a well marked distinction between permissive and obligatory duties; but as the question has been more fully argued on the present occasion, we think it desirable to state succinctly the rule and the limitations applicable to the two branches of duties. If the act is only permitted by the statute to be done, the corporation is practically under the same obligations to respect the rights of others as a private individual. The Corporation should so perform the duty as not to injure private rights [see *Attorney General* v. *Thames Conservatory* (5) and *Madras Railway Company* v. *Zemindar of Carvetenagaram* (6)]. Further the duty must be done without negligence and with care. See *Nagendra Nath Mittra* v. *Bhupendra Narayan Dutt* (7). There is no distinction between mis-feasance and none feasance in such cases. See *Canadian Pacific Ry.* v. *Parke* (8). The position of a corporation which is bound to carry out certain duties is different. In enjoining the performance of them the Legislature contemplates the fact that private individuals will have to submit to a certain amount of infraction of their rights. The principle is that where the Legislature directs a duty to be done, it must be deemed to have weighed the balance of convenience between public benefit and private rights and to have laid down that the latter should give way to the former. See *Geddis* v. *Proprietor's of Bann Reservoir* (9); *L. B. & S. C. Ry.* v. *Truman* (10), *West* v. *Bristol Tramways* (11)

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(1) 6 Ch. D. 521.

(2) *Aiyasami* v. *District Board* of *Tanjore* 31 M. 117; see also *Krishna-Moorti* v. *The Taluk Board*, 42 M. 331.

(3) *A Rama Rao* v. *Martha Sequeira*, Ind. Cas. 921=42 M. 796=37 M. L. J. 224. This is a suit for a mandatory injunction to remove a latrine, erected at a place approved of by the Municipal Commissioners and the District Magistrate.

(4) 50 Ind. Cas. 809=42 M. 331.

(5) 8 Jur. N. S. 1203=136 R. R. 1.

(6) 1 I. A. 364 at p, 384=22 W. R. 279 P. C.

(7) 38 C. 296=15 C. W. N. 316.

(8) (1899) A. C. 535.

(9) (1878) 3 A. C. 430 at p. 455.

(10) (1886) 11 A. C. 45.

(11) (1908) 2 K. B. 14.

and *Westminster Corporation* v. *London and North Western Ry.* (1). But the private individual is not altogether without remedy even in such cases. If the work has been done negligently or carelessly the corporation will be liable. See *Hammer Smith & Ry. Co.* v. *Brand* (2) and *Thompson* v. *Eccles Corporation* (3). The Corporation will also be liable where it acts maliciously and with a wanton desire to injure private rights. But it is not liable for mere non-feasance. The question now is under which of the two categories we should place the erection by the 1st defendant of the latrine ordered by the Municipality. Section 207 runs 'The Municipal Council may by a notice require, etc.' *Mr. Sitarama Rao* drew our attention to section 264(a) which contains the penal clause. He also referred to section 35, which enables the Governor in Council to suspend the operations of the resolutions passed under the Act if the execution of such resolutions is likely to cause obstruction, injury or annoyance to any person lawfully employed or danger to human life, health or safety. The learned Vakil argued from these provisions that the duty cast upon the municipality must be regarded as obligatory. We are unable to agree with him. *Prima facie* the provision of a latrine is for the convenience of the inmates of the place and has no doubt a bearing on the health of the town. But a direction to build at a particular place without reference to the surroundings can not be said to be obligatory on the Municipality. Under very similar circumstances it was held in *Vernon* v. *Vestry of St. James, Westminster* (4) to which *Mr. Shenai* drew our attention, that the Corporation would be liable in damages to a private individual. In that case *Malins V. C.* stated: Therefore I repeat if the question before me were simply whether they were right in selecting the place, and whether one place or another was better I should be bound to decide that the vestry are the sole Judges as to what the situation should be. But great as the powers of the vestries under the Act are, they are not absolute, and vestries are like all other public bodies, liable to be controlled by this court, if they proceed to exercise their powers in an unreasonable manner, whether they are induced to do so by improper motives or from error of judgment Further on the V. C. says: 'It is clear that the court has power to entertain such suits, and that these vestries must not exercise these powers in such a manner as to create a nuisance when the object of the Act is to remove a nuisance.' The case was taken up to the courts of Appeal. Lord Justice James said: 'If the erection in question were made by a private land owner on his own soil and free hold it would seem to be beyond all question a nuisance so grave and so serious that the neighbours would be entitled to apply to the court for an injunction to restrain it. The question is whether the fact that the thing is done, not by a private owner on his private soil, but by the parish vestry on a place that is said to be a public highway, makes any difference.' The learned Lord Justice then quoted section 6, which is very similar to section 207 of

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(1) (1905) A. C. 426.
(2) 4 H. L. 171.
(3) (1905) 1 K. B. 110.
(4) (1881) 16 Ch. 449.

the District Municipalities Act and proceeded: '*Prima facie* nobody is authorized to commit a nuisance and no body is to be held so authorized under an Act of Parliament unless it appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance.' *Lord Justice Cotton* said: 'Therefore the mere fact that an urinal is authorized to be erected does not necessarily or by necessary implication give parliamentary power to do it if it is a nuisance.' *Lord Justice Lush* said: 'That if the inconvenience is only to the public and there is no special injury to a particular individul no action would lie.' This case is strong authority for the position that although the Municipal Act has authorized the council to direct the location of latrine in a particular place, the work should not be carried out so as to affect injuriously private interests more than is necessary. In *Sellors* v. *Matlock Bath Local Board* (1) the same principle was enunciated. In *Rapeir* v. *London Tramways Co.*, (2) also this principle was affirmed. It seems to us therefore, that in the contemplation of the Legislature the power given to the Municipality to supervise the erection by a private individual of a latrine must be regarded as a permissive obligation which should be exercised without unnecessary detriment to private rights and without creating unreasonable nuisance. This being so, their erection must be detremental to some private right.

"The learned vakil for the appellant further relied upon the fact that by section 278 of the Act, compensation is payable by the Municipal Council for any damage caused by the exercise of its powers and hence the plaintiff is not entitled to any further remedy from the defendant in this suit. In the case already referred to, namely, *Vernon* v. *Vestry of St James, Westminster* (3) *Lord Justice James* referred to the clause which provided for compensation and held that the plaintiff was not confined to that remedy alone. In *Att. Gen.* v. *Lewes*] *Corporation*] (4) it was held that none of the provisions relating to remedies in the Act would interfere with the common law rights of injured parties. We do not think the decision in *West* v. *Bristol Tramways Co* (5) is any authority for the proposition contended for by the learned Vakil for the appellant. Moreover, this is not a suit against the corporation for any injunction or for damages, although the Municipal Council has been impleaded as a defendant. The suit is primarily against the 1st defendant for what he has done on his premises. It would be unreasonable to expect that the Municipal Act should provide for reliefs as against private individuals. We are therefore, of opinion that there is no substance in this contention. In the result our conclusion is that the direction to pull down the whole building was wrong and that there should be an enquiry as to whether the defendant could have located the latrine in such a place as not to cause unreasonable

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(1) (1881) 14 B. D. 928.
(2) (1893) 2 Ch. 588=63 L. J. Ch. 36.
(3) (1881) 16 Ch. 449.
(4) (1911) 2 Ch. 495.
(5) (1908) 2 K. B. 14.

injury to the plaintiff. Even should the defendant be obliged to remove some of the cottages in order that a convenient place may be found for erecting a latrine without causing inconvenience to the plaintiff, he should be required to do so. Therefore we must ask the District Judge to return a finding on the following issue :—Was the latrine erected by the defendant in a reasonable manner so as not to infringe unncessarily the rights of the plaintiff ?" .

When nuisance is caused by a statutory public body in exercise of statutory Powers.—The Burma Railways Company (plaintiffs-respondents) occupying a plot of land adjoining one of the Rangoon Municipal night-soil depots sued for an injunction restraining the Municipal Committee (defendants appellants) from maintaining and continuing the depot so as to constitute a nuisance. The transfer of night soil from carts to the Municipal drains was alleged to give rise to an intolerable stench and noxious vapours which rendered the plaintiffs' quarter unfit for habitation. The Municipal Committee denied the allegations as to stench and noxious vapours and alleged that every care is taken to prevent any 'unreasonable' smell from arising at the depot. But the principal defence was that no cause of action lies as the committee have statutory authority under section 98 of the Burma Municipal Act for providing the site in question for the disposal of sewage. They also pleaded, under section 42 A, that the operations have been carried out lawfully in good faith and with due care and attention (1). *Robinson J* in the Court of first instance granting an injunction and prohibiting the defendant committee from using this depot as to cause a nuisance to the plaintiff company and those dwelling on its land, observed : "I will first deal with the statutory authority as given by the Burma Municipal Act and whether the defendant committee is, therefore, not liable to be sued for an injunction. The defendant committee claims that the Act imperatively requires them to provide for the disposal of offensive matter ; that to do so is not possible without creating some nuisance and that this must have been realised by the Legislature which, therefore, when enacting the provision, must have contemplated interference with private rights. It urges that its operations are not for gain but solely for the public benefit and that in respect of night soil their duty is so obviously imperative that the rights of individuals must be subordinated to the advantage of the community as a whole. The general principle on which this claim to exemption rests is well recognized and has frequently received judicial expression. In respect of Acts giving powers to construct a railway it is pointed out by *Lord Halsbury*, *Lord Chancellor*, at the end of his judgment in *London and Brighton and South Railway Company* v. *Truman* (2) that they were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not.' And this is so although the Railway Company works for the gain of its share-holders as a

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(1) The *Rangoon Municipal Committee* v *The Burma Railway Co*, 13 Bur. L. T. 136=59 Ind. Cas. 823.

(2) 11 App. Cas. 45=55 L. J. Ch. 354.

commercial adventure. There are next the cases where powers are given to companies, such as, Gas and Electric Lighting Companies. In respect to them no such assumption can be made. It is true their operations may result in great convenience to the public at large but they are carried out primarily for the pecuniary advantage of the share-holders and it is for them to prove affirmatively the exception they may claim. Lastly we have the cases of corporations and public bodies not working for private gain but primarily for the public good. In the case of the last class, amongst which a Municipal Committee is included, no right to create a nuisance or to interfere with private rights is to be assumed and it must be proved that they are entitled to exemption from an action to restrain them. The 'onus of proving this is on them, and it cannot be claimed that they come without proof within the rule allowed in the case of Railway Acts. To establish this it is sufficient to refer to passages in the judgments in the *Metropolitan Asylum District* v. *Hill* (1), where *Lord Blackburn* says: 'It is clear that the burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears (2)' and *Lord Watson* says: 'The onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the legislature, lies upon the person seeking to justify the nuisance.' As to the law applicable to the claim to exemption, that is made, it is set out clearly in this authority and I need not refer to the other cases in which it has also been laid down. *Lord Selborne*, *Lord Chancellor*, deals with the Act then under consideration and he says: 'If express words or necessary implication and intendment, must be shown, in order to authorise the Poor Law Board, or any managers of an asylum, to create a nuisance, in the exercise of the discretionary powers given to them, I can find none in this statute.'

'The result is: (*i*) That this Act does not necessarily require anything to be done under it which might not be done without causing a nuisance; (*ii*) That as to those things which may or may not be done under it, there is no evidence on the face of the Act that the legislature supposed it to be impossible for any of them to be done (if they were done at all) somewhere and under some circumstances, without creating a nuisance, (*iii*) That the legislature has manifested no intention that any of these optional powers as to asylums should be exercised at the expense of, or so as to interfere with, any man's private rights,' and again: 'If the legislature had authorized some compulsory interference with private rights of property, within local limits which it might have thought fit to define for the purpose of establishing this asylum to be used for the reception of patients suffering from small-pox or other infectious disorders, and had provided for compensation to those who might be thereby

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(1) 6 App. Cas. 193=50 L. J. Q. B. 353.

(2) See also *Att. Gen.* v. *Dorchester*, 94 L. T. 688; *Metropolition Water Board* v. *Solomon*, (1908) 2 Ch. 220; *Dell* v. *Chesham*, 90 L. J. K. B. 33.

injuriously affected (in such cases and under such conditions as it might have prescribed) the present case might have been like *Rex* v. *Pease* (1) and the *Hammersmith & City Ry* v. *Brand* (2). No person out-side the statutory line of compensation even if the use of the asylum fn the manner authorized by the statute had been productive of serious damage to him, could then have obtained any relief or remedy, upon the footing that what the statute authorized was a legal nuisance to himself, or, in itself an actionable wrong. But the case is different, when (as here) no interference at all with any private rights is authorised, and no place, or limit of space, is defined within which the establishment of such an asylum is made lawful.' *Lord Blackburn* says: 'I think that the case of the *Hammersmith and City Railway* v. *Brand* (2) in your Lordship's House, settles, beyond controversy that where the legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the Legislature, would entitle any one to an action, the right of action is taken away (3 3).....The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured (4); and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done.....without injury to others. What was the intention of the Legislature in any particular Act is a question of the construction of the Act.' *Lord Watson*, after pointing out that it was not asserted that express power of authority to that effect had been given by the Act but that the contention was that, having regard to the nature of the public duties laid upon the appellants and the necessities of the case, it must, on a fair construction of the Act, be held that the Legislature did intend them to exercise, and authorize them to exercise such powers, says: 'I see no reason to doubt, that wherever it can be shown to be matter of plain and necessary implication from the language of a statute, that the Legislaure did intend to confer the specific powers above referred to the result in law will be precisely the same as if these powers had been given in express terms (5). And I am disposed to hold that if the Legislature, without specifying either plan or site, were to prescribet by statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital

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(1) 4 B. & Ad. 30=38 R. R. 207.

(2) 38 L. J. Q. B. 265.

(3) See also *East Fremantle* v. *Annois*, (1902) A. C. 217; *Eastern and South African Tetegraph Co*, v. *Cape Town Tramways Co.* (1902) A. C. 381; *Canadian Pacific Ry.* v. *Roy*, (1902) A. C. 220; *Sheppard* v. *Glossop Corporation* (1921) 3 K. B. 142; *Howard Flanders* v. *Moldon Corporation*, 135 L. T. 6.

(4) Vide Railway Fires Act, 1905, 5 Edw. 7 C. 11 as amended by Railway Fires Act, 1923, 13 & 14 Geo 5 C. 27 and *Att. Gen.* v. *Great Western Ry*, (1921) 2 K. B. 1=93 L. J. K. B. 524 whereby the railway companies are now made liable for damage caused to agricultural lands and crops by the sparks of the engine. Kerr on Injunction p. 144.

(5) Vide also *Gas Light and Coke Co.*, v. *Vestry of St. Mary Abbots*. 15 Q. B. D. 1.

established in persuance of the Act, provided that it were either apparent or proved to the satisfaction of the court that the directions of the Act could not be complied with at all, without creating a nuisance (1). In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed.

'On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. Then, after dealing with the question of onus which lies upon the person claiming to justify the nuisance, he continues: Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the Legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights.

"I will next consider the provisions of the Burma Municipal Act to see whether they are such as justify the claim of the defendant committee in the light of these expositions of the law applicable...Subsection (2) of section 98 enacts :—'The committee shall provide within the limits of the Municipality sites and places for the collection, deposit, or disposal of all refuse, rubbish, and offensive matter: provided that the local Government may require the said committee in lieu of, or in addition to, such sites and places, to provide sites and places for such deposit and disposal beyond such limits.....Subsection (2) is clearly imperative in its terms and the committee is left no option. It has to provide sites and places for the disposal of offensive matter. A discretion is given to the committee as to the exact location of such sites and places but they must be within the limits of the Municipality.....I must, therefore, hold that section 98 (2) does apply to the matter in dispute and it imposes an imperative duty on the committee to provide sites and places for the disposal of night soil.

"The Act clearly does not permit a nuisance to be committed in the disposal of night soil in express terms and the next question is whether the nuisance was so certain a consequence that it must be assumed that the Legislature realized when passing the Act that the imperative duty imposed 'could not be performed without creating a nuisance, that is, without interfering with private rights. *Lord Blackburn* said in *Metropolitan Asylum District* v. *Hill* (2): 'If it be the fact that such an asylum must be a nuisance, unless on a site so extensive as to keep all habitations at a considerable distance, it may

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(1) See also *Sellors* v. *Matlock Local Board*, 14 Q. B. D. 929; *Freemantle* v. *Annois*, (1902) A. C. 218; *Dell* v. *Cresham* (1921) 3 K. B. 433.

(2) 6 App. Cas. 193.

be that such a site cannot be obtained at all in the neighbourhood of the metropolis, or only at a cost so enormous as to make it practically impossible. If that is the case it might be for the consideration of the Legislature whether the certain danger of infection, from leaving the infectious sick paupers where they fell ill, exceeded that which would arise from a well regulated hospital erected in another place, to such an extent that it was for the public benefit that this latter risk should be run, and whether the rights of owners of property there should stand in the way of such a public benefit, or should be made to give way, with or without compensation.' And so, in this case, if it is established or can be held that the depot can not be used without causing a nuisance it may well be that the Legislature held that the public advantage so far exceeded the injury to private individuals that the latter must give way.....

"It is claimed that every effort has been made to avoid a nuisance but that it is impossible, However, the question is whether it was so clearly impossible that it must be assumed that the Legislature was aware of this and nevertheless imposed the imperative duty..... ..Nor can I find any sufficient ground for holding that the disposal by the carts at a depot was so certain to result in a nuisance that it must have been in the contemplation of the Legislature. *Lord Hatherley L. C.* in *Attorney General* v. *Leeds Corporation* (1) in dealing with the case of a sewer said: 'Yet the Legislature may have thought that the thing could be done (and, for aught I know, it is not impossible it can be done) without creating a nuisance.' In my opinion, that is exactly the position here. In *Jordeson* v. *Sutton Southcoats and Drypool Gas Co*, (2) *North J.* held:— 'To make out their case the company must show that they cannot, without interference with the plaintiff's rights, do something they are bound to do.' They have not shown that in this case and I must, therefore, hold that this suit will lie against them."

On appeal this decision was affirmed. In delivering his judgment in the Appeal Court *Twomey C. J.* said: "For the committee it is contended that the Legislature having imposed upon them these imperative duties with reference to night soil, it must be taken that the Legislature also gave them full discretion to choose sites for the night soil depots. In support of this contention we are referred to the rulings of the English Courts in the interpretation of Railway Acts, and especially to the case of the *London and Brighton Railway Company* v. *Truman* (3). It is clear from that case that a Railway Company, acting under its statutory authority, has an absolute discretion in selecting sites for additional station yards and other convenience in the vicinity of the railway. *Lord Blackburn* held that the Railway Company were not bound to prove the impossibility of creating cattle yards and pens any where else within the defined limits without being a nuisance to any one.

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(1) (1870) 5 Ch. App. 583=39 L J. Ch. 711.

(2) (1898) 2 Ch. 614.

(3) 11 App. Cas. 45=55 L. J. Ch. 354.

It is urged that the Municipal Committee is similarly not bound to prove the impossibility of establishing their night soil depots any where else without being a nuisance to the neighbouring occupiers. But it is clear from the judgment in *Truman's case* (1) that the principle of construction applied to Railway Acts is not of general application. The reason for the special construction given to Railway Acts is explained in the following passage of the judgment of *Lord Selborne* : 'Although no exact site or local limits may be prescribed by the terms of the authority for the acquisition of that land, yet being directly subsidiary to the general traffic of the line, it follows from the very nature of the purposes authorized that it must be land contiguous to the railway or some of its stations, the local situation of the whole line of railway being within certain limits of deviation defined by the Act.' It does not appear that the same principle has ever been applied in construing the powers of a sanitary authority for the disposal of sewage. Reference may be made to the following cases of this nature : *Attorney General* v. *Leeds Corporation* (2), *Price's Patent Candle Co. Ltd.* v. *London County Council* (3), *Attorney General* v. *Council of the Borough of Birmingham* (4). In all those case the sanitary authority was restrained from committing a nuisance in the disposal of sewage. It is true that in English Municipal Legislation there is a general provision requiring the powers of the sanitary authority to be exercised so as not to cause a nuisance. But these cases are instructive as showing the intention of the Legislature, at any rate in England, that such operations as the disposal of sewage must be carried out in such a way as not to cause a nuisance. There is no special clause in the Burma Municipal Act requiring the Committee to exercise its powers so as not to cause a nuisance. But neither is there any clause expressly excusing a nuisance. It is clear that the burden lies on the Municipal Committee to establish that the Legislature intended to take away the private rights of individuals. They must show that such an intention appears either by express words or by necessary implication. He (the Trial Judge) suggested that the area set apart for the purpose should be extensive enough to have a free space of 50 yards separating the actual depot from neighbouring buildings. It seems probable that if the Municipal Committee had taken up a sufficient area of land for this purpose at the out-set, no question of nuisance from this particular method of disposal would have arisen. Adopting the language of *Lord Seborne* in the *Metropoliton Aylum District* v. *Hill* (5) I would hold that there is no evidence on the face of the Municipal Act that the Legislature supposed it to be impossible for the effectual disposal of night soil to be carried out some where and under some circumstances without creating a nuisance.

" No stress is now laid upon the fact that the night soil depot was established some years before the plaintiff company occupied a plot of land adjacent thereto

(1) 11 App. Cas. 45.
(2) 5 Ch. App. 583.
(3) (1898) 2 Ch. 526-
(4) 4 K. & J. 521.
(5) 6 App. Cas. 193.

and built quarters thereon for the members of their staff. In *Truman's Case* (1). *Lord Halsbury* observed that the old notion of people losing their rights of complaint because they come to a nuisance has long since been exploded."

In an action for an injunction against a *Taluk Board* directing it to lop off the branches of certain trees which spread over the plaintiff's land. *Held* that the action could not be maintained (*i*) as the *Taluk Board* was under an obligatory duty to plant and preserve trees on the sides of public roads (*ii*) as no carelessness or negligence in the discharge of its duties was proved and (*iii*) the omission to remove the branches only amounted to a non-feasance for which no action lay at the instance of a private individual (*2*). In the above case the Court observed : "The main argument for the appellant was that, although the original act was done properly, the *Taluk Board* is under liability to see that the result of that act do not injuriously affect private rights. *Gaekwar of Baroda* v. *Gandhi Kachrabai* (2), which was relied on, only lays down that in exercising a duty, a public body should see that as little damage as possible is done to private individuals. In *Sankara Vadivelu Pillai* v. *Secretary of State for India in Council* (3), it was held that the duty was not obligatory on the Government to provide a bye wash and that, therefore, in performing this self-imposed task the Government was bound to have respected private rights. It is not necessary to say whether this view of the functions of the Government is right or not. In our opinion those decisions are not applicable to the present case. As the learned Advocate General contended, before fastening responsibility upon a public body for acts done by it, the first thing is to ascertain whether the act complained of was done in the discharge of a permissive right or of a compulsory duty. If corporations have been authorized to perform certain function not solely in the interests of the public, their liability may not differ much from the liability of private individuals. But where a legislature imposes a statutory obligation on a public body, the duty *prima facie* is imposed in the interests of the public and private individuals are expected to submit themselves to some inconvenience in order that the general convenience of the public may be furthered." In *Geddis* v. *Proprietors of Bann Reservoir* (4). *Lord Hatherly* stated : "If a company, in the position of the defendants there, has done nothing but that which the Act authorised (5)—nay in a sense be said to

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(1) 11 App. Cas. 45.
(2) 27 B. 344.
(3) 28 M. 72=15 M. L. J. 32.
(4) 3 A. C. 430 (438).
(5) In *National Telegraph Co.* v. *Baker*, (1893) 2 Ch. 186 at p. 203, *Kekewich J.* said : "The defendants are expressly authorised to use electrical power, and the Legislature must be taken to have contemplated it, and to have condoned by anticipation any mischief arising from the reasonable use of such power. A distinction was endeavoured to be made between cases where extra-ordinary powers are directly sanctioned by the Legislature, and those where it is left to some other authority (in this instance the Board of Trade) to determine whether, if at all, they may be brought into operation. It is within the competence of the Legislature to delegate its authority ; and when once that delegated authority has been properly exercised by the agent to whom it is entrusted, the sanction is that of the Legislature itself, just as much as if it had been expressed in the first instance in an Act of Parliament."

have directed and if the damage which arises therefrom, is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation." Where the acts of a corporation is permissive, there the rights of the private parties must be respected (1). But public corporations to which an obligation to keep roads and bridges in repair has been transferred are liable to an action in respect of mere non-feasance, unless the legislature has shewn an intention to impose such liability upon them (2). In *Tregellas* v. *London County Council* (3), a suit was brought against the London County Council and the complaint was that, by the neglect of the council to lop off branches of tress plaintiff suffered injury. In that case there was no duty cast upon the Council to plant and preserve trees. Still *Lord Russel of Killowen, C. J.* held that because the failure to lop off the branches was only non-feasance no action lay against the county council. It must be taken now as well established that for mere non-feasance, no action for damage will lie against a public body (4). In *Moul* v. *Telling Ltd.* & *Croydon Corporation* (5), the corporation was charged with the duty of woodpaving roads. After 17 years, the wood blocks swelled and bulged and owing to the obstructions caused by such bulging an accident happened. *Avory and Lush JJ.* held that it was not a case of mis-feasance, but only one of non-feasance, namely neglect to repair the highway, and held that the corporation was not liable.

To obtain an injunction to restrain the commission of a prospective nuisance it is necessary to show a strong case of probability that the apprehended mischief will in fact arise (6).

Railway Company, liability of, for fire caused by sparks.— A Railway Company which is authorised to run Locomotive Engines on the railway line under statutory powers given to it, is not liable, without proof of negligence, for damages caused by fire from sparks which have escaped from its engines in the ordinary and normal use of their railway, if the Company takes all reasonable precaution to provide against such fire by the use of engines of the best construction fitted with fire-arrester and perforated dampers (7) In the above case in delivering the judgment *Mitter J.* said : "It is contended on the other hand, on behalf of the opposite party that it was no defence that all possible care and sklll had been used in the construction of the engines to prevent

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(1) *Aiyasami Aiyar* v. *District Board of Tanjore*, 31 M. 117 ; see also *Canadian Pacific Ry. Co.* v. *Parke*, (1899) A. C. 535.

(2) *Municipality of Pictou* v. *Geldest*, (1893) A. C. 524 ; see also *Cowley* v. *Newmarket* (1892) A. C. 345 ; *Sanitary Com.* v. *Orfila*, 15 App. Cas. 411.

(3) 14 T. L. R. 55.

(4) *Municipal Council* of *Sydney* v. *Bourke*, (1895) A. C. 433 ; *Earl of Harrington* v. *Derby Corporation*, (1905) 1 Ch. 205.

(5) (1918) 119 L T, 318=82 J. P. 283.

(6) *Anandrao* v. *President*, 89 Ind. Cas. 929.

(7) *Secretary of State* v. *Kali Brahmo Chatterjee*, 33 C. W. N. 50.

the escape of sparks, and the burden was on the Railway Company to show that there was no negligience on their part. In support of this contention reference has been made to *Powell* v. *Fall* (1) and to *Smith* v. *South Western Railway Company* (2).

"In the case of *Powell* v. *Fall* (1), the defendant was held liable for damage caused by the escape of fire from locomotive steam engines used by them, and, it is true, that it was held to be no defence that all possible care and skill had been used in the construction and management of these engines to prevent the escape of sparks. But the fact which distinguishes the present case from that, is that in that case the engine was not used under any statutory authority which granted any protection against the ordinary rule of liability at common law. The facts of the case of *Smith* v. *London and South Western Railway Company* (3) are distinguishable from the facts of the present case."

"The true rule applicable to the present case is that which had been laid down in the case of *Vaughan* v. *Taff Vale Railway Company* (4) where the defendant-company having statutory authority to use locomotive steam engines was held not liable for a fire caused by an escape of the sparks, it being proved that the engines were constructed with all due care and skill and that it was wholly impossible to prevent the escape of sparkes. At common law it would have been an actionable nuisance to use engines which were such a source of danger; and, it would have been no defence that they had been made as safe as they could be. See *Jones* v. *Festiniog Railway Company* (5). This last case is of the same type of cases as *Powell* v. *Fall* (6) above referred to where the engines were not run under some statutory authority. Statutory protection is, however, possessed by Railway Companies in respect of various nuisances which are necessarily incident to the management of their business. *e.g.*, noise and vibration. See *Hammersmith Railway Company* v. *Brand* (7) and *London Brighton Railway Co.*, v. *Truman* (8).

"The case of *Powell* v. *Fall* (6) relied on by the learned Advocate for the opposite party lays down this principle that where the defendants make use of locomotive engines without having obtained the necessary authority of the law and the Plaintiff suffers damage by reason of fire proceeding from the same they are liable though not guilty of any negligence in the management of the engines and the case of *Vaughan* v. *Tuffvale Railway Company* (9), illustrates the rule that in the same case they would not have been liable had they had the proper authority. This latter case was followed by the Privy Council in *Canadian Pacific Railway Co.*, v. *Roy* (10), where their Lordships of the Judicial Committee of the Privy Council laid it down that a Railway Company authorised by Statute to carry on its railway under-

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(1) L. L. 5 Q. B. D. 597.
(2) L. R. 6 C. P. 14.
(3) L. R. 6 C. P. 14.
(4) 5 H. & N. 669.
(5) L. R. 3 Q. B. 733.
(6) L. R. 5 Q. B. D. 597
(7) 4 H. L. 171.
(8) L. R. 11 A. C. 45
(9) 5 H. & N. 679.
(10) (1902) A, C. 220 (P. C.)

taking in the place and by the means adopted, is not responsible in damages for injury not caused by negligence but by the ordinary and normal use of its railway or, in other words, by proper execution of the power conferred by statute.....In poking the fire the servants of the company did nothing more than what was necessary for the running of the train and if notwithstanding all precautions known to science taken by the Railway Company to prevant damage by fire occurring the sparks were emitted, the company cannot be held liable. This principle has been lucidly expounded by *Lord Hatherly* in the case of *Geddis* v. *Proprietors of Bann Reservoir* (1) thus :—'If a company, in the position of the Defendants there has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers. My Lords, I say the proper mode of executing those powers because it appears to me that it is very neatly and appositely put by *Mr. Baron Fitzgerald*, in giving his judgment in the Court of Exchequer Chamber, in this form. *Mr. Baron Ftizgerald* says : 'The substantial question raised on the pleading in the first and second counts of the declaration, appears to me to be whether these acts of the defendants were done in a due exercise of their authority, under the local and personal statute which has been mentioned, without negligence.' The view which I take is supported by the case of *Port Glasgow and Newark Sail Cloth Company* v. *Caledonian Railway* (2), in which it was held : That the legislature by authorizing the use of steam engines or railways, has impliedly indemnified Railway Companies against the consequence of the use of such engines, provided they are of the best construction, and that the proper safeguards are used for minimising the risk of fire damage. I think this rule must be made absolute.

"I fully sympathise with the Plaintiff in his distress—in the loss of his house by fire but I have to administer the law as I find it. I am convinced that the principle for which the Secretary of State contends is supported by English jurisprudence by which courts in India are governed in all cases in which there is no codified law. In England, however, the Railway Fires Act of 1905 (5 Ed. 7 C. 11) (4) has been enacted ; this Act has to some extent altered the law as laid down in *Vaughan* v. *Taffvale Railway Co.*, (4) for it provides that the Railway Company shall by liable, notwithstanding their statutory authority to the extent of £ 100 at the most for damages done to

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(1) *L.* R. 3 A. C. 430, 438.
(2) (1893) W. N. 29.
(3) Vide *Att. Gen.* v. *Great Western Ry.*, 93 L. J. K. B. 524.
(4) 5 H, & N 629.

agricultural land or crops by the escape of sparks and cinders from locomotive engines, but there is no such legislation here in India and the rule in the leading case of *Vaughan* v. *Tuffvale Railway* (1) must govern the present case."

So also persons whose property has been affected by vibration, sparks, noise or smoke incident to the proper working of a Railway Company, have no remedy in law apart from that provided in the statute (2).

CHAPTER XX.

Nuisance to natural rights etc.,—Injunction against.

Natural rights.—Natural rights are those rights which supplement the direct rights of ownership by imposing duties on other persons. Thus every owner of land has *prima facie* the right o prevent his neighburs from polluting the air passing over his land, and from disturbing, diminishing or polluting the water flowing through his land ; he is also entitled to so much support from his neighbour's land as is necessary to keep his own land at its natural level. These are called natural rights, as opposed to acquired rights, such as easements, *profits a pendre*, franchise etc. (3). Such rights need not be acquired at all and are not so far, the subject of the aquisitive prescription. Such rights require no age to ripen them (4). "Besides the ordinary rights of property" says *Mr. Mitter* "which are determined by the boundaries of the land, there are certain accessorial rights, incident to ownership of land, which entitle the owner to enjoy the natural advantages arising from the situation or position of the land in relation to other lands in its vicinity. The right of every owner of land that such land in its natural condition shall have the support (vertical or lateral) naturally rendered by the subjacent minerals and adjacent soil of another person, the right of the owner of higher land that the fall of its surplus rain-water upon the adjacent lower ground shall not be obstructed by the owner of the latter, the right of every riparian owner to the uninterrupted flow (subject to lawful use by others) of a natural stream in its natural state, are when recognised by custom or the law of the land, instances of such accessorial rights. These rights, which are very like easements proper, are generally called, 'natural rights,' and are sometimes described as natural 'easement' (5)". So these can be described as "rights incidental to the ownership of immoveable property (6)."

Nuisance to natural rights etc, General Principles.—Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruc-

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(1) 5 H. & N. 679.
(2) Kerr on Injunction p. 144.
(3) Byrne's Law Dictionary.
(4) Mitra's Limitation and Prescription p. 8.
(5) Mitter T. L. L The Law of Prescription and Easement pp. 470, 471 citing *Dalton* v. *Angus*, 6 App. Cas. 740.
(6) Vide Statement of Objects and Reasons to the Indian Easement Bill.

tion to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any public park, square, street, or highway (1). But no parties can be enjoined as for the commission of a nuisance because they are carrying on protracted litigation thereby disturbing the public peace (2). Matters in a natural state do not constitute nuisance in law, for instance, a swamp from which malaria is exhaled causing sickness in the neighbourhood. But when the party in possession does any act upon the land which increases the effect he becomes liable (1).

Nuisance to a dwelling house and place of business, etc.—Generai Principle.—The foundation of the jurisdiction in Equity to interfere by injunction is the existence of an injury to property of such a nature as to render the property in a material degree unsuitable for the purposes to which it is applied, or to lessen considerably the enjoyment of that property. Such an injury is considered by the Court to be incapable of measurement in damages (3). The law may be regarded as settled that when a business, although lawful in itself becomes obnoxious to neighbouring dwellings and renders their enjoyment uncomfortable, whether by smoke, cinders, noise, offensive odours, noxious gases or otherwise, the carrying on of such business is a nuisance which a Court of Equity will restrain. Nor is it necessary that the nuisance be injurious to health to warrant the interference; but mere noise will, in a proper case, suffice to justify a Court of Equity in interfering (4), and relief has been granted against the ringing of bells in a church in such a manner as to annoy a neighbouring resident (5). It is not a sufficient defence to an action for an injunction to restrain a nuisance to prove that the nuisance is caused by a perfectly reasonable use of the defendant's property (6). The defendant, who was a hotel proprietor, placed in his kitchen and used in the course of his business a large cooking range, with a shaft for hot air, which interfered with the comfort of the plaintiff's house by over-heating his wine cellor: *Held* that although the use by the defendant of the range and shaft was perfectly reasonable, the plaintiff was entitled to an injunction to restrain the nuisance caused thereby to him (7). But it would be wrong to enjoin a company or an individual from permitting that to be done which is really beyond his control—not beyond his control in this sense, that there is a *vis major* or an act of God paramount—but beyond his control in the sense that he cannot by any precaution or by any works with reasonable certainty prevent that happening which all contemplate as likely to happen (8). The Court will restrain excavations which threaten damages to

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(1) Spelling on Injunction etc, § 373.
(2) *People* v. *Albany*, 5 Lans. (N. Y.), 25.
(3) *Jackson* v. *Newcastle* (Duke) 3 De. G. J. & S. 275.
(4) *White* v. *Cohen*, 1 Drew. 313.
(5) *Soltu* v. *De. Held*, 2 Sim. N. S. 133; High on Injunction § 772.
(6) *Reinhardt* v. *Montasi*, 58 L. J. Ch. 787=42 Ch. D. 685.
(7) *Ibid*; see also *Broder* v. *Saillard*, 2 Ch. D. 692.
(8) *Evans* v. *Manchester, Sheffield and Linconshire, Ry.* 57 L. J. Ch. 153=36 Ch. D. 639.

adjoining houses, though the actual resulting damage may be small (1). So where a nuisance is not temporary or trifling, but is likely to be serious and to lessen the value of the estate an injunction will be granted (2). But the Court will not restrain the erection of buildings which merely prevent the goods displayed in a shop from being seen from places whence they would have previously been seen (3). The fact that the nuisance is not perpetual, but will only recur occasionally, and then but for a short period, will not avail the defendant if it be an unmistakeable nuisance (4).

Where loss of health, destruction of business and irreparable injury to property will result from the obnoxious erections, equity will not hesitate to interfere. Thus, the burning of bricks so near a dwelling as to expose the premises to danger from fire and imperil the health of the inmates (5), or the erection of a chandlery (6); or of a slaughter house (7), or of a livery stable (8), or of a cemetry (9), or the operating of lime kilns (10), or of a bone factory and rendering establishment (11), or of gas works (12), or cement works (13), or of a fertilizer factory, (14), or of a carpet cleaning establishment (15), or of a planning mill (16), if so near a residence as to imperil the health of its inmates, will be enjoined (17). Mere smoke or disagreeable odours, although not noxious, may be sufficient ground for the interference of equity. So offensive noises may afford ground for relief, the main question in all such cases being whether the annoyance is such as materially interferes with the ordinary comfort of human existence (18).

In *St. Helen's Smelting Co.* v. *Tipping* (19), an action was brought by the plaintiff to recover from the defendants damages for injuries done to their trees and crops by noxious gases, vapours, and other noxious matter from their works. The cause was tried before *Mr. Justice Mellor* at Liverpool when the plaintiff was examined and spoke distinctly to the damage done to his plantations, and to the very unpleasant nature of the vapour, which when the wind was in a particular direction, affected persons as well as plants in the grounds. On the part of the defendant, evidence was called to show that the whole neighbourhood was studded with manufactures and tall chimneys, and there were some alkali works close by the defendant's works, that the smoke from

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(1) *Dent* v. *Auction Mart Co.*, 35 L. J. Ch. 555.

(2) *Goldsmid* v. *Tunbridge Wells*, 35 L. J. Ch 382.

(3) *Smith* v *Owen*, 35 L. J. Ch. 317.

(4) High on Injunction § 772.

(5) *Walter* v. *Selfi*, 4 De. G. & Sim. 315; *White* v. *Jameson*, L. R. 18 Eq. 303.

(6) *Howard* v. *Lee*, 3 Sand. 281.

(7) *Rex* v. *Cross*, 2 Car. & P. 484.

(8) *Coker* v. *Birge*, 9 Ga. 425.

( ) *Jung* v. *Neraz*, 71 Tex. 396.

(10) *Hutchin's* v. *Smith*, 63 Barb. 251.

(11) *Meigs* v. *Lister*, S. C. E. Green 199.

(12) *Imperial Gas. Co.* v. *Broadbent*; 7 H. L. 600.

(13) *Umfreville* v. *Johnson*, L. R. 10 Ch. App. 580.

(14) *Evans* v. *Reading*, 160 Pa. St. 209.

(15) *Rodenlauson* v *Craven*, 141 Pa. St. 546.

(16) *Rogers* v. *Week Lumber Co.* 117 Wir. 5.

(17) High on Injunction § 773.

(18) *Crump* v. *Lambert*. L. R. 3 Eq 409.

(19) 11 H. L. C. 642=35 L. J. Q. B. 66=145 R. R. 348.

one was quite as injurious as the smoke from the other, that the smoke of both sometimes united, and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendants' works existed before the plaintiff bought the property was also relied on. The learned Judge told the jury that an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbours; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, arising from noxious vapours, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with. The verdict of the jury was entered for the plaintiff and the damages were assessed. Leave was given to appeal, and the case was carried to the exchequer chamber, where the judgment was affirmed. An appeal was then brought to the House of Lords. *Lord Chancellor, Lord Westbury* in delivering his judgment said: "My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no grouud for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a

very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property. Now in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June 1860. In the month of September, 1860, very extensive smelting operations began on the property of the present appellants, in their works at St. Helens'. Of the effect of the vapours exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

"My Lords, the action has been brought upon that, and the jurors have found the existence of the injury; and the only ground upon which your Lordships are asked to set aside that verdict, and to direct a new trial, is this, that the whole neighbourhood where these copper smelting works are carried is a neighbourhood more, or less devoted to manufacturing purposes of a similar kind, and therefore it is said that, in as much as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My Lords, I apprehend that that is not the meaning of the words 'suitable,' or the meaning of the word 'convenient' which has been used as applicable to the subject. The word 'suitable' unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property. Of, course, my Lords, I except cases where any prescriptive right has been acquired by lengthened user of the place. On these grounds, therefore,.....I advise your Lordship to affirm the decision of the Court below....." In the same case *Lord Cranworth* said: "In stating what I always understood the proper question to be, I cannot do better than adopt the language of *Mr. Justice Mellor.* He says, 'It must be plain, that persons using a lime-kiln, or other works which emit noxious vapours, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law a convenient place.' I always understood that to be so; but in truth, as was observed in one of the cases by the learned Judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property. I perfetcly well

remember, when I had the honour of being one of the Barons of the Court, of Exchequer, trying a case in the county of Durham, where there was an action for injury arising from smoke, in the town of Shields. It was proved incontestably that smoke did come and in some degree interfere with a certain person ; but I said, 'you must look at it not with a view to the question whether abstractly that quantity of smoke was a nuisance but whether it was a nuisance to a person living in the town of Shields ; ' because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance." *Lord Wenslydale* added : "Everything must be looked at from a reasonable point of view ; therefore the law does not regard trifling and small incon veniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected."

"That doctrine," *Lord Lindley* says (1), "as stated in *City of London Brewery Co.* v. *Tenant* (2) is that generally speaking an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a ware house, a shop, or other place of business. The expressions, 'the ordinary notions of mankind,' 'comfortable use and enjoyment,' and 'beneficial use and occupation,' introduce elements of uncertainty ; but similar uncertainty has always existed or exists still in all cases of nuisance, and in this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement (3)."

Natural right to support.—The right of support to land is either a natural right or an easement. Every proprietor of land is entitled to so much lateral support from his neighbour's land as is necessary to keep his soil at its natural level, that is, his neighbour must not excavate so close to the boundary as to cause his land to fall or subside. Similarly, if one person is entitled to the surface of land, and the land beneath the surface belongs to another proprietor, the owner of the surface is entitled to vertical support as against him ; that is, the owner of the subjacent land must not cause subsidence of the surface unless he has an easemant entitling him to do. This natural right to support, whether lateral or vertical, does not extend to the case of land, the right of which has been increased by buildings, unless it can be shown that the land could have sunk if there had been no buildings on it (4), The right to extraordinary support, that is, to the support of land on which buildings have been erected, and which consequently, requires more support than it did in its natural condition, is an easement. "It seems that a man who has land closely adjoining my land, cannot dig his land so near mine that mine

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(1) *Colls* v. *Home and Colonial Stores Ltd*, (1904) A. C. 179 (208).
(2) L. R. 6 Ch. 806.
(3) *Kine* v. *Jolly*, (1905) 1 Ch. 480.
(4) Byrne's law Dictionary p. 855 ; ee also the Indian Easements Act, s. 7, illustration (e).

would fall into his pit ; and an action brought for such an act would lie (1)." "It is true" said *Lord Tenterden* (2), that "if my land adjoins that of another, and I have not by building, increased the weight upon my soil, and my neighbour digs in his land, so as to occasion mine to fall in, he may be liable to an action."

In *Humphries* v. *Brogden* (3), *Lord Campbell C. J.* said : "Where portions of the freehold, lying one over another perpendicularly, belong to different individuals, and constitute (as it were) separate closes, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined. But, in the case of adjoining closes which belong respectively to different persons from the surface to the centre of the earth, the law of England has long settled the degree of lateral support which each may claim from the other : and the principle upon which this rests may guide us to a safe solution of the question now before us. In Rolle's Abridgment, 564, tit. Trespass (i), pl. 1. it is said : 'If A, seised in fee of copyhold land next adjoining land of B, erect a new house on his copyhold land' (I may remark that the circumstance of A's land being copyhold is wholly immaterial), 'and part of the house is erected on the confines of his land next adjoining the land of B, if B afterwards digs his land near to the foundation of the house of A, but not touching the land of A, whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A against B, because this was the fault of A himself that he built his house so near to the land of B, for he could not by his act hinder B from making the most profitable use of B's own land : Easter Term, 15 Car. B. R. *Wilde* v. *Ministerly*. But, *semble* that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit ; and for this, if an action were brought, it would lie.' This doctrine is recognised by *Lord C. B. Comyns*, Com. Dig. Action upon the case for a nuisance (A) ; by *Lord Tenterden*, in *Wyatt* v. *Harrison* (4) and by other eminent Judges. It stands on natural justice, and is essential to the protection and enjoyment of the property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the precept, *Sic utere tuo ut alie num non lædas*. As is well observed by a modern writer : 'If the neighbouring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone' Gale on Easement, p. 216 (5). This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant (6), but is a right of property passing with the soil (4). If the owner of two adjoining closes

(1) Rolle's Abridgment, Vol. II, 564, Trespass.
(2) *Wyatt Harrison* 3 B & Ad. 876 =37 R. R. 566.
(3) 12 Q. B. 739=76 R. R. 402.
(4) 3 B & Ad. 871 876=37 R. R, 566.
(5) *7th Ed.*
(6) *Dalton* v. *Angus*, (1881) 6 App. Cas. 792.
(7) See *Back house*, v. *Bonomi*, (1861) Tr. 9 H. L. C. 503 ; *Lamb* v. *Walker*, 3 Q. B. D. 401 ; *Darley* v. *Mitchell*, 11 App. Cas. 137.

conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years, or any longer period. *Pari ratione*, where there are separate freeholds from the surface of the land and the minerals belonging to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings and in its natural state, is entitled to have it supported by subjacent mineral strata. Those strata may of course be removed by the owner of them, so that a sufficient support for the surface is left ; but if the surface subsides and is injured by the removal of these strata, although, on the supposition that the surface and the mineral belong to the same owner, the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface close, it cannot be securely enjoyed as property ; and under certain circumstances, as where the mineral strata approach the surface and are of great thickness, it might be entirely destroyed. We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation or covenant, must be laid down generally without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule ; and the attempt to introduce them would lead to uncertainty and litigation ; greater inconvenience cannot arise from this rule, in any case, than that which may be experienced where the surface belongs to an owner, and the mineral, to another, who cannot take any portion of it without the consent of the owner of the surface. In such cases a hope of reciprocal advantage will bring about a compromise, advantageous to the parties and to the public. Something has been said of a right to a reasonable support for the surface : but we cannot measure out degrees to which the right may extend ; and the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level (1)." But the obligation to support a particular property only binds so much of the adjoining land as is necessary to sustain such property in its natural state ; so that no man can sue for damages caused to his property by the excavation of land not immediately adjoining it, if the damage would not have resulted but for the excavation of the intervening land (2).

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(1) See also per *Wood V. C.* in *Hunt* v. *Peake*, 1 Johns. 705 ; *North Eastern Ry.* v. *Elliot*, De G. F & J. 423=10 H. L. C. 33 ; *Angus* v. *Dalton*, 4 Q. B. D. 167, 184, 191 ; *Dalton* v. *Angus*, L. R. 6 App. Cas. 79 ; *Bonomi* v. *Back house*, E. B & E. 655 ; *Harris* v. *Ryding*, 5 M & W. 60.

(2) *Corporation of Birmingham* v. *Allen*, (1877) L. R. 6 Ch. D. 284 ; Gale on Easement 8th Ed. 373.

When the owner of the whole property severs it by a conveyance either of the surface, reserving the mines, or of the mines, reserving the surface, he intends, unless the contrary be made to appear by plain words, that the land shall be supported not merely in its original condition suitable to any of the ordinary uses necessary or incidental to its reasonable enjoyment (1). But the natural right does not extend to have the support of any under ground water which may be in the soil, so as to prevent the adjoining owner from draining his soil, if for any reason it becomes necessary or convenient for him to do so ; the pressure of the water in the soil being an accidental circumstance, the continuance of which the owner has no right to count upon (2). But this rule is not applicable to pitch or any other liquifying substance (3). A land owner has a right independently of prescription to the lateral support of his neighbour's land, so far as that is necessary to sustain his soil in its natural state, and also to compensation, for damage caused either to the land or to buildings upon it by the withdrawal of such support (4). But the right of the owner of land to the lateral support of his neighbour's land in not an absolute right, and the infringement of it is not a cause of action without appreaciable damage (5). Therefore where A dug a well near B's land which sank in consequence, and a building erected on it within twenty years fell, and it was proved that if the building had not been on B's land, the land would still have sunk, but the damage to B would have been inappreciable : *Held* that B had no right of action against A (6).

This right of support of the land surrounding a man's premises, unlike rights of property in general, is not infringed, for the purposes of a suit for tort, unless removing the soil cause damage (7) ; but damage being caused by the removal of support, a right of action arises. Accordingly to prove the removal of the lateral support of the plaintiff's land in its natural condition, to the plaintiff's damage, will make a *prima facie* case. (8). The owner of the surface of land does not by parting with the minerals under such land lose his common law right of support, and in the absence of express power, or necessary implication in the conveyance, the grantee of the minerals has no right to work them so as to let down the surface. This obligation is not affected by a provision that compensation shall be payable for damage to the surface (9). There is no right of action against the owner of a mine, or his lessee, in respect of damage caused by the working of mine by a predecessor in title, although the actual subsidence which causes the damage occurs when

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(1) *Richard* v. *Jenkins*, 18 L. T. N. S. 437 ; Bigelow on Torts p. 273.

(2) *Corporation of Birmingham* v. *Allen*, L. R. 6 Ch. D. 284 (293) ; Gale on Easement p. 373.

(3) *Trinidad* v. *Ambard*, (1899) A. C. 954.

(4) *Hunt* v. *Peake*, 29 L. J. Ch. 785.

(5) *Smith* v. *Thackerah*, 35 L. J. C. P. 276.

(6) *Ibid.*

(7) *Bonomi* v. *Backhouse*, El. B & E. 622, 646 ; S. C. 9 H. L. Cas. 503 ; *Darley Colliery Co.* v. *Mitchell*, 11 App. Cas. 127.

(8) Bigelow on Torts § 266.

(9) *New Sharlton Collieries Co*, v. *Westmoreland* (Earl), 82 L. T. 725 ; see also *Butterknowle Colliery Co.* v. *Bishop Auck land*, (1906) A. C. 305.

sach owner or lessee is in possesoion (1). The surface owner has no cause of action against the owner of the subjacent stratum for the removal thereof until actual damage is caused. The surface owner may recover for that damage as and when it occurs, and the statute of limitations is no bar to the recovery of damages, however long a time has elapsed since the removal. Depreciation in selling value caused by apprehension of future mischief gives no cause of action (2).

The right of support of land in its natural condition by adjacent land is a natural right and incidental to the owner of property. Any change in the land supported which converts its natural character into an artificial character such as would be caused by placing buildings upon it or excavating it would obviously impose a changed or increased burden on the adjoining land the effect of which would not alter or increase the previous obligation unless the existence of an easement could be proved (3). In *Darley Main Colliery* v. *Thomas Wilfred Howe Mitchel* (4) *Lord Fitzgerald* stated the following propositions as what he considered to have been settled by authorities: "(*i*) That the owner of the surface has a natural legal right to the undisturbed enjoyment of that surface in the absence of any binding agreement to the contrary. (*ii*) That the owner of the subjacent minerals may excavate and remove them to the utmost extent, but should exercise that right so as not to disturb the lawful enjoyment of the owner of the surface. (*iii*) That the excavation and removal of the minerals does not *per se*, constitute any actionable invasion of the right of the owner of the surface, although subsequent events show that no adequate supports have been left to sustain the surface. (*iv*) But, that, when in consequence of not having or providing sufficient support, a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface and constitutes his cause of action (5)". In the same case *Lord Brawwell* observed: "It cannot be said that the act of excavation is unlawful. A contract to do it could be enforced. No injunction against it could be obtained unless the injuries were imminent and certain."

Right to natural support protected.—The right to lateral support is regarded as an incident to the ownership of land, and its infringement has been considered as a nuisance which equity may enjoin. Thus, the removal and excavation of earth upon adjacent premises in such manner as to endanger the stability of complainant's soil and fences, by removing their lateral support, will be enjoined (6). There is a *prima facie* inference at common law upon every demise of mineral or other subjacent *strata* where the surface is retained by the lessor, that the lessor, is demising them in such a manner as is consistent with the

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(1) *Hall* v. *Norfolk*, (1900) 2 Ch. 193; *Greenwell* v. *Lord Beech burn*, (1897) 2 Q. B. 165.

(2) *West Leigh Colliery Co*, v. *Tunnicliffe*, (1908) A. C. 27.

(3) *Bhagwan* v. *Bibi Iqbal*. 118 Ind, Cas. 715=A. I. R. 1929 A. 885.

(1) 11 App. Cas. 127.

(5) *Minus* v. *Davey*, A. I. R. 1933 Rang. 18.

(6) High on Injunction § 753.

retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *mode et forma*, and with the natural support which is possessed before the demise (1). In the above case enquiry was directed upon the principle just laid down with a view to an injunction (2). Where houses of the plaintiffs were injured by mining operations of the defendant in adjoining land, which would have caused the soil to subside without the additional weight of the houses, a decree was made for perpetual injunction and for compensation (3). In order to displace the common law right of support, there must be either express permission or clear implication. But where in the case of leases of an upper stratum and lower stratum an owner's right to support will be protected by an injunction when the interference with the right is of a substantial nature even though the pecuniary loss actually resulting from the defendant's wrongful acts is small. The Court will also interfere by injunction before subsidence has actually taken place if satisfied that injury is imminent and certain to result from the defendant's acts, also when the defendant claims the right to do acts which must inevitably cause a subsidence. Non-occurrence of actual damage therefore is not a ground for challenging the maintainability of a suit for injunction (4). In the case of *Corporation of Birmingham* v. *Allen* (5); *Sir George Jessel M. R.* said: "Now having so far dealt with the facts, let me consider the law. As I understand, the law was settled by the House of Lords, confirming the decision of the Court of Exchequer chamber in the case of *Backhouse* v. *Bonomi* (6), that every land owner in the kingdom has a right to the support of his land in its natural condition. It is not an easement; it is a right of property. That being so, if the plaintiff's land had been in its natural state, no doubt the defendants must not do anything to let that land slip or go down or subside. If they were doing an act which it could be proved to me by satisfactory expert evidence would necessarily have that effect, I have no doubt this Court would interfere by injunction on the ground upon which it always interferes; namely, to prevent irreparable damage when the damage is duly threatened. Of course they must have a much clearer and much stronger case to call for the interference of this Court by injunction where the damage is merely threatened and no damage has actually occurred, than when some damage has actually occurred, because in the one case you have no facts to go by, but only opinion, and in the other case you have actual facts to go by." The same view has also been taken by their Lordships of the Judicial Committee in the case of the *Trinidad Asphalt Co.* v.

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(1) *Dugdale* v. *Robertson*, 3 K. & J. 785=112 R. R. 349.

(2) *Ibid.*

(3) *Hilton* v. *Graville* (*Earl of*) Cr. & Ph. 283; see also *Durham County Council* v. *South Medomsley*, (1918) J. P. 343.

(4) *Tamluk Trading* v. *Nabadwip Chandra*, 59 C. 363=A. I. R. 1932 Cal. 542.

(5) 9 H. L. C. 503=34 L. J. Q. B. 181.

(6) 6 Ch. D. 284=46 L. J. Ch. 673.

Ambard (1), where *Lord Macnaghten* said: "Assuming that the plaintiffs were entitled to have their land in its natural state supported by the adjacent land belonging to *Ambard*, it would seem to follow as a matter of course that this right which the defendants have invaded should now be protected by injunction, and not the less so because in His Honour's view the damages that could be recovered at law would only be trifling." *Prima facie*, the owner of the surface has a right of support, and a lessee is not entitled to work a mine so as to cause a subsidence. The right to support will be protected by injunction, if the Court is satisfied that injury is imminent and certain to result from the defendant's acts. The Court will also interfere by injunction when the defendant claims the right to do acts which must inevitably cause a subsidence (2).

In order to displace the common law right of support, there must be either express permission or clear implication. But where in the case of leases of an upper stratum and lower stratum of coal it is knowledge common to the lessee of both strata that the lower stratum cannot be worked on the usual and most approved system without causing subsidence of the upper stratum, and provision is made for indemnity against physical damage caused by such working, an injunction will not be granted to prevent the working of the lower stratum (3). So also where the evidence showed that a seam of coal in a mine could not be worked without causing subsidence of the surface, and that this fact must have beenknown to the parties and their agents, the Court refused to grant an injunction restraining the lessees from working the coal so as to cause a subsidence of the surface (4). But to a grant or demise of the surface, the right to support is incident, and cannot be taken away except by a clear indication in the instrument of such an interest (5). And even when though mines cannot be worked at all without causing the surface to subside, the owner of the surface has an absolute right to have his surface supported, and is entitled to restrain the owner of the mines from letting it down, unless authorized to do so by the Legislature (6); and a custom entitling the lord in his workings to let down the surface, though proved, is bad and void (7). Upon a bill filed by a railway company to restrain the defendant from removing the coal or water from underneath the land occupied by the plaintiff's line of railway, and necessary to the stability of the Victoria Bridge over the River Wear, *Vice-chancellor Sir W. P. Wood* held (and *Lord Chancellor Campbell* affirmed the decision), that, upon a conveyance of land for the express purpose of building, the right of working minerals being reserved to the vendor, the purcheser is entitled to support for his

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(1) (1899) A. C. 594=68 L. J. P. C. 114.

(2) *Ramjas Agarwalla* v. *Broja Mohan Singh*, 20 C. L. J. 538.

(3) *Butterley Coal* v. *New Hucknall Colliery*, (1910) A. C. 381.

(4) *Locker Lampson* v. *Starely Colliery*, 25 T. L. R. 130.

(5) *Proud* v. *Bates*, 10 Jur. N. S. 441.

(6) *Wakefield* v. *Buccleuch*, 36 L. J. Ch. 763; *Buccleuch* v. *Wakefield* 4 H. L. 377; *Ramjas* v. *Brojomohan*, 19 C. W. N. 887; see also s. 54 of the Specific Relief Act illus. (2); *Ramkrishna* v. *Setharam*, 37 M. 527; *Ramkrishna* v. *Ramnatha* 1929 M. 819.

(7) *Ibid*; Joyce on Doctrines 73.

buildings, not only from the underlying but adjacent soil, even though the conveyance was under the compulsory powers of the Railway Act, and an injunction was granted restraining the defendant from removing coal or other minerals from underneath the land purchased, or within twenty yards of any masonry or building belonging to the plaintiffs (1). And although, as between conterminous owners, the lateral support of a neighbour's soil can only be claimed for the surface of the land in its natural state, yet where a person sells land to another to be used for an express purpose he will not be allowed to derogate from his own grant by doing anything in the adjacent soil which unfits the land sold for the purpose for which it was sold, and it makes no difference that the land so sold was taken away by compulsory powers (2). The right to support land in its natural state vertically by subjacent *strata* and laterally by the adjacent soil, is a right to which the owner of the surface is of common right *prima facie* entitled. The right of an owner of land to the support from adjacent or subjacent soil is not that the substance supporting his soil shall not be removed, but that the enjoyment of his land be not disturbed by the removal of his support (3). A suit for perpetual injunction restraining the defendant from removing the necessary lateral support to which the plaintiff's land is entitled is a suit in the nature of a *quia timet* action and the plaintiff, in order to succeed, must prove imminent danger of a substantial kind, or that the apprehended injury, if it does occur, will be irreparable. Therefore excavation and removal of the earth on his own land by a defendant, without leaving sufficient support to the adjoining plaintiff's land to enable it to remain in its natural state, does not *per se* constitute an actionable invasion of the latter's right ; and such an act to constitute a valid foundation for a claim by the adjoining plaintiff for damages must be coupled with actual damage or injury to his property. Where an act threatening danger to a person's land is such that injury will inevitably follow, the court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit. Where therefore a plaintiff files a suit for injunction against the defendant who has cut down the land near the common boundary the court should grant the injunction if it is proved that if the bank of

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(1) *North Eastern Ry. Co.* v. *Elliot*, 7 Jur. N. S. 6 ; Joyce on Injunctions p. 455.

(2) *North Eastern Railway Co.*, v. *Elliot*, 6 Jur. (N. S.) 817 ; Joyce on Injunction p. 455.

(3) *A. S. Minus* v. *E. F. Davey*, A. I. R. 1933 Rang. 18 ; see also *Bonomi* v. *Backhouse*, El. Bl. & El. 655 ; *Necklin* v. *Williams*, 10 Ex. 259=23 L. J. Ex. 335 ; *Back house* v. *Bonomi*, 9 H. L. C. 503 ; *Charles Dalton* v. *Henry Angus*, 6 App. Cas. 740 ; *Darley* v. *Thomas*, 11 App. Cas. 127 ; *Corporation* of *Birmingham* v. *Allen*, 6 Ch. D. 284. In the last case Jessel M. R. said : 'If the plaintiff's land had been in its natural state no doubt the defendants must not do any thing to let that land slip or go down or subside. If they were doing an act which it would be proved to me by satisfactory expert evidence would necessarily have that effect, I have no doubt that this court would interfere by injunction on the ground upon which it always interferes, namely, to prevent irreparable damage when damage is threatened."

the cuttingbe left as it is injury to the plaintiff's land will inevitably follow (1).

But the purchaser is not entitled to any additional support afforded by the accidental state in which the adjacent soil happens to be at the time of the purchase, however long it may have been in that state prior to the purchase, and therefore, where the owners of a drowned mine sold land to a railway company for the purpose of building a bridge, and the land sold derived additional support from the water in the mine, *Vice-Chanllor Sir W. S. Wood* held, that the railway company was not entitled to restrain him from pumping out the water, and restoring the mine to a working condition, although the mine had continued in its drowned state and the works had been abandoned for forty years prior to the purchase (2).

On a claim for an injunction the court has to consider not merely whether the plaintiff's legal right has been infringed or even materially infringed but also whether under all the circumstances of the case he ought to be granted an injunction as the proper and appropriate remedy for such infringement. Where the parties were relatives on bad terms and the suit for injunction was prompted by desire to cause injury to the defendant the court would not grant the relief (3).

Right to vertical light.—The right of every owner of land to so much light and air as pass vertically thereto is an ordinary right of property, based upon the maxim *enjus est solum, ejus est usque ad cælum et inferos* (4). From the maxim *enjus est solum ejus est usque ad cælum* it follows that a person has no right to erect a building on his own land which interferes with the due enjoyment of adjoining premises, and occasions damage thereto, either by over-hanging them, or by the flow of water from the roof and eaves upon them, unless, indeed, a legal right so to build has been conceded by grant or may be presumed by user (5). On this ground to place things projecting into the air over another's land is actionable (6). But, where one of two adjoining houses is built so as to protrude into or over the other, the protrusion may, by grant, reservation, or otherwise, be as of right (7). This is continually done at the present day in the case of buildings with cornices returned at the ends so as to project over the perpendicular boundary line of the next building (8), So projecting of one's cornice over another's land amounts to a trespass and such another is entitled to mandatory injunction without proof of special

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(1) *A. S. Minus* v. *E. F. Davey*, A. I. R. 1933. Rang. 18 ; *Bindubasini* v. *Jahnabi*, 24 C. 260 ; *Pattison* v. *Gilford*, 18 Eq. 259.

(2) *Ibid* ; Joyce on Injunction p. 455.

(3) *Ramchandra* v. *Raghubar*, 67 Ind. Cas. 299=4 U. P. L. R. (Lah.) 69 ; *Ghanasham* v. *Moraba*, 18 B. 474 (488).

(4) Mitra's Prescription & Easements p. 472. (He who possesses land possesses also that which is above it) ; Act V of 1882, s. 7 illus. (d).

(5) Broom's Legal Maxim p. 301.

(6) Gale on Easement p. 314 ; see also *Pickering* v. *Rudd*, 4 Camp. 219 ; *Fay* v. *Prentce*, 1 C. B. 22 ; *Martyr* v. *Lawrence*, 2 De. G. J. & S. 261.

(7) *Corbitt* v. *Hill*, L. R. 9 Eq. 671 ; *France's* v. *Hayward*, 22 Ch. D. 177 ; *Lay Boom* v. *Gridley*, (1892) 1 Ch. 53.

(8) Gale on Easements p. 314.

damage (1). So also every owner is under an obligation not to allow the boughs of tree to grow so as to over hang, or the roots of his tree to extend so as to penetrate his neighbour's land, to the detriment of the latter. In case of breach of such an obligation it is open to the court to grant a mandatory injunction for the removal of the nuisance under section 55 of the Specific Relief Act (2).

But save and except vertical light, an owner of a field has no right to have the sun's ray fall on it from every possible direction. There cannot be such a right, for if it were allowed the use and enjoyment of the adjoining fields by their owners would be very largely restricted (3). In this connection the following passage from the judgment of *Bramwell L. J.* in *Bryant* v. *Lefever* (4), may be cited with advantage: "What is then the right of land and its owner and occupier? It is to have all natural incidents and advantages as nature would produce them. There is a right to all the light and heat that would come, to all the rain that would fall, to all the wind that would blow—a right that the rain, which would pass over the land should not be stopped and made to fall on it, a right that the heat from the sun should not be stopped and reflected on it; a right that the wind should not be checked, but should be able to escape freely; and if it were possible that these rights were interfered with by one having no right, no doubt an action would lie. But then natural rights are subject to the rights of the adjoining owners, who for the benefit of the community, have and must have rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbours' rights to use their property in the various ways in which property is commonly and lawfully used. A hedge, a wall, a fruit tree, would each affect the land next to which it was planted or put. They would keep off some light, some air, some heat, some rain, when coming from one direction, and prevent the escape of air, of heat, of wind, of rain, when coming from the other: but no body could doubt that in such a case no action would lie."

The foundation of the jurisdiction in Equity to interfere by injunction is the existence of an injury to property of such a nature as to render the property in a material degree insuitable for the purposes to which it is applied, or to lessen considerably the enjoyment of that property. Such injury is considered by the Court to be incable of compensation in damages (5). But, semble, where

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(1) *Rama subhier* v. *Shenbagarat nam.* A. I. R. 1927 Mad. 357.

(2) *Vide* pp. 550-52 supra; see also *Lakshmi* v. *Tara Prosunna*, 8 C. W. N. 710; *Lemmon* v. *Webb*, (1895) App. Cas. 1; *Hari* v. *Shankar*, 19 B. 420; *Baten's case*, 9 Rep. 53 (54); *Norris* v. *Baker* 1 Rol. Rep. 393; *Kunhayya* v. *Bettaiya*, 3 Mys. L. J. 143; *Maung Po* v. *Ma Gyi*, 76 Ind. Cas. 812=2 Bur. L. J. 136; *Mahabali* v. *Manu*, 74 Ind. Cas. 828; *Bhudeb* v. *Kalachand*, 34 C. L. J. 315; *Behari Lal* v. *Ghisa Lal*, 24 A. 490=A. W. N. 1902, 169; *Vishnu Jagannath* v. *Vasudeo Raghunath*, 47 Ind Cas 629=20 Bom. L. R. 826; but see *Sameshwar* v. *Chunilal*, 57 Ind. Cas. 544=44 B. 605=22 Bom. L. R. 790; *Parsotam* v. *Gandrap* 17 B. 745.

(3) *Guman* v. *Umrao*, 75 Ind. Cas. 559=19 N. L. R. 191.

(4) 4 C. P. D. 172=48 L. J. C. P. 380=40 L. T. 579.

(5) *Jackson* v. *Newastle* (*Duke of*) 3 De. G. J. & S. 275.

the abridgment of light complained of does not materially interfere with the comfort of the persons complaining, and does not materially diminish the suitableness of the premises for the present purposes to which they are applied, the Court has no jurisdiction to interfere by injunction on the ground of a diminution of light which, having regard to a future possible destination of the property, may materially diminish its value (1).

Right to Air.—The right to the enjoyment of air is, generally speaking, at common law, governed by the same principles as those which regulate the passage of light (2). Every owner of land has the right that the air passing thereto shall not be unreasonably polluted by other persons (3). The law may be regarded as settled, that when a business, although lawful in itself, becomes obnoxious to neighbouring dwellings and renders their enjoyment uncomfortable, whether by smoke, cinders, noise, offensive odonrs, noxious gases or otherwise, the carrying on of such business is a nuisance which equity will restrain (4). Every owner of a house has also a right that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person (5). It may be observed here, that the right to a lateral passage of air, as well as to a flow of water, superadds a privilege to the ordinary rights of property, and is quite distinct from that right which every owner of a tenement, whether ancient or modern possesses to prevent his neighbour transmitting to him air or water in impure condition ; this right is one of the ordinary incidents of property, requiring no easement to support it, and can be counter-vailed only by the acquisition of an easement for that purpose by the party causing the nuisance (6). In *Ranchod Shamji* v. *Abdulabhai* (7), the plaintiff sued for the removal of a super-structure newly raised by the defendant on the open ground adjoining the back wall of the plaintiff's house, alleging that the said supers structure prevented the access of light and air coming to his house from over the ground, or in the alternative that such part of the super-structure be removed as had been raised by the defendant over and above the projecting beams inserted by the plaintiff in his own wall underneath his (plaintiff's) roof. The defendant denied that there was any open land as alleged close to the wall of the plaintiff's house and contended that the said land belonged to him ; that he had a right to use it as he chose and that on the plaintiff's request he permitted the plaintiff to open a *jali* (*lattice*) in the back wall of his house. In disallowing the injunction *Jenkins C. J.* said : "The plaintiff's beams overhang the defendant's soil, and the defendant has erected a building which overhang those beams. The Lower Appellate Court has granted a mandatory injunction directing the removal of the building. The sole question is whether the beams have given the plaintiff a right to the column

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(1) *Ibid*, Joyce on Injunction p. 425.
(2) Gale on Easements, 8th Ed. 338.
(3) The Indian Easements Act, 1882, s. 7 illus. (b).
(4) High on Injunction § 772.
(5) Illustration (e) to section 7 of the Indian Easements Act, 1882.
(6) Gale on Easements 8th Ed. p. 343; *Winstanley* v. *Lee*, 2 Swans. 239.
(7) 28 B. 428.

of air above them. The defendant being the owner of the soil is entitled *prima facie* to all above it, and in our opinion the diminution in his rights by reasons of the beams does not extend beyond the portrusion of the beams themselves: See *Corbett* v. *Hill* (1) and *Harunis* v. *De Prria* (2). The injunction must, therefore, be dissolved and the decree must be varied to that extent."

General principles of preventing nuisance to air, such as noise, smoke etc.—In *the Land Mortgage Bank of India* v. *Ahmedbhoy Habibhoy* (3), the plaintiffs are the owners of the two blocks of buildings at *Colaba* known as Grant Buildings, and they seek by their plaint to restrain the defendants as the owners of the mill lying immediately to the south of, and parallel to the said buildings, originally built by the Nicol Press and Manufacturing Company, from working or using the said mill so as to occasion nuisance to the plaintiffs, or any person occupying the said Grant Buildings by reason of (a) the noise made in the working of the engines, machinery and gear on the defendant's premises; (b) the discharge or escape of dust, fluff, cotton flakes or particles of cotton and of smoke from the defendant's premises; (c) the escape of noxious smells and odours from the said premises. The defendants by their written statement denied that the working of the mill caused any nuisance to the Grant Buildings; but urged that, even if it did, the plaintiffs are now debarred from seeking the relief claimed, in the plaint and subsequently at the raising of issues took the additional objection that the plaintiffs could not maintain the suit. In delivering the judgment of the original Court *Sarjent C. J.* said: "Now the evidence doubtless shows that the noise of the traffic in front is very considerable in the cotton season, and such as sometimes to overpower the noise of the mill in the front rooms, especially on the first floor; it is quite distinct in its character from that of machinery, and may possibly be regarded by some persons as the greater nuisance of the two while it lasts. But the question is not which is the greater nuisance during the cotton season, but whether the noise of the mill is in itself a nuisance; and remembering the noise in front is but little heard in the back rooms during the cotton season and that the noise of the mill is heard throughout the year, the latter may well be regarded by others as a serious nuisance quite independently of what may be thought of the nuisance in front during the cotton season.....The noise from the working of the mill had the character of a deep hum and drone, broken by the sound of the engine in the fourth division. It is distinctly audible in the back rooms on all floors. In the front rooms the noise on the first and second floors was to a great extent drowned by that of traffic in front. Indeed, on the first floor it could not be heard without close attention being laid on it, so great was the noise from the traffic. On the third floor, however, it was distinctly audible, overpowering the noise from the traffic. In the middle compartments it was quite audible

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(1) L. R. 9 Eq. 671.
(2) 33 Ch. D. 238 (260).
(3) 8 B. 35.

without listening for it, and distinct from that of the traffic. The impression produced on me was that such a noise lasting continuously throughout the day could not fail to affect seriously the comfort of most ordinary persons residing in divisions Nos 2, 3 and 4, and more especially on the second and third floor. This effect would, of course, be greatly enhanced out of the cotton season when the traffic in front is not going on. Upon the whole I am of opinion that the noise caused by the working of the mill has always constituted and still constitutes a nuisance to the occupants of divisions 2, 3 and 4. Passing to the question whether the smoke and cotton fluff which issue from the mill are a nuisance, it is to be remarked at the out-set that the two chimneys through which the smoke and fluff are emitted are so situated relatively to the Grant Buildings that it is when the wind flows from between south by west and west—south-west that the smoke and fluff would be carried directly towarads some part of the eastern block, and when it flows from between south by east and south-east by east, that they would be carried directly towards some part of the western block. But the observations taken at the Colaba Observatory show that it is only for four or five days in the year that the wind blows from between the two last mentioned quarters. Having regard to this circumstance and to the distance of the chimney from the western block, it is plain the smoke and fluff, although possibly carried towards the western block a few times in the year, could not amount to a nuisance. With respect, however, to the eastern block, it appears from the same observations that the wind undoubtedly blows for a great many days from between south by west and west south-west, altough the observations do not show the exact number of days ; for according to the note annexed to the diagram the fifty days during which the wind is said to blow from west south-west would include the days on which it blows between west by south and south-west by west. A great deal of evidence was given by the plaintiff to show that during the latter part of the monsoon of 1881 the smoke and fluff found their way into the back windows of the rooms, more especially in divisions 2, 3 and 4...However during the cold wheather season it is difficult to understand how smoke and fluff could possibly find their way, except very occasionally, into the Grant Buildings.....In this state of the authorities I feel myself bound to hold that the only cause of action on which the plaintiffs can at present rely in support of their claim for an injunction is the diminution of the value of their property owing to the working of the mill being a nuisance in respect of the four or five sets of rooms now vacant in divisions Nos. 2, 3 and 4. As to those rooms, the conclusions I have already arrived at with respect to the Divisions Nos. 2, 3 and 4 generally, are applicable, *viz.*, that the noise caused by the working of the mill always has constituted and still does (notwithstanding the double windows) constitute a legal nuisance, and also that the smoke and fluff (independent of the question as to the effect of the new contrivances introduced into the mill) also constitute a nuisance during the monsoon. The important question then arises, whether these conclusions as to the effect

of the working of the mill on the plaintiff's buildings is such as to enable them to ask for the preventive relief which the Court affords by injunction. Now it was contended by the defendants that, even assuming the nuisance had existed, it has ceased to do so since the changes and improvements introduced into the mill ; that no smoke of any importance had issued from the chimney since *Cardiff* coal had been used exclusively in the furnaces....However, since the hearing of the suit commenced, *Cardiff* coal, which emits very little smoke, has been used exclusively, and it was admitted by plaintiff's own witnesses that with very careful stoking there need be no smoke of any importance, except when getting up the fires, and I can feel very little doubt that it is in the power of the defendants, if so willed, to prevent altogether the nuisance from smoke, or, at any rate, to make it of no appreciable importance ; but whether the nuisance will continue in some degree or other, or disappear altogether, depends, it is clear, upon the care taken by the defendant and his servants in carrying out the necessary measure to insure it. Now the remedy to be applied, it is to be remarked, is not of a permanent nature such as might possibly be a raising of the mill chimney, which when once done would always have the desired effect, but consists in the exclusive use of a particular sort of coal at whatever price it may be in the market, and further in careful firing throughout the day, both of which depend upon the will and carefulness of the defendants, exercised not only from day to day, but from hour to hour. What guarantee have the plaintiffs that this will be done ? It was said, indeed, that it was the interest of the mill owner to do so. Theoretically it may be under certain circumstances, but it is impossible to allow one's vision to range over the numerous mills and presses at work at *Colaba* and throughout the island of Bombay without concluding that mill owners find it expedient, for practical reasons best known to themselves, to disregard it. The same remarks apply to the contrivances adopted for reducing the quantity of the fluff which issues from the blow chimney. There can be no doubt that it has been very considerably reduced by them, so much so as probably to be of little or no importance, but their deficiency entirely depends upon the continuous care in seeing that they are each and all in working order. I cannot think, therefore, that the changes and improvements made at the eleventh hour, and the efficacy of which depends so much on the good intention and constant personal care of the defendants and their servants, ought to influence the question of injunction when once the nuisance is distinctly proved to have existed, as is the case here...

"Now the plaintiffs rely upon section 54, cls. (*b*) and (*c*) of the Specific Relief Act which (subject to the discretion of the Court as provided by section 52) determines the cases in which a perpetual injunction may be granted where the defendant invades or threatens to invade the enjoyment of property.

"Section 54 of the Specific Relief Act provides that where the defendant invades or threatens to invade the plaintiff's enjoyment of property, the Court may grant an injunction, 'where there exists no standard for ascertaining the

actual damage caused, or likely to be caused by the invasion,' and also 'where the invasion is such that pecuniary compensation would not afford adequate relief.' In applying these provisions we shall do well to be guided by the decisions of the Court of Chancery in England which, it cannot be doubted are the source from which the above provisions have been drawn. In *Jackson* v. *Duke of Newcastle* (1), *Lord Westbury* says: 'The foundation of the jurisdiction appears to be that injury to property which renders it in a material degree unsuitable for the purpose to which it is applied or lessens considerably the enjoyment which the owners have of it. The court considers that injury of this nature does not admit of being measured and redressed by damages.' This statement of the law was adopted by *Lord Hatherly* in *Dent* v. *Auction Mart Co.*, (2). Those were cases of obstruction of light. In *Goldsmid* v. *Tunbridge Wells Commissioners* (3); *Salvi* v. *North Brancepeth Coal Co.*, (4), where the nuisances sought to be abated were akin to those complained of in the present case; and in *Kino* v. *Rudkin* (5), we find the same rule substantially laid down for determining whether the court should relieve the plaintiff by injunction, or leave him to recover damages in a court of law. In the former case *Lord Justice Turner* says: 'I think that it ought not to interfere where the injury is merely temporary and trifling, but it ought to do so in cases in which the injury is permanent and serious; and in determining whether the injury is serious or not regard must be had to all the consequences which may flow from it, and in this particular case regard must not be had merely to the comfort or convenience of the occupier which may only be interfered with temporarily and in a partial degree; but regard must also be had to the effect of the nuisance upon the value of the estate and upon the prospect of dealing with it to advantage."

But where the working of a factory is held to amount to a nuisance, an injunction restraining the nuisance should be in the form that the defendant do refrain from carrying on the working of the factory in such a manner as to occasion a nuisance to the plaintiff (6).

Injunction against noise.—So far as nuisance to air is concerned it is not necessary that it should be injurious to health to warrant interference of the Court. A mere noise will in a proper case, suffice to justify a Court of Equity in interfering (7), and the relief has been granted against the ringing of bells in church in such a manner as to annoy a neighbouring resident (8). But a person living in a manufacturing town cannot expect the same freedom from noise as a person living in a country. But if in a town a person opens a

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(1) 3 De. G. & J. 275.
(2) L. R. 2 Eq. 238.
(3) L. R. 1 Ch. Ap. 349.
(4) L. R. 9 Ch. 705.
(5) L. R. 6 Ch. D. 160.
(6) *Chiragdin* v. *Karim Bux*, 64 Ind. Cas. 169; see also *Bhicaji* v. *Peroj Shaw*, 133 Ind. Cas. 192=50 B. 401; *Phirayamal* v. *Emperor* 9 P. R. 1904 Cr. =1 Cr. L. J. 512.
(7) *White* v. *Cohen*, 1 Drew. 313.
(8) *Soltu* v. *De Held*, 2 Sim. N. S. 133; Section 54 of the Specific Relief Act illus. (s); see also *Hardman* v. *Holberton* (1866) W. N. 379.

business in the course of which hammers have to be used and the use of hammers causes noise which materially interferes with the comfort of his next door neighbour, he can be restrained by an injunction from carrying on the business in the process of which hammers are used (1). Thus noise which tend to disturb rest and quiet in the neighbourhood may be restrained. Thus where a railway company for the construction of their works erected a mortar mill on a part of their land, close to the place of business of the plaintiff, who complained of the injury and annoyance occasioned by the noise and vibration, it was held that the mortar mill was not necessary for the construction of the line and an injunction was granted accordingly (2). To warrant an injunction against a noise as a nuisance it must be shown that the noise is such as to produce actual physical discomfort to a person of ordinary sensibilities, and is unreasonably and unnecessarily made (3). Where a tenant of a house makes musical and other sounds for the purpose of vexing and annoying his next door neighbour, this is in point of law done maliciously, and is an unreasonable user of the house that may be restrained by injunction (4). A circus, the performances in which were to be carried on for eight weeks, was created near a dwelling house, and the performances, which took place every evening, lasted from about half-past seven till half-past ten. It was proved that the noise of music and shouting in the circus could be distinctly heard all over the plaintiff's house and was so loud that it could be heard above the conversation in the dining room though the windows and shutters were closed, and several persons were talking in the room: *Held* that this was such a nuisance as a Court of Equity will restrain by injunction (5). But the mere assembling of crowds of persons going to and from the performances at a circus held in a covered building, is not necessarily a nuisance which a Court of Equity will restrain (6). A confectioner had for more than twenty years used a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt as a nuisance, and were not complained of. But in 1873 the physician erected a consulting room at the end of his garden, and then the noise and vibration became a nuisance to him. He accordingly brought an action for injunction: *Held* that the defendant had not acquired a right to an easement of making a noise and vibration and the injunction was granted (7). In considering whether any act is a nuisance regard must be had not only to the thing done, but to the

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(1) *Hulas Rai* v. *Sohanlal*, 71 Ind. Cas. 620=A. I. R 1923 All. 445. *Juwand Singh* v. *Mahomed Din* 1 Lah. 140=51 Ind. Cas. 728.

(2) *Fenwick* v. *East London Ry. Co*,, L. R. 20 Eq. 544; see also *Lady Gort* v. *Clash*, 16 W. R. 569.

(3) Spelling on Injunction and other Extra-ordinary Remedies § 43.

(4) *Christie* v. *Davey*, 62 L. J. Ch. 439.

(5) *Inchbold* v. *Robinson*, L. R. 4 Ch. 388.

(6) *Ibid.*

(7) *Sturges* v. *Bridgman*, 11 Ch. D 852.

surrounding circumstances. What would be a nuisance in one locality might not be so in another (1).

Where injury was caused to a public house by noise and vibration, so as to interfere with the enjoyment of the lessee, and to cause injury to the structure of the premises, an injunction was granted against an electric lighting company at the suit of the lessee and reversioner respectively (2). Injunction was granted to restrain nuisance caused by whistling for and noise of cabs in connection with boxing contests at a club between midnight and 7 a. m. (3). An injunction is also obtainable against increase of noise (4). But a person who resides in a populous community or a manufacturing neighbourhood cannot have an injunction to prevent all noise, smoke, and jar, and vibration and occasional odours, but must to a large extent surrender his tastes, pleasures, and preferences to the preferences and interests of the many. Personal enjoyment must often yield to the demands of trade and manufacture (5). The maxim, *sic utere tuo ut alienum non laedas*, is not to be construed in a civilized society as meaning that one must never use his own so as to do any injury to his neighbour or his property. A city resident must patiently endure the dirt, smoke, odours, noise, and confusion incident to city life. A use of property in one locality and under some circumstances may be lawful and reasonable which in another place and other circumstances would be an insufferable nuisance (6). In *Salvin* v. *North Brancepeth Coal* (7), *James L. J.* said: "If some picturesque heaven opens its arms to invite the commerce of the world it is not for this Court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells, of a common sea-port and ship-building town, which would drive the dryads and their masters from their ancient solitudes." The Mahomedans have an inherent right to call out *azan* from the mosque. So where noises are made by the defendants (Hindus) collectively and continuously at the time of calling out the *azan* for the sole purpose of frustrating the object of the call it constituted a nuisance and it was no answer to the suit that the little noise made by each of the defendants personally do not amount to a nuisance. The plaintiffs (Mahomedans) are entitled to the injunction prayed for because the nuisance caused by the defendants is not a reasonable exercise of their rights and is an infringement of the rule "give and take, live and let live (8). In the above case *Pitman J.* in delivering his judgment said: "As pointed out in Kerr on Injunctions, 5th Edition, page 203, the proposition that mere noise alone will, on a proper case of nuisance being made out, be sufficient ground for an injunction, is well established. The inconvenience caused is not of a trifling nature which no reasonable man should complain, nor is the nuisance one of a temporary or occasional character. Though it may be said that the

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(1) *Ibid.*
(2) *Shelfer* v. *City* of *London Electric Light*, (1895) 1 Ch. 287.
(3) *Bellamy* v. *Wells*, 60 L. J. Ch. 156,
(4) *Heather* v. *Pardon*, 37 L. T. 393.
(5) *Smelting Co*, v. *Tipping*, 11 H. L. Cas. 642.
(6) *Darsey* v. *Allen*, 85 N. C. 358; H. C. Joyce on Injunction § 68.
(7) L. R. 9 Ch. App. 705.
(8) *Jaward Singh* v. *Mahammed Din*, 1 Lah. 140=51 Ind. Cas. 728.

blowing of conches, or beating of drums on isolated occasion of the calling out of the *azan* could not amount to such a nuisance as would necessitate the interference of a Court by injunction, yet, by their continuance and constant repetition, a sufficiently substantial case for such interference would be made out. There is every likelihood of their continuance. Again, as pointed out in Kerr on Injunctions, page 156, when a man who is entitled to a limited right exercises it in excess so as to produce a nuisance and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it altogether within its proper limits. The Hindu defendants have not an unlimited right to blow conches and beat drums as claimed by them in this Court. Nor can each of them plead that the little noise made by him personally at only one time of the day, or even at intervals of days, but at the time of the calling out of the azan, does not amount to a nuisance. The defendants had a common intention, and *Lambton* v. *Mellish* (1) is an authority for holding that the acts of two of more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing acts constituting the nuisance, although the annoyance occasioned by the acts of any one of them, if taken alone, would not amount to a nuisance. That case related to the nuisance caused by a number of barrel organs. It has been established, by a current of the highest English authorities, 'that what makes life less comfortable and causes sensible discomfort and annoyance is a proper subject for injunction," whilst certain decisions show that an injunction may be issued even where the defendant had acted reasonably. Such a case is *Broder* v. *Saillard* (2), where it is explained that is no answer to say that the defendant is only making a reasonable use of his own property and the law is stated as follows :—'I take it the law is this, that a man is entitled to comfortable enjoyment of his dwelling house. If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling house, so as to cause serious annoyance and disturbance, the occupier of the dwelling is entitled to be protected from it.' The present case is a much stronger one for the issue of an injunction, because the nuisance caused by the Hindu defendants is not a reasonable exercise of their rights. Their actions break what *Lord Bramwell* has called 'the rule of give and take, live and let live."

"The judgment in *Christie* v. *Davey* (3) is, I think, very pertinent to the present case. In that case a teacher of music, living in a house gave lessons in music extending over seventeen hours in a week ; there was also in the same house, practising on the piano and violin and singing and musical entertainments sometimes extended to eleven at night. These facts were held not to constitute a legal nuisance of which the occupier of the adjoining house was entitled to complain, but an injunction was granted to restrain the occupier of the adjoining

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(1) (1894) 3 Ch. 163.
(2) (1876) 2 Ch. D. 692=45 L. J. Ch. 414.
(3) (1893) 1 Ch. 316.

house, who had asserted, as the defendants assert here, that he had a perfect right to make the noises complained of, from causing any sounds or noises in his house to vex or annoy the occupier of the first house, the Court being satisfied that he had been making noises on musical instruments and otherwise maliciously for the purpose of annoying the occupier of the first house. A similar state of things exists in the present case. The acts of the Muhammadans objected to by the Hindus do not constitute a legal nuisance of which they can rightly compiain, whilst the acts of the Hindus are maliciously done for the sole purpose of annoying and obstructing the Muhammadans in their religious observances and ceremonies. The powers of the Courts in India under the Specific Relief Act are no less than the powers of the Courts in England, whilst in some respects such powers are wider. I hold therefore, that the plaintiffs respondents are entitled to an injunction to restrain the defendants-appellants from committing the nuisance complained of."

Smoke nuisance and Injunction.—Smoke unaccompanied with noise or with noxious vapours, although not injurious to health, may constitute a nuisance. The material question in all such cases is, whether the annoyance produced is such as materially to interfere with ordinary comfort of human existence (1). The enjoyment of pure and wholesome air is a right to which the owners of land and the inmates of a dwelling house are of common right entitled. Any act which pollutes or corrupts the air is, strictly speaking a nuisance (2). In *Cleave land* v. *Citizens, G. L. Co.* (3), *Zabriskie Chancellor* said: "Any business however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence is a nuisance that should be restrained, and smoke, noise, and bad odours even when not injurious to health may render a dwelling so uncomfortable, as to drive from it any one not compelled by poverty to remain. Unpleasant odours, from the very constitution of our nature, render us uncomfortable, and when continued and repeated make life unendurable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbour in the comfortable enjoyment of life is a wrong which the law will redress. The only question is what amounts to that discomfort from which the law will protect. The discomfort must be physical, not such as depends upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort (4)."

Offensive smells.—The test as to whether a smell is a nuisance which will be restrained by injunction, is not whether it is so strong and disagreeable as

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(1) *Crump* v. *Lambert*, L. R. 3 Eq. 409 affirmed on appeal 17 L. T. N. S. 133.

(2) Kerr on Injunction p. 181

(3) 5 C. E. Green 201.

(4) Spelling on Injunctions etc. § 432.

to be offensive to any sensitive nose, but whether it is so bad and continuous as to seriously interfere with comfort and enjoyment of ordinary people (1). In the above case, *Lindley L. J.* said: " If the defendants are right in saying that they cannot concentrate their stables to such an extent as is desirable without committing a nuisance to the neighbourhood, they cannot concentrate their horses to such a degree. That is all. It is a mere question of money; it is nothing but economy which requires them to crowd their horses together. If they cannot keep 200 horses together, even when they take proper precautions, without committing a nuisance all I can say is they cannot have so many horses together. No doubt it is a serious matter to them, but I cannot disagree with the Court below" (2).

But a real and not a fanciful injury must be shown. The fact that odours are unpleasant and disagreeable is not sufficient ground for invoking the aid of a Court of Equity. A substantial annoyance must be caused thereby or physical discomfort to a person or an injury to health and property, and where a discomfort is claimed it must not be one which depends merely upon a fanciful taste or imagination, To entitle the complainant however to the aid of a Court of Equity it is not necessary that the odours complained of should actually produce disease or be unwholesome. It is sufficient if they are offensive and disagreeable in such a manner as to render life uncomfortable. And though the business is lawful in itself, yet this is not an element which controls, for if it causes noxious, offensive and injurious smells it may be restrained at the suit of one who has been injured thereby (3). An injunction can also be obtained against the obnoxious smell from a shop used for frying stale fish (4). The deposit of grit and ashes from an electric supply station can also be enjoined (5). Carrying on of offensive manufacture which creates stenches may also be restrained, such as brick burning (6), fat-melting (7), soap boiling (8), slaughter-house (9). A ground for granting injunction is made by offensive odour alone (10).

In *Amarendra Nath Dey* v. *Baranagore Jute Factory* (11), the plaintiff claimed a perpetual injunction restraining the defendant from erecting a septic tank on south side of the road and opposite to the plaintiff's premises. They alleged that inconvenience and nuisance were likely to arise therefrom and prayed for a permanent injunction restraining them from erecting the septic tank in that particular place. In refusing the injunction *Sir Lancelot Sanderson C. J.* said: " It is clear to my mind on the evidence that the use of the septic tank had been approved by the proper authorities and by fully qualified

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(1) *Rapier* v. *London Tramways Co.*, 69 L. T. 361.
(2) H. C. Joyce on Injunction § 1098a.
(3) H. C. Joyce on Injunction § 1098.
(4) *Adams* v. *Ursell*, 82 L. J. Ch. 157.
(5) *Morrow* v. *Stepney Cor.* 18 L. G. R 458 ; Kerr on Injunction 187.
(6) *Walter* v. *Selfe* 4 De G. & Sm. 315.
(7) *Att. Gen* v. *Colde* (1901) 1 Ch. 205=70 L. J. Ch. 148.
(8) *Rex* v. *Price*, 2 Show. 327.
(9) *R.* v. *Cross*, 2 Car. & P. 484.
(10) *Crump* v. *Lambert* (1867) L. R. 3 Eq. 409.
(11) 70 Ind. Cas. 939=49 C. 1059.

scientific men as a proper system in a neighbourhood where there is no sufficient drainage system, and on the evidence given by both sides in this case, to my mind, it is clear, that the septic tank which was proposed to be erected at the time this suit was tried, ought not to be a nuisance if it were properly used and if its capacity were not over-taxed."

Nuisance and vibration.—There is a distinction between injuries which affect the air merely by way of noises and disagreeable gas, resulting in personal discomfort, and those which injuriously affect the land itself, or structures upon it. As to the former, each person living in society must submit to a degree of discomfort depending in some measure upon the circumstances of his residence. As to the latter, the owner or occupant of land is entitled to enjoy it free from any direct injury which will appreciably affect its value, and to restrain by injunction any noise or vibration which is clearly shown to cause such injury (1). And in an action to restrain an electric

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(1) H C. Joyce on Injunction § 1097. In *Sturges* v. *Bridgman*, L. R. 11 Ch. D. 852, where the injunction was granted, the case was one mainly of noise, and though the element of vibration was mentioned, the judges dealt altogether of noise. This same may be said of *Gaunt* v. *Fynney*, L R. 8 Ch. App. 9, where the injunction was refused. In *Hennessey* v. *Carmoney*, 50 N. J. Eq. 616, *Pitney* V. C. said: "The serious and troublesome question in the case is as to whether the vibration established is of such a degree as to entitle the complainant to the aid of this court. Upon reason and authority I think there is a clear distinction between that class of nuisances which affect air and light merely, by way of noises and disagreeable gases and obstruction of light, and those which directly affect the land itself, or structures upon it. Light and air are elements which mankind enjoy in common, and no one person can have an exclusive right in any particular portions of either, and as men are social beings and by common consent congregrate, and need fires to make them comfortable and to cook their food, it follows that we cannot expect to be able to breathe air entirely free from contamination or that our ears shall not be invaded by unwelcome sounds. Thus my neighbour may breathe upon my land from his, and the smoke from his house fire and the vapour from his kitchen may come on to any land, or he may converse in audible tones while standing near the dividing line, and all without giving me any right to complain. So my neighbour and I may build our houses on the line between our properties, or have a party wall in common, so that we are each liable to hear and be more or less disturbed by the noise of each other's family and cannot complain of it. In all these matters of the use of the common element air we give and take something of injury and annoyance, and it is not easy to draw the line between reasonable and unreasonable use in such cases, affecting as they do, mainly the comfort, and in a small degree only, the health of mankind. In attempting to draw this line, we must take into consideration the character which has been impressed upon the neighbourhood by what may be called the 'common consent' of its inhabitants. But when we come to deal with what is individual property, in which the owner has an exclusive right, the case is different. While my neighbour may stand by my frence on his own lot, and breathe across it over my land, and may permit the smoke and smell of his kitchin to pass over it, and may talk, laugh and sing or cry, so that his conversation and hilarity or grief is heard in my yard, he has no right to shake my fence ever so little or to throw sand, earth or water upon my land in ever so small a quantity. To do so is an invasion of property, and a trespass, and to continue to do so constitutes a nuisance; and if he may not shake my fence or by house by force directed immediately against them I know of no principle by which he may be entitled to do it by indirect means. I think the distinction between the two classes of injury is clear. At the same time it would seem that it has, in appearance at least been frequently overlooked by able and careful judges, and the same

light company from so operating its plant as to cause a nuisance by the noise and vibration to the lessee of adjoining premises, it was decided that there must be an injunction during the continuance of plaintiff's lease to restrain the defendant company, its servants, directors and

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rule as to the degree of the injury which will justify judicial interference applied to each class. The distinction between the two classes of injuries was pointed out by *Lord Westbury* in *Smelting Co.*, v. *Tipping*, 11 H. L. C. 642. Looking at the instances in which a court of equity has granted relief in cases like the present, we have in this state, the case of *Demarest* v. *Hardham*, 34 N. J. Eq. 469, in which the report shows a vibration probably some what greater than that shown by the evidence in this case. There the parties occupied adjoining buildings whose wall touched, and complainant manufactured harness, and defendant operated steam printing presses, and the vibratory force was not, as here, transmitted many feet through the earth. But I think the right of action at law is quite as clear in the case in hand as it was in *Demarest* v. *Hardham*. In *Hurlbut* v. *Mc Kone*, 55 Con. 31, there was a vibration of the same character and degree, as near as may be, as that shown in this case. "The windows rattle in the casings; dishes and other like things standing on the table or on shelves will shake and jolt together.'.....In *Mc. Keon* v. *See*, 51 N. Y. 300, the trial judge found that the action of the defendant's machinery, used to saw marble, produced a jarring and shaking of complainant's two houses, injuring the same and amounting to a nuisance (the degree of vibration was not stated, and gave judgment for 967 dollars apparently for loss of rent-with an award for an injunction. The general term of the Supreme Court struck out the judgment of damages, but made the injunction perpetual. The Court of Appeals affirmed this judgment . . . . . It was said in the *Ohio* case that it was argued here that, if this Court is to enjoin a vibration of this character, then it must also enjoin the passage of vehicles on the street, which shake the dwellings or the adjourning houses. But the case is quite distinguishable. A man builds his house on the street subject to the right of the public to pass upon it with all its annoyance of noise and jar from passing vehicles. This right of passage is public necessity and benefit, as well as an advantage to the dwellers thereon and where the land has been taken by condemnation proceedings, the injury if any, to result from its proximity to the street is presumed to have been taken into consideration. Where it has been dedicated of course there can be no cause of action. Another objection taken was that, if the fact that the vibration as felt in this case is due to the presence of an underlying layer of quick sand, then the defendant should not be held responsible for it. I am unable to discover any strength in that position. I do not see how the fact that nature has proved a very convenient medium through which my neighbour may injure my property should be held to give him the right to injure it. Nor do I think that the presence of this quick sand renders it impracticable for the defendant to remedy the nuisance without stopping his work. Capt. Ward suggests that he should drive pillars for a foundation to his machines. There was no proof as to whether it was impossible to reach solid ground with masonary, but it seems to me probable from the evidence that there will be no difficulty in so doing, and that, at a comparatively trifling expense, the defendant may so arrange matters that his neighbours will not be annoyed by his machinery. The result of a careful review of the evidence upon my mind is to lead me to the conclusion that the degree of injury is such as to entitle the complainant to damages in an action at law with the result that he is entitled to an injunction in this Coart. The injury, to be actionable, must be sensible and appreciable, as distinguished from one merely fanciful, and in a case like this I assume for present purposes, that it must have the effect of rendering the premises less desirable, and so less valuable for ordinary use and occupation. Now it seems to me that a vibration that causes the windows and doors of a house to rattle in their casings, and dishes in the shelves to rattle and move on one another, and the walls to crack, and is distinctly felt by persons in the house, would have such effect, and is therefore actionable; while smoke and noise might have a similar effect in rendering the house less desirable without being actionable, because the degree of discomfort would not be sufficiently great to reach the standard (if indeed any standard

agents from using or working or causing or permitting to be used or worked, in or upon their generating station and other works adjacent to the plaintiff's garden, any engines, dynamos, or other machinery, or for the carrying on of the manufacture of gas or any other process, in such manner as, by the production of noise, noxious or offensive smells, vibration or otherwise, to be or occasion nuisance or injury to the plaintiff as lessee or occupier of the house, garden, and premises comprised in her lease (1). A man is liable if he causes vibrations by an engine or otherwise and thereby injures the property of another. Though the nuisance was in existence previously and the man comes to the nuisance, till he is entitled both to the remedy by way of damages and the remedy by injunction. Whether an injunction should be granted or only damages depends upon circumstances of each case. Where the vibrations caused to the building are such that if the nuisance continues there is danger of the whole building collapsing it is clearly a case for injunction and not for damages (2). In *Hoore & Co*, v. *Mc Alpin Sons & Co*, (3), an old building belonging to the plaintiff was damaged by building operations which set up vibrations. It was contended that the vibrations would not have caused damage to a normally constructed building; and that the case being one of nuisance the plaintiff should have made out such a nuisance as would affect normal persons or buildings of normal stability. *Astbury J.* held that the defendants had caused damage and then dealt with the plea that the defendant could not be held liable for what they were entitled in the ordinary course to do by reason of the unstable character of the plaintiff's buildings. After considering the cases of *Grosvenor Hotel Co.* v. *Hamilton* (4), *Robinson* v. *Kilvert* (5), *Eastern and South African Telegraph Co.* v. *Cape Town Tramways* (6) and *Kine* v. *Jolly* (7), he assented to the proposition of law that a man cannot, "limit the operations of his neighbour on his own land or increase his neighbour's liability by putting his property for his own purposes into a structural condition in which it is more than ordinarily liable to be affected

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has been established) applied to that class of injuries. See *Walter* v. *Selfe*, 4 De G & S. 318=20 L. J. Ch. 434; *Ross* v. *Buther*, 19 N. J, Eq 294, 299, 306 There is evidence tending to show that complainant made little or no complaint with regard to this vibration until about the time the bill was filed, when the invasion of his property rights by hanging the stay wire over his land, by driving the filthy stream from the sewer into his kitchen and the sprinkling of spray over his backyard, seemed to combine to exasperate him. This apparent acquiescence can only be used as evidence that the complainant did not consider the vibration as serious, but I think that this is not sufficient in that regard to overcome the weight of the evidence that his house is injured. I will advice a decree that the defendant be restrained from so using his machines as to cause the complainant's house to vibrate and also from allowing the water and spray from the exhaust of her engines to come into the complainants' lands.")

(1) *Knight* v. *Isle Weight Elec. L & P. Co.*, 73 L. J. Ch. 299, per Joyce J.

(2) See *Selfher* v. *City of London Electric Lighting Co*, (1895) 1 Ch. 287; *Sturges* v. *Bridgman*, 11 Ch. D. 852; *Hoare & Co.* v. *Mc Alpine Sons & Co.* (1 23) 1 Ch. 167; *Tihping* v. *St. Helens Smelting*, (1865) 1 Ch. 66; *Bliss* v. *Hall*, 5 Scott, 500; *Att. Gen.* v. *Cambridge*, (1868) 4 Ch. 71.

(3) (1923) 1 Ch. 167=39 T. L. R. 97.

(4) (1894) 2 Q. B. 836=63 L. J. Q. B. 661.

(5) (1888) 41 Ch. D. 88=58 L. J. Ch. 392.

(6) (1902) A. C. 381.

(7) (1905) 1 Ch. 480.

by his neighbour's legitimate operations." "This case indicates the differences between the views of 1865 and 1923, the views of a generation in which property was sacrosanct, and those of a business generation. *Astbury J.* had not to give effect to his view and perhaps could not have done so. But in India we are not bound to follow the ruling of *St. Helen's Smelting Co.* v. *Tipping* (1) and speaking for myself I am prepared in a proper case to adopt the view of *Hoare & Co.* v. *Mc Alphine Sons & Co.* (2), for it seems to me that circumstances have changed since the rules of *Rylands* v. *Fletcher* (7) and *St. Helen's Smelting Co.* v. *Tipping* (3) were formulated. It must be borne in mind that land in cities has a special situative value and I can see no reason for allowing people to have the advantage of the proximity of their fellows and to expect the freedom from interference of the country; and I can see no logical distinction between a nuisance which diminishes personal convenience and one which affects property. As a matter of fact both ordinarily affect the value of property. for the proximity of an oil engine may not only cause natural damage, but may depreciate the letting value of a house (4)."

So noise incident to lawful trade or business will not ordinarily be enjoined as a nuisance, unless it is ill-timed, or unusual in the locality where it occurs, and causes discomfort to persons who are not super sensitive to noise. This rule is applied to the noise and vibration of machinery in an adjoining building, and in such case an injunction should not be granted until after a trial upon the merits (5). In the above case *Book staver J* said: "One dwelling in the midst of a crowded commercial centre cannot have or claim the same quiet and freedom from noise or jarring that he would enjoy in a quiet country district."

Abating filth on adjacent premises; privies.—Where water and filth from defendants' premises penetrate into the plaintiff's cellor and render it unwholesome and unfit for occupancy, the Court of Equity will enjoin the nuisance; and having assumed jurisdiction for the purposes of the injunction, may incidentally award damages for the injury already sustained by the plaintiff (6). And the repeated use of one's premises by another for the deposit of refuse and filth will be enjoined both as a nuisance and as a trespass causing irreparable injury (7). And a privy will be a nuisance which may be enjoined where it clearly appears from the facts that persons in the neighbourhood are rendered uncomfortable to a substantial degree by the smells therefrom; but if the evidence does not show that it has been so kept as to render it a nuisance the maintenance thereof will not be enjoined (8). And an injunction would lie to prevent an adjoining land-owner from building a privy within ten feet of plaintiff's well, and within thirteen feet of the dining

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(1) 11 H. L. C. 642=35 L. J. Q. B. 66.
(2) (1923) 1 Ch. 167=92 L. J. Ch. 81.
(3) 3 H. L. C. 330.
(4) A, I, C. 1930 Sind 310.
(5) *Mc Guire* v. *Blooming dale*, 8 App. 419.
Misc. R. (N. Y.) 478.
(6) H. C. Joyce on Injunction § 1100.
(7) *Lowe* v. *Hol brook*, 71 Ga. 563.
(8) *Iliff* v. *School Directors*, 45 Ill.

room and family bed room, where she and her two daughters, one of whom is an invalid, eat and sleep (1). In the above case *Holt C. J.* said: "The privy was erected when the action was brought. It is obnoxious in itself. Its use was calculated to make the residence of the appellant almost, if not quite, unbearable as well as unhealthy. The danger was probable and threatening. It would be continuous and the appellant without legal remedy. The appellant could have built this structure at other points on his lot, which is a good sized one, where it would not have been annoying to his own family or that of the appellant, or dangerous to the health of any one."

But in such a case the plaintiff should allege in the plaint and prove by direct evidence that inconvenience has been experienced by her in a specific manner and on specific occasion in consequence of the arrangements made by the defendant in connection with the privy (2). The erection of a public urinal in a public street so as to be a nuisance can also be restrained (3). But the unauthorized erection of a public urinal will not be enjoined where it is not shown that it will constitute a nuisance (4).

Nuisance obstructing the view to a shop.—No action will lie for the removal of erections in front of a shop merely on the ground that such erections obstruct the view which passers-by formerly had of the shop (5). In delivering the judgment *Banerjee J.* said: "The only right claimed is that the plaintiffs are entitled to undisturbed prospect of their shop from the road. In *Smith* v. *Owen* (6), it was held that the Court will not restrain the erection of buildings which merely prevent goods displayed in a shop from being seen from places whence they would previously have been seen. In *Brett* v. *Imperial Gas Co.* (7), it was held that the erection of a building will not be restrained because it injures the plaintiff by obstructing the view of his place of business. The principle laid down in English cases referred to above equally applies to cases arising in this country (8)". An erection of a disagreeable object in view cannot also be enjoined (9).

Right of Telegraphic Company to carry wire over private premises.—In an *American case*, *Butler* v. *Frontier* (10) the question arose whether the owner of private property can maintain an action in ejectment for the removal of a telephone wire stretched across private property but not in any place resting thereon. It does not appear that the streching of the wire did in any way materially interfere with the use and enjoyment of the

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(1) *Miley* v. *O' Hearn*, 13 Ky. Law Rep. 834.

(2) *Must. Pyari* v. *Pandiya Raja Ram*, 11 Ind. Cas. 45.

(3) *Biddulp* v. *St. George's Vestry*, 3 De G. J & S. 493; Kerr on Injunction 187.

(4) *Biddulp* v. *St. George's Verty*, 3 Dey J & S. 493; Joyce on Injunction § 1100.

(5) *Gopi Nath* v. *Munno*, 29 A. 22.

(6) 35 L. J. Ch. 317.

(7) L. R. 2 Ch. 158.

(8) *Att. Gen.* v. *Doughty*, 2 Ven. Sen. 43; *Dal ton* v. *Angus*, 6 A. C. 824; *Campbell* v. *Pading ton*, (1911) 1 K. B. 869.

(9) *Att. Gen.* v. *Doughty*, supra.

(10) 79 N. E. Rep. 716=11 C. W. N. (190) notes.

property by the owner. The court observed that the serious question was whether the plaintiff was deprived of possession to the extent necessary to authorise ejectment, and proceeding upon the well-settled theory of law that the ownership of land extends upwards to an indefinite extent and that the extent of obstruction is only one of degree, held that the action was maintainable and made a decree in favour of the plaintiff—the owner of the proprety.

Inundation by water.—Where in consequence of the defendant having raised the height of a tank bund and narrowed the sluice, the neighbouring land of the plaintiff was rendered more liable to submersion than before, and to a greater extent in a year of heavy rain, the plaintiff was entitled to an injunction directing the defendant to adopt such means as would prevent the plaintiff's land from being more constantly submerged (1). In such a case the injunction should in the first instance, be in general terms directing defendant to employ such means, as would effectually prevent the plaintiff's land from being submerged more often or to a greater extent than before, and failing that the defendant should be directed to reduce the height of the tank bund and widen the sluice. A decree directing defendant to make such alterations in the tank as to prevent the plaintiff's land from being flooded more often than it used to be before is vague and inappropriate in the case (2).

Peril to health and comfort, ground for relief; illustrations of the rule.—Where loss of health,, destruction of business and irreparable injury to property will result from the obnoxious erections, equity will not hesitate to interfere, And mere smoke or disagreeable odours, although not noxious, may be sufficient ground for the interference of equity. So offensive noises may afford ground for relief, the main question in all such cases being whether the annoyance is such as materially to interfere with the ordinary comfort of human existence (3). So, too, stenches and odours resulting from manufacturing houses, which are of an offensive nature and injurious to the public health, may be enjoined as a nuisance (4). And the keeping of jacks and stallion across the street from and in front of plaintiff's residence may also be enjoined (5). And the manufacture of vitrol and sulphuric acid in a factory adjoining plaintiff's premises constitutes such a nuisance as entitles him to maintain a bill for an injunction (6) So maintaining a small-pox hospital in close proximity to plaintiff's dwelling will warrant an interlocutory injunction until a final hearing of the cause (7). And when a Municipal Corporation unlawfully permits the use of a street for market purposes

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(1) *Appaya* v. *Puvala* 14 Ind. Cas. 267.

(2) *Ibid. Sankaravadivelu* v. *Secretary of state*, 28 M. 72 distinguished.

(3) *Crump* v. *Lambert*, L. R. 3 Eq. 409.

(4) *Butterfoss* v. *State*, 40 N. J. Eq. 325.

(5) *Farrell* v. *Cook*, 16 Neb. 483.

(6) *Chappel* v. *Funk*, 57 Md. 465. *Georgia Chamical Co.* v. *Colquitt*, 72 Ga; 172 ; High on Injunction § 773.

(7) *Bendelow* v. *Guardians*, 57 L. J. R. N. C. Ch. 762 ; *Metropoliton District Asylum* v. *Hill*. 6 A. C. 193 ; *Fleet* v. *Metropoliton Asylum*, 2 T. L. R. 361 ; *Att. Gen*, v. *Nottingham Cor.*, (1904) 1 Ch. 677.

in front of plaintiff's premises, causing offensive odours, loud noises and disturbance to plaintiff and his family, the corporation may be restrained from permitting the continuance of such nuisance (1). And a municipal corporation, which is proceeding without legal authority to construct a sewer upon or near plaintiff's premises, which will probably result in great injury to the health of the plaintiff and his family by discharging sewage upon or in the immediate vicinity of his land, may be enjoined from so doing (2). And in such a case a rail road company may enjoin the municipal authorities from discharging sewage upon its right of way (3). So the discharge of sewage from defendant's premises upon those of plaintiff's, thereby seriously endangering health, may be enjoined as a nuisance (4). While it would seem that an intentional and wanton disturbance of the peace and comfort of plaintiff's home by his neighbours affords sufficient ground for an injunction, yet the relief will be denied where the plaintiff is as much at fault in the manner complained of as is the defendant and therefore fails to come into equity with clean lands (5).

Test in crowded cities; adjacent stable; cooking range—Upon the question of what constitutes a nuisance to dwellings in populous cities the rule is, in general terms, as regards cases of adjoining houses, that if either party devotes his house or any portion of it to unusual or extra-ordinary purposes in such manner as to produce a substantial injury to his neighbour, such use of the premises will not be regarded as a reasonable use and the person sustaining such substantial injury is entitled to the aid of an injunction. Thus, the use of a building adjoining plaintiff's in a large city, as a stable and the keeping of horses therein, causing annoyance and loss to plaintiff in his business as a lodging house keeper, constitutes such a nuisance as will be enjoined (6). So the keeping of horses in a stable adjoining plaintiff's premises and the noise resulting there from, with the fact of moisture and dampness passing through from defendant's stable to plaintiff's wall, afford sufficient ground for relief by injunction (7). So relief has been granted against the use of a stove in defendant's kitchen in such a way as to render plaintiff's wine-cellor so hot as to be unfit for the storage of wine (8). But an injunction has been refused against the erection of a urinal by a municipal corporation, when it did not appear that defendants were transcending their powers, and when it was not shown that the proposed erection would constitute a nuisance (9).

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(1) *Mc Donald* v. *Newark*, 47 N. J. Eq. 136.

(2) *Butler* v. *Mayor*, 74 Ga. 570.

(3) *Newyork C. & H.* v *City of Rochester*, 127 N. Y. 591.

(4) *Evans* v. *Wilmington* & W. R. *Co.*, 96 N. C. 45.

(5) High on Injunction § 773.

(6) *Ball* v. *Ray*, L. R. 8. Ch. 467; High on Injunction § 780.

(7) *Broder* v. *Saillard*, 2 Ch. D. 392.

(8) *Reinhardt* v. *Mentasti*, 42 Ch. D. 685=58 L. J. (N. S.) Ch. 787.

(9) *Biddulph* v. *Vestr of St. George*, 3 De. G. J. & S. 493; High on Injunction § 780.

CHAPTER XXI

Injuuction for the protection of water Rights, rights to highways etc.

Natural rights to waters.—Water is either public or private. Public waters are the sea and its branches, and navigable rivers the beds of which belong *prima facie* to the Crown (1). In British India also the Government has a free hold in the beds of navigable rivers, and in the land between high and low water marks (2). As a rule the soil of estuaries and of rivers [whether navigable (3) or not] in which the tide ebbs and flows is vested in the Crown. Private waters are rivers, streams, lakes and ponds etc., the beds of which belong to private persons. *Prima facie* the soil of non-tidal rivers and lakes belongs to the owners of the adjoining land. "*Prima facie*" says *Story J.* in *Tyler* v. *Wilkinson* (4), "every proprietor upon each bank of a river is entitled to the land covered with water, in front of his bank, to the middle thread of the stream ; or, as it is commonly expressed, *ad medium filum aquae* (5). In virtue of this ownership, he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a preprietor above or below in the course of the river ; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrime that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows, for that would be to deny any valuable use of it. There may be, and there must be allowed to all, of that which is common, a reasonable use. The true test of the principle

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(1) Byrne's Law Dictionary.

(2) *Doe dem Sheeb Kristo* v. *E. I. Co*, 6 M. I. A. 267 ; see also *Gaun* v. *Fishers of Whistable*, 11 H. L. Cas. 207 ; *Att. Gen.* v. *Emerson*, (1891) A. C. 649.

(3) *Att. Gen.* v. *Earl of Longdale*, L. R. 7 Eq. 397 ; *Lyon* v. *Fish mongers' Co*, L. R. 1 App. Cas. 682, *Original Hartlepool Colleries Co*, v. *Gibb*, L. R. 5 Ch. D. 713 ; *Bell* v. *Corporation of Qucbec*, 5 App. Cas. 84 ; *Fritz* v. *Hobson*, 14 Ch. D. 542.

(4) 4 Mason, U. S. R. 397 ; cited in Gale on Eastment p. 239.

(5) *Beckett* v. *Morris*, L. R. 1 H. L. Sc. 47 ; *Mayor and Corporation of Carlisle* v. *Graham*, L. R. 4 Exch. 361 ; *Earl of Zet law* v. *The Glover In Corporation of Perth*, L. R. 2 H. L. Sc. 70.

and extent of the use is, whether it ts to the injury of the other proprietors, or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, perfectly consistent with the common right. The diminution, retardation or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, *sic utere tuo ut alienum non laedas.*

"But of a thing common by nature, there may be an appropriation by general consent or grant. Mere priority of occupation of running water, without such consent or grant confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the one already acquired. But our law awards to the riparian proprietors the right to the use in common, as one incident to the land ; and whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law. Now this may be either by a grant from all the proprietors, whose interests are affected by the particular appropriation, or by a long exclusive enjoyment without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. I say of a grant or right—for I very much doubt whether the principle now acted upon, however in its origin it may have been confined to presumptions of a grant—is now necessarily limited to considerations of this nature. The presumption is applied as a presumption *juris et de jure*, wherever by possibility, a right may be acquired in any manner known to the law." So "the right to receive a flow of water in a natural stream, and transmit it in its accustomed course, is an ordinary right of property—a natural right (1) ; the right to interfere with the accustomed course, either by sending it back upon the land above, or transmitting it altered in quantity or quality to an extent not justified by natural right, is an easement. The right to have a natural stream run in its accustomed course does not arise by prescription, but "*jure naturae*," and of common right as an ordinary incident of property ; the right to interfere with this natural course, by altering the quality or quantity of the water, is an easement, and is claimable by prescription (2)."

In *Belbhadra Prosad* v. *Sheikh Barkat Ali* (3) the plaintiffs, riparian proprietors alleged that the defendant had erected a dam across the water-

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(1) *Chasemore* v. *Richards*, 7 H. L. C. 379 ; *Mansell* v. *Valley Printing*, (1908) 2 Ch. 448 ; *Henry* v. *Shcoraj*, 64 Ind. Cas. 346=3 P. L. T. 53.

(2) *Gale on Easements* p. 238.

(3) 11 C. W. N. 85=4 C. L. J. 370.

course at a place belonging to him and had thereby cut-off the entire water supply to the village owned by the plaintiffs. The plaintiffs prayed for the removal of the dam and also for a perpetual injunction restraining the defendant from interfering with the flow of water to the village owned by him. The lower Courts decided the case in the Plaintiffs' favour and granted the reliefs prayed for. The defendant appealed. On his behalf it has been pleaded that the defendant being a superior riparian proprietor is entitled to as much water of the *nala* as is required by him for the purpose of irrigating his field. It is also contended on his behalf in support of the above contention that according to English law, the user of water of water courses are divided under two heads—(*i*) primary and (*ii*) secondary. Under the first head is the use of water for domestic purposes and for the watering of cattle. For these purposes an upper riparian proprietor may consume the whole of the water of a water course that passes through his land. For other purposes he can only use a reasonable proportion of water, and then pass it on. It is also contended that in British India, the irrigation purpose should be considered as a primary use. In delivering his judgment *Rampini J.* said: "The learned pleader, however, asks us to lay down a new rule of law to the effect that in this country the use of water for irrigation purposes is a use that should be classified under the head of primary and not of secondary uses, and we should hold that the defendant had a right to use all the water of *Bhutahinala* for the purpose of irrigating his own land and that he was not obliged to leave any at all for the consumption of the plaintiffs. In support of this contention he has cited a passage in section 121 (p. 207) of Angell on Water Courses in which it has been pointed out that according to the supreme Court of *Illinois* in arid climates water for irrigation is referred to the class of natural wants, to which artificial wants must ever be legally subservient. But whatever may be the law or the future developments of the law in other countries than this, I can only say that no such rule has yet been laid down in this country. The law on the subject is to be found in the judgment of this Court and of their Lordships of the Privy Council in *Chumrao Singh* v. *Khyrut Ahmed* (1), *Ramessur Persad Narain Singh* v. *Koonj Behary Singh* (2), and *Debi Pershad Singh* v. *Joy Nath Singh* (3) and according to these the defendant is not entitled to consume the whole of the water of the *Bhutahinala* but only to a reasonable use of it" (4). In the same case *Mookerjee J.* in delivering his elaborate judgment observed: "Reliance was placed upon the observations of *Lord Managhten* in *Mc Cartney* v. *Londonderry* (5) and of *Sir William Brett, M. R. in Ormerod* v. *Tadmorden* (6) in which the distinction is pointed out between the use of the water of a running stream for ordinary or primary purposes and for extraordinary or secondary purposes. Reference was also made to passages from Angell on Water-courses (7th Ed.

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(1) 18 W. R. 525.
(2) 4 C. 633, 637=6 I. A. 33.
(3) 24 C. 865=24 I. A. 60.
(4) See also *That Ev.* v. *Lama Ma Gale*, 3 L. B. R. 23.
(5) L. R. (1904) A. C. 301, 306.
(6) 11 Q. B. D. 154.

1877) sections 120 to 128, in which a distinction is drawn between user for natural and artificial purposes.....In the first place, it is firmly settled that riparian owners have equal rights to a usufruct of the waters of an adjacent stream, and no proprietor has the right to use the water to the prejudice of other proprietors, above or below, unless he has a prior right to diversion. This is explained with great clearness by *Mr. Justice Nelson* in his judgment in the case of *Howard* v. *Ingersoll* (1), where that learned Judge observed as follows:— 'Every proprietor of land on the banks of a river has naturally an equal right to the use of water, which flows in the stream adjacent to his lands. No proprietor has a right to use the water to the prejudice of other proprietors, above or below, unless he has acquired a prior right to divert it. He has no property in the water itself, but a simple usufruct while it passes along. Any one may reasonably use it who has a right of access to it, but no one can set up a claim to an exclusive right to the flow of all the water in its natural state, and that, what he may not wish to use himself will flow on till lost in the ocean. Streams of water are intended for the use and comfort of man, and it would be unreasonable and contrary to the universal sense of mankind to debar a riparian proprietor from an application of the water to domestic, agricultural and manufacturing purposes, provided the use works no substantial injury to others (2)".

There is a distinction between the ordinary and extraordinary user of water or uses for the purpose of satisfying natural and artificial wants. One of the earliest cases in which this distinction was established is that of *Miner* v, *Gilmour* (3) decided by the Judicial Committee on an appeal from Lower Canada. *Lord Kings down* in delivering the judgment of their Lordships observed : "By the general law applicable to running streams, every reparian proprietor has a right to what may be called the ordinary use of the water flowing past his land ; for instance, to the reasonable use of the water for his domestic purposes and for his cattle and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury (4)"

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(1) 13 Howard 381 (426).

(2) *Balbhadra* v. *Barhat* 11 C. W. N. 85. See also *Tylor* v. *Wilkinson*, 4 Mason 397 per *Story J.* ; *Embrey* v. *Owen*, 6 Exch. 353, 369 ; *Sampson* v. *Haddinoltt*, 1 C. B. N. S. 590, 611.

(3) 12 Moo. P. C. 131 ; see also *Lord Norbury* v. *Kitchen*, 9 Jur. N. S. 132 ; *Wood* v. *Wund*, 3 Ex. 781 ; *Mc Cartney* v. *Londonderry*, (1904) A C. 306, 307 ; *Att wood* v. *Llay Main Colleires* (1926) 1 Ch. 458=95 L J. ch 221. But the use must be for the riparian tenant. *Att wood* v. *Llay Main Coileries*, (1926) 1 Ch. 458.

(4) See also *Lord Norbary* v. *Kitchin*, 9 Jur. N. S. 132 ; *Nuttall* v. *Brace well*, L. R. 2 Exch. 1 (9) ; *Swindon* v. *Witts*,

In *Mc Cartney* v. *Londenderry*, (1), *Lord Macnaghten* stated the law as follows : " There are three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes and the wants of his cattle. He may use it also for some other purposes—sometimes called extra-ordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign or unconnected with this riparian tenement. His rights in the first two case are not quite the same; in the third case he has no right at all. In the ordinary or primary use of flowing water, a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights, he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights, extra-ordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable (2). The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for these purposes substantially undiminished in volume and unaltered in character."

This distinction between ordinary and extra-ordinary use of water was adopted by *Sir William Brett M. P.* in *Ormerod* v. *Tadmorden* (3), who went a step further than *Lord Kingsdown* and held that a user which would be extra-ordinary in one place, might be ordinary in another, owing to the surrounding circumstances, and that a user which at one time would be considered extra-ordinary might at another time be deemed ordinary owing to changes in locality. The cases of *Wood* v. *Wand* (4), *Sampson* v. *Hoddinott* (5), and *Embry* v. *Owen* (6) are authorities for the proposition, that whether a riparian owner may use the water of a natural stream to irrigate his land,

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L. R. 7 H. L. 697 ; *Rameswar* v. *Kunj Behari*, 4C. 633 P. C ; *Commissioners of French Hock* v. *Hugo*, L. R. 10 App. Cas. 336 ; *Athur Ali* v. *Sekendar*, 4 W. R. 28 ; *Monoor* v. *Kanhyalal*, 3 W. R. 218 ; *Perumal* v. *Rama Sami*, 11 M. 16 ; *Sunkar* v. *Gurbhoo*, 15 W. R. 216 ; *Court of Wards* v. *Raja Pulanand*, 13 W. R. 48 ; *Madhab* v. *Rakhana*, 9 Bom. L. R. 864. A volume of water which has acquired a distinctive character as a stream upto a point does not loose it by the fact that in the rest of its course it is not well defined. The attributes of a natural stream are :—It must have a fairly defined course. It must move. Its water must be capable of identification. It need not always be confined within banks. Its width need not be of a particular dimensions. *Gopal Kishna* v. *Secretary of State*, 16 M. L. T. 597.

(1) L. R (1904) A. C. 301 at p. 306.

(2) Vide *Attwood* v. *Llay Main Collieries*, (1926) 1 Ch. 458 ; see also *Dinkar* v. *Narayan*, 29 B. 357.

(3) *Vide Evans* v. *Merry Weather*, 3 Scam. 492=38 Am. Dec. 106, where *Mr. Justice Lock wood* appears to have observed, that in countries with a hot and arid climate where water is absolutely indispensable to the cultivation of the soil, water for the purposes of irrigation would be a natural want.

(4) 3 Ex. Ch. 748.

(5) 1 C. B. N.'S. 603.

(6) 6 Exch. 353.

depends upon the quantity of water he requires and the injury he inflicts upon other riparian owners (1).

In *Lux* v. *Huggin* (2), the Court doubted whether any artificial classification of primary and secondary user could be of general application and pointed out that the relative importance and necessity of the several user of the water of a particular stream must generally depend upon circumstances of each case, and that all these circumstances are to be considered in determining the reasonableness of the use for irrigation (3).

In *Harris* v. *Harrison* (4) it was said that where irrigation is absolutely necessary, a riparian owner is entitled only to the reasonable user of natural water for irrigating his land, although such use may appreciably diminish the flow down to the lower riparian proprietors; the larger the number of the riparian proprietors whose rights are involved—the greater the difficulty of adjustment; the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these and many other considerations must enter into the solution of the problem; but one principle is surely established, namely that no proprietor can absorb all the water of the stream so as to allow none to flow down to his neighbour (5).

In *Emani* v. *Secretary of State* (6). *Sadasiva Ayar J.* said: "section 7, clause (*b*) of the Easement Act and illustration (j) thereto recognise the right of a riparian owner to enjoy without disturbance 'the natural advantages arising from the situation of' his riparian land, including his right to use and consume the water of the stream for drinking, household purposes and watering his cattle and sheep and for "irrigating'. such land, provided it does not thereby cause material injury to other like owners. It has, no doubt, been said that 'irrigation necessarily consumes a large part of the water taken from a stream for that purpose, while milling permits practically all the water to remain in the stream' and that 'therefore, 'the right of irrigation is less strong' than the right of milling. Having, however, regard to the customs and necessities of a tropical agricultural country like India, Indian Courts should, it seems to me, be liberal in recognising irrigational rights as natural rights of as strong a character as any other, provided of course, the lower riparian owners are not injured to an unreasonable extent and the equality and the wide participation of the benefits' of the natural

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(1) *Vide* also *Swinden Water Works* v. *Witts & Berks Canal*, 7 H. L. 704; *Baily* v. *Clark*, (1902) 1 Ch. 649.

(2) 69 California, 255.

(3) *Belbhadur Prosad* v. *Sheikh Barket Ali*, 11 C. W. N. 85; Kerr on Injunction p. 214.

(4) 93 Cal. 676.

(5) *Secretary of State* v. *Ambalavana*, 18 Ind. Cas. 294; *Thakur Sheonarayan* v. *Chandraball*, 10 Ind. Cas. 181; *Bal deo* v. *Jugal Kishore*, 33 A. 619; *Mohendra* v. *Narayana*, 6 Bom. L. R. 291; *Sankerruppa* v. *Pori*, 21 Ind. Cas. 62=38 M. 149.

(6) 43 Ind. Cas 113=34 M. L. J. 223=7 L. W. 1=23 M. L. T. 235.

stream are not interfered with to an unreasonable extent. As regards what is riparian land, the opinions of Judges and text-writers have not been uniform. *Franham* says in Paragraph No. 463 (*a*)—'The first and the most important test' is the natural configuration of the country through which the stream flows, so that all land within the water shed which lies in such a manner that the drainage from it finds its way into the stream might be regarded as riparian land. But a rule which would recognise such a vast extent of territory as riparian land would be almost as distinctive of the right of the riparian owner as a rule which would permit any one who could give access to the water to make use of it. Such a rule not only would permit the consumption of the water near its source of supply, but it would result in conflicts between land owners as to rights of way and the construction of the necessary apparatus to make the water available. Another criterion for determining what is riparian land might be the land which is in possession of one person whose holdings actually extend so as to come in contact with the water. This test, in some cases, might be too broad, because part of the land might be out of the natural watershed of the stream and, therefore, be outside of the boundaries established by nature for riparian ownership. The criterion which most nearly meets the necessities of the case is the rule that all land must be regarded as riparian (a) 'when it is within the natural watershed of the stream', (b) 'the title to which is in one owner,' and (c) 'the boundaries of which have been established in accordance with the requirements of the conditions which will best serve the interests of individual land owners. Under ordinary circumstances, the individual acquires title to such an amount of land only as he can reasonably care for and cultivate by his own efforts with such paid assistants as his business ability make it profitable for him to employ.' I think, that, in India, riparian land must be confined to land which is on the bank of the stream and which extends from that bank to a respectable depth in land: I do not wish to express a final opinion in this case as to what would be the lineal measurement of such a reasonable depth, but I am clear that a depth of more than half a furlong would usually, be unreasonable"

Every land owner has a natural right to collect and retain upon his own land surface water not flowing in a defined channel and to put it to such use as he may desire. He may allow it to flow away, in the usual course of nature, upon the lower lands of his neighbour and cannot be bound to prevent it from so doing; but the adjoining owner has no right to compel him to do so, unless he has acquired a right to it by contract or prescription (1). A riparian right is a natural right and is not lost by non-user until some other person acquires a right of easement to substantially diminish the water available to the riparian owner; the riparian right cannot be affected or lost (2),

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(1) *Abdul Bagui* v. *Sheo Prakash* A. I. R. 1928 Pat. 279=107 Ind. Cas. 542.

(2) *Ramswaran* v. *Secretary of State for India* 104 Ind. Cas, 781.

In the Indian Easements Act of 1882, the following illustrations are appended to section 7 as instances of natural right to water, namely :—

(*f*) The right of every owner of land that within his own limits, the water which naturally passes or percolates by, over or through his land, shall not before so passing or percolating, be unreasonably polluted by other persons ; (*g*) The right of every owner of land to collect and dispose, within his own limits, of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel. (*h*) The right of every owner of land that the water of every natural stream which passes by, through, or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature ; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake, or pond shall be allowed by other persons to remain within such owner's limits without natural alteration in quantity or temperature. (i) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run as naturally thereto. (j) The right of every owner of land abutting on a natural stream, lake, or pond to use and consume its water for drinking, house-hold purposes, and watering his cattle and sheep, and the right of every such owner to use and consume the water for irregating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners. A natural stream is a stream whether permanent or intermittent, tidal or tideless on the surface of land or under ground which flows by the operation of nature only and in a natural and known course (1).

An artificial stream is a stream which flows at its source by the operation of man, or if it flows at its source by the operation of nature, flows in a channel made by men. Where water is made to flow in an artificial channel from a natural stream, such a channel is an artificial stream. Where a stream is artificial and flows in a channel made by artificial means through the lands of adjoining proprietors, the rights of such proprietors are not *prima facie* the same as those of proprietors on the banks of natural streams. The right to the enjoyment of a natural stream or water belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself. He has a right to have it come to him in its natural state, in flow, quantity and quality and to go from him without obstruction. Such a right in no way depends on prescription or any presumed grant. But in the case of artificial water courses the acquisition of rights in them must be by grant or prescription (2). But the

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(1) Vide illustrations (*f*), (*g*), (*h*), (*i*) and (*j*) to section 7 of the Indian Easements Act of 1882.

(2) *Narasimhulu* v. *Bhadraya*, A. I. R. 1933 Mad. 10.

above statement must be subject to the following qualification: "There is however a well established principle of law, namely, that a water course originally artificial may have been made under such circumstances and have been used in such a way that an owner of land situate on its banks will have all the rights over it, that a riparian owner would have if it had been a natural stream (1)".

Other rights of riparian owners.—Riparian owners are entitled to use and consume the water of a stream for drinking and household purposes, for watering their cattle, irrigating their land, and for purpose of manufacture, subject to the conditions (*i*) that the use is reasonable, (*ii*) that it is required for the purposes as owners of land, and (*iii*) that is does not destroy or render useless or naturally diminish or affect the application of the water by riparian owners below the stream in the exercise of their natural right or their right of easement (2). In the absence of circumstances disclosing a state of things from which the existence of some grant or arrangement may reasonably be presumed a servient owner cannot claim as a matter of right the continuance of an easement to discharge water over his tenement possessed by the owner of the dominant temenent (3). An easement is a right existing in a particular individual in respect of his land, while customary right belongs to no individual in particular, but is capable of being enjoyed by all those who, for the time being own land in the locality to which the right is attached. If a custom is shown to exist under which individuals of a class may obtain independant rights in respect of their land, which would be an easement if acquired by grant and prescription, these rights are easements, though acquired by reason of custom. There is nothing in the Easements Act to invalidate a customary easement. A natural stream is one which has a natural source and flows in a natural channel. The rule of law with regard to rights of upper riparian owners to water in a natural stream flowing in a defined channel, is that they may use the water for all ordinary purposes without regard to the effect which such use may have on proprietors lower down the stream, and even use it for extra-ordinary purposes connected with their tenement, without thereby inflicting sensible injury on lower owners. Without interfering with the rights of proprietors above and below them, they may dam up the stream for purposes of irrigation or for the purpose of a mill (4).

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(1) *Maung Bya* v. *Maung Kyi Najo*. 90 Ind. Cas. 198=52 I. A. 385.

(2) *Tha E.* v. *Lona Ma*, 3 L. B. R. 23; *Maung Hmin* v. *Mang Shwe*, L. B. R. (1872-1892), 233; *Perumal* v. *Ranaswami*, 11 M. 16. The law as to riparian owners is the same in India as in England, and is stated in illustration (*h*) of section 7 of the Easements Act (v. of 1882). Each proprietor has a right to a reasonable use of the water as it passes his land, but in the absence of some special custom, he has no right to dam it back, or exhaust it, so as to deprive other riparian owners of like use. *Narayan Hurry* v. *Keshab Shivram* 23 B. 506.

(3) *Chakradhar* v. *Tikaram*, 14 C. P. L. R. 145.

(4) *Orr* v. *Raman Chatti*, 18 M. 320; *Eshan* v. *Nimoni*, 35 C. 85.

Rights acquired by a person in excess of natural rights as a riparian owner are easements within the meaning of s. 25 of the Limitation Act, any interference with which would give rise to a cause of action for an injunction (1). In the absence of evidence to the contrary, the exact share of water of each riparian owner for reasonable use through whose lands a natural stream flows is equal (2). The owner of land, through which a river or other natural channel flows is bound to clear it out from time to time, so that the amount of water that can pass down it may not be diminished. Such an owner is bound within certain limits, as between himself and other riparian owners, not to do anything which will obstruct the flow of the water or naturally interfere with their right (3).

Every body has a right to do any thing on his own land with regard to the diversion, storage or the user of water in any way he chooses, provided that when he has made such use of it on his own land or when he has made such use of it as he is minded to make, he is not to allow or cause that water to go upon his neighbour's land so as to affect that neighbour's land in some other way than the way in which it had been affected before (4). A person has no right to obstruct the water of a natural stream, except to the extent to which he had prescriptive use there of (5). A plaintiff, whose natural rights in regard to water courses are in danger of being infringed or further encroached upon by a new enjoyment on the part of the defendant, capable of being converted by user for the prescriptive period into a new right in the latter, has a good cause of action, apart from any question as to the amount of damage which he may have suffered or be likely to suffer (6). A plaintiff whose title to land is based upon a grant by a Hindu widow, which may or may not be valid against the reversioners can during the life time of the widow maintain a suit for a permanent injunction restraining the defendant from diverting the course of the natural flow of surface water so as to affect his land (7).

The Indian Easement Act only declared the existing law in regard to the easement over water. An easement may be acquired in regard to the water of the rainfall, though the supply from that source may be only casual and intermitted. Surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise, is not subject of easement and prescription. It may however, be a subject of express grant or contract. It is the

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(1) *Sirdar Kirpal Singh* v. *Lal khan*, 25 P. R. 1895.

(2) *Ahmad Ali* v. *Malak Hashan* 49 P. R. 1888.

(3) *Baldeo Singh* v. *Jugalkishore* 8 A. L. J. 640 ; See also *Wazera* v. *Sipadar*, 33 P. R. 1867 ; *Noor Mahommed* v. *Khanee*, 12 P. R. 1862 Rev.

(4) Vide per *James L. J.* in *West Cumberland Iron & Steel Co.*, v. *Kenyon*, 11 Ch. D. 782.

(5) *White* v. *White*. (1906) A. C. 72 (85).

(6) *Mc Cartney* v. *Londonderry*, (1904) A. C. 301 (313) ; see also *Mc Intyre* v. *Mc Gavin*, (1893) A. C. 268 ; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590 ; *Baird* v. *Williamson*. 15 C. B. N. S. 376 (391) ; *Young* v. *Bankier Disterlley*, (1893) A. C. 691.

(7) *Eralijool* v. *Nagendra*, 41 Ind Cas. 47.

natural right of every owner of land to collect and dispose of all water on the surface which does not pass in a defined channel (1).

Where there is a natural outlet for a natural stream, no one has power for the safety of his own property, to divert or to interfere with its flow, and if he does so, he is ordinarily liable to pay damages to any one who is injured by his act, no matter how the water before the mischief came into the water course. The right of a person to protect his land from extraordinary floods extends to the doing of anything which is reasonably necessary to save his property; but he cannot actively adopt such a course as might have the effect of diverting the mischief from his own land to the land of another person, which would otherwise have been protected (2).

Natural right of drainage.—An owner of land on a lower level to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his land so as to obstruct the flow of water from the higher land (3). But the natural right of drainage covers only the right to allow rain water falling on land of a naturally higher level to drain off surface flow along whatever lines the water many find its way to the neighbouring land, but it does not include a right to pass water which has come artificially thereon. Natural rights in water do not come into existence so long as the water does not flow in known and defined channels whether on the surface or under ground. There is no obligation upon an adjoining land-owner to submit to artificial discharge of water from his neighbour's land unless he is bound by an easement to do so (4). Defendant constructed certain embankments in his lands which caused the natural drainage from certain adjoining lands deflect along the foot of the embankments into the plaintiff's lower land so as to increase the usual burden upon it. Plaintiff sued for an injunction to compel the defendant to restore the original flow and both the lower Courts decreed in his favour. On second appeal, it was contended that the defendant was entitled to protect himself by works erected on his own land from the egress of water from the higher levels and that the plaintiff could not succeed without proving that some other method of protection might have been adopted by the defendants which would not have caused any injury to the plaintiff. *Held*, the plaintiff was entitled to the injunction sued to restrain the defendant from causing circumstances to exist which increased the usual flow into the plaintiff's land resulting in damage by cutting up the ground on the principle that, if in "cases in which property is so situated that unless the owner prevents an injury from happening to his property, which the ordinary course of nature would bring upon his property, it must suffer injury from its position, the owner of the land does something on his own land to cure that natural defect, and thereby attempts

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(1) *Perumal* v. *Ramasami*, 11 M. 16.

(2) *Mahomed Samiullah* v. *Mukund*, 63 Ind. Cas. 980=19 A. L. J. 736=3 U. P. L. R. (A) 131.

(3) *Partab Singh* v. *Surjan Singh*, 29 P. L. R. 440=A. I. R. 1928 Lah. 717.

(4) *Ramchandra* v. *Nagoba*, 24 N. L. R. 122=107 Ind Cas. 203=A. I. R. 1928 Nag. 184; see also *Ramkrishna* v. *Venkata*, 39 M. L. T. 379.

to transfer that defect to a neighbour's land, the law will not permit him so to alter the course of nature, as he cannot do without causing injury to his neighbours (1)".

Plaintiff and defendants owned adjacent lands, near which was situated a tank which was common to both and the surplus from which had flowed from time immemorial down a channel which lay between the plaintiff's land and that of defendants. The channel was insufficient to carry off all the water, and some of it flowed over plaintiff's lands and some over those of the defendants. The flow was not the result of extraordinary flood but was the normal state of things. Plaintiff desired to erect a bank to protect his land from the water but defendants had prevented him. It was found that if plaintiff did erect such a bank, it would throw back on the land of the defendants more water than had customarily flowed over it and would increase the damage to which it had hitherto been subject. On a suit being brought by plaintiff for an injunction restraining defendants from interfering with the erection of the proposed bank: *Held* that plaintiff was entitled to an injunction (2). In delivering the judgments in the above case, *Sir Subrah mania C. J.* said: "It is quite true that every land owner exposed to the inroads of the sea has the right to protect himself by erecting such works as are necessary for that purpose and that if he acts *bona fide* he is not liable for any damage occasioned to his neighbours who must protect themselves (3). But I take it that the law does not, except in the case of extraordinary floods, give such large powers for protection to riparian owners, it having been distinctly laid down that such owners have a right to protect their lands with reference to ordinary floods, only if they do so without injury to others (4).

"Here, however, the bund proposed would as found by the lower Courts, affect the defendant's land injuriously. The case is therefore analogous to *Mzis* v. *Breadalbane* (5), where the House of Lords, speaking through *Lord Lyndhurst* pointed out the similarity between the English, Scotch and Roman Law bearing on the matter; and held that a proprietor of land on the bank of a river ought to be restrained from erecting a mound, which, if completed, would in times of ordinary flood throw the water of the river on the grounds of a proprietor on the opposite bank, so as to over flow and injure them. (6).

"This decision of the House of Lords is referred to in *Whalley* v. *Lancashire and Yorkshire Company* (7) as illustrative of the second of the four heads

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(1) *Jairam Mali* v. *Babaji Vidur*, 1 N. L. R. 182.

(2) *Venkata Chalam* v. *Zaminder* of *Sivaganga*, 27 M. 409.

(3) *Rex* v. *Pagham Commissioners*, 8 B. & C. 355.

(4) *Rex* v. *Trafford*, 8 Bing. 204; *Cf. Ridge* v. *Midland Ry. Company* 53 J. P 55; Forbes Laws of Water, 2nd Ed. page 155.

(5) 3 Bligh N. S. 414.

(6) See also *Trafford* v. *Rex*, 8 Bing. 204; *Wicks* v. *Hunt*, John 372; *Lawrence* v. *Great Northern Ry. Co.*, 16 Q. B. 643; *Greyvenstyn* v. *Hattengh*, (1911) A. C. 359; *Greenock* v. *Caledonian*, (1917) A. C. 556.

(7) 13 Q. B. D. 131 (136).

of the classification there adopted by the Master of the Rolls. He observed: 'Then we come to the case of having property which is subject to this defect, that unless you can prevent the injury which the ordinary course of nature will bring upon it, by transferring that injury to your neighbour's property, your property must suffer as a natural consequence of its position. That is the case of *Menzie* v. *Breadbane* (1), where property was so situated with regard to a river that if the river was left alone with its ordinary flow of water, it must, in the course of nature, eat away the property or occasionally overflow it. If the owner of such property, in order to cure that defect were to do something to his land which by turning the stream out of its ordinary course would throw that defect on his neighbour's land, he would I think, according to the ordinary principles of law, become liable to pay the damages this would occasion, and further be prevented from continuing to do it by an injunction.

"That is practically the case here. The land of the plaintiff by its situation, has from time immemorial been exposed to the periodical overflow of the water discharged by the Weir and therefore the owner of such land even if he had no interest in the tank would not be at liberty to construct an embankment such as that proposed, to the injury of the proprietor of lands on the otherside.

"The case of *Neild* v. *London and North Western Railway Co.* (2) is not in point for the reason that, apart from the water sought to be turned away in that case being extraordinary flood water, neither party to the contest was responsible for the coming in of the water; while here the water which is sought to be kept off by the plaintiff, is the surplus of what comes in to the tank in the interest of both the parties and has to be discharged for the safety of the common property—the tank. This circumstance would distinguish the present case of *Gopal Reddi* v. *Chenna Reddi* (3)."

The plaintiffs were the owners of land on the south of that of the defendants, on a higher level, and the water falling on the land of the plaintiffs flowed on to the land of the defendants who built a bund on their land so as to obstruct the water accumulated on the plaintiff's land from flowing towards the north through the defendants' land. The plaintiffs alleged that they were entitled to have the water on their land discharged through the defendants' land; but they did not claim it as an easement but as a right ancillary to their property which they had not parted with. *Held*, that there was such a right as that claimed by the plaintiffs, although the plaintiffs did not claim the right to discharge their water and did not in fact discharge their water on to the defendants' land by any definite channel, that the duty of the defendants was to allow the water from the plaintiffs' land to pass on through their land. It was then open to them to dispose of it in the way they thought best (4).

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(1) 3 Bligh N. S. 414.
(2) L. R. 10 Ex. 4.
(3) 18 M. 158.
(4) *Ramadin Singh* v. *Jadunandun Singh*, 19 C. W. N. 54; *Kasiswar* v. *Jyotkumar*, 22 C. W. N. 666; see also *Hameedunnissa* v. *Anandamoyi* W. R. (F. B.) 25; *Kopil* v. *Manik*, 20 W. R. 287; *Imam* v. *Paresh* 8 C. 468; *Abdul Hakim* v. *Ganesh*, 12 C. 323.

But in the absence of controlling right of easement or servitude in respect of his premises, every one has a right to protect them against the flow of water from adjacent lands or houses (1). The plaintiff sued for a permanent injunction on the allegation that the defendant, by raising the height of his building, had diverted the rain water, which coming from the premises of certain third parties, had previously flowed over the premises of the defendant, on to the premises of the plaintiff. It was not alleged that the plaintiff possessed only right of easement by which he was entitled to claim that the water should flow as before over the defendant's premises: *Held* that the plaintiff had no right of action whatever (2). Where a right to discharge water on another's immoveable property is claimed the onus is on the dominant owner to prove all the points which are necessary to establish an easement under s. 26 of the Limitation Act (3). Defendant, who was the owner of land which was on a lower level to that owned by the plaintiff, erected a bund between his own land and that of the plaintiff in order to protect his land from being flooded by water which flowed over the plaintiff's land in seasons of flood from the river, owing to the failure of the plaintiff to maintain a proper bund. Plaintiff sued for an injunction restraining the defendant from erecting the bund on the ground that the bund obstructed his natural and agricultural drainage. *Held* (i) that the plaintiff had no right to drain away his flood water accross and over the defendant's land and the latter was, therefore entitled to erect the bund in dispute to protect his land; (ii) that if the bund interfered with the plaintiff's natural right of drainage, it was due to his own fault and he had no right to complain; (iii) that the plaintiff was not therefore, entitled to the injunction sought for (4). Where the rain water falling on the plaintiff's land which is on a higher level flows across the defendant's land which is situated on a lower level, the plaintiff has a natural right of flow of such water, and the defendant is not entitled to obstruct it so long as his land continues to be on a lower level. The plaintiff's right is a right *ex jure natura* and not founded on prescription (5).

Foundation of the jurisdiction.—The interference of equity by the writ of injunction is frequently invoked to restrain nuisances to water and the infringement of riparian rights. As an incident to the ownership of the adjacent soil, a riparian proprietor has an interest of a usufructuary nature in the water flowing past his land, which equity will protect. The right or interest

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(1) *Jairam* v. *Khan Bahadur*, 16 Ind. Cas. 797=248 P. L. R. 1912=259 P. W. R. 1912; *Rangachariar* v. *Municipal Council*, 29 M. 539; *Sangana Reddir* v. *Perumal*, 5 Ind. Cas. 921.

(2) *Jairam* v. *Khan Bahadur*, 16 Ind. Cas. 797=248 P. L. R. 1912=259 P. W. R. 1912.

(3) *Brij Ram* v. *Brijlal*, 26 P. L. R. 42=84 Ind. Cas. 676=A. I. R. 1925 Lah. 297.

(4) *Moksod Ali* v. *Ma Hli*, 76 Ind. Cas. 729=A. I. R. 1924 Rang. 86; see also *Sankarappa Naicker* v. *Pari Naicker*, 21 Ind. Cas. 62=38 M. 149=25 M. L. J. 276.

(5) *Ambica Saran* v. *Debi Saran*, 24 Ind. Cas. 91=12 A. L. J. 685; see also *Subramaniya* v. *Rama Chandra*, 1 M. 335; *Rangachariyar* v. *Municipal Council*, 29 M. 539.

being common to all owners of land adjacent to a stream, no proprietor can, in the absence of a right to exclusive enjoyment, use the water in such a manner as to injure adjoining proprietors. Nor can he, unless authorized by adjacent owners, divert the water from its natural course, to the injury of the owner below, or change its quantity, or diminish its quality or cause it to flow back upon the proprietor above (1). And the test to be applied in such cases is whether the use of the water is such as to cause a substantial injury to other proprietors in their common right (2). The jurisdiction of equity in this class of cases may be regarded as ancient and well established. It is founded upon the pressing necessity of immediate relief being granted where, in the absence of such relief, permanent mischief and lasting injury might result (3), and also rests upon the necessity of preventing multiplicity of suits (4). And the right being established, together with the wrongful interruption of that right tending to the great injury of the person aggrieved, equity will interfere (5). And while an injunction will not ordinarily be granted unless positive and substantial injury be shown, yet where adverse rights are likely to arise, it may be allowed, even though the injury is trivial, to the extent of vindicating the plaintiff's rights and of preventing their loss by adverse user or lapse of time (6). Where the extent of the injuries resulting from the invasion of the right is difficult of estimation, an injunction is regarded as the most efficient remedy (7). In the above case the Court observed: "Where the invasion of a right of this kind of property is threatened and intended, which is necessarily to be continuing and operates prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the writ of injunction is not only permissible, but is the most appropriate means of remedy. It affords, in fact, the only adequate and sure remedy. The very doubtfulness as to the extent of the prospective injury and the impossibility of ascertaining the measure of just reparation render such an injury irreparable in the sense of the law relating to this subject (8)".

The right of the owner of the land through which a stream of water flows to uninterrupted use and enjoyment of the stream, extends to the quality as well as to the quantity of the water (9). Hence any use of the water which operates to destroy the health or to diminish the comfort of a riparian owner will be enjoined as a constantly recurring injury, irreparable in its nature and not susceptible of adequate compensation in damage (10). And a Court of Equity will enjoin the fouling of stream in such manner as to be injurious to the owner of

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(1) High on Injunction § 794 citing *Webb* v. *Portland Mfg. Co.*, 3 Summer 189; *Beally* v. *Shaw*, 6 East. 208; *Mason* v. *Hill*, 5 B. & A 1; *Maccormic* v. *Horan*, 81 N. Y. 86; *Roberts* v. *Gwyrbai District Council*, (1899) 2 Ch 608.

(2) *Tyler* v. *Wilkinson*, 4 Mason, 397.

(3) *Gardner* v. *Newburgh*, 2 Johns. Ch. 162.

(4) *Lyon* v. *Mc. Langhum*, 32 Vt. 423.

(5) *Gardner* v. *Newburgh*, 2 Johns. Ch. 162.

(6) High on Injunctions § 794.

(7) *Lyon* v. *Mc Laughim*, 32 Vt. 423.

(8) High on Injunction § 795.

(9) *Beally* v. *Shaw*, 6 East. 208.

(10) High on Injunction § 797.

dye works, situated further down the stream, by rendering the water unfit for dying purposes (1).

Plaintiff's delay and acquiescence.—While a court of equity may interfere for the protection of the legal right to the use of water in a stream which is being fouled, and whose value is being impaired for manufacturing purposes, by defendants' works further up the stream, yet if complainants have not used due diligence in the assertion of their rights, and have for a long period allowed defendants to erect and operate their works without objection, an injunction will be refused especially when the injury complained of can be compensated in damages at law, and when the granting of the relief would inflict serious injury upon defendants, without doing any practical good to complainants (2).

Right by prescription.—Adverse possession and exercise of the right of diverting the water for twenty years is sufficient to raise a presumption of a grant, and to defeat complainant's right to an injunction against a private nuisance (3). And this upon the principle that as twenty years' possession gives rise to a presumption of a grant, so non-user for that length of time will put an end to the presumption (4). But the extent of the prescriptive right must be limited by the actual enjoyment, and must commensurate with that enjoyment (5). And to bring a case within the rule, the possession of the one must be so inconsistent with the rights of the other as to amount to an actual ouster (6). On the other hand, the right of the riparian owner to protection may itself arise from prescription. Thus, where a change is made in the natural flow of a water course, as by a canal company in erecting embankments and structures which protect the land of riparian owners from overflow, and this use of the stream is acquiesced in for so long a period as to give a right by prescription or limitatoin, a riparian owner may enjoin the removal of such structures which would cause the water to overflow his land (7). The person gaining a right to the use of water by adverse enjoyment for the required period is entitled to what he has enjoyed during that period, and to no more (8). Thus, if he has exercised the right to use the water upon certain days of the week or in certain quantities, he cannot use it upon other days or in different quantities (9).

Diversion or Obstruction.—It is a clear principle in law, that the owner of land is entiled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for

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(1) *Clowes* v. *Staffordshire*, L. R. 8 Ch. 125.
(2) *Wood* v. *Satciffee*, 2 Sim. N. S 163.
(3) *Shields* v. *Armdt*, 3 Green. Ch. 234.
(4) *Bliss* v. *Hall*, 4 Bing N. C. 183.
(5) *Holsman* v. *Boiling Spring* 1 Mc Cart 335.
(6) *Pratt* v. *Lamson*, 2 Allen. 275.
(7) *Burke* v. *Simonson*, 104 Ind. Cas. 173 ; High on Injuuction § 799.
(8) *Bealey* v. *Shaw*, 6 East. 208 ; *Davies* v. *Williams*, 16 Q, B. 546.
(9) *Strutt* v. *Bovingdon*, 5 Esp. 56 ; *Brown* v. *Best*, 1 Wils. 174 ; High on Injunction § 800.

the violation of this right (1). To obstruct or divert a water course is a private nuisance. The remedy by injunction which equity affords is very frequently sought. "And the foundation of that jurisdiction is the necessity of a preventive remedy when great and immediate mischief, or natural injury arises to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which upon just and equitable grounds ought to be prevented" (2). "If this oft—quoted language means anything" says *Prof Pomeroy* "more than that the diversion of waters will be enjoined when it is irreparable, or when from its continuance, it would involve repeated suits at law to furnish redress to the plaintiff, and that generally the case will fall within one or both of the familiar heads of jurisdiction, it is believed the authorities do not support it ; diversion of water is not *per se* a thing that will be enjoined (3)". Nor will a diversion of water in a stream be enjoined when the stream is restored to its old channel by defendant before it enters upon plaintiff's land (4). It may, however, be enjoined without a showing of damage ; but this results from the fact that at law the plaintiff may maintain an action without proof of damage, on account of the invasion of his right to have the water flow in its accustomed channel, and equity will enjoin under the same circumstances in order to avoid repeated litigation (5). Another ground of jurisdiction may be that, though the injury is not irreparable in the sense of being one of such peculiar character that money will not pay for it, yet the amount of damage is incapable of ascertainment in amount, and equity will not leave the plaintiff to a verdict at law which "cannot be measured by any certain pecuniary standard," but must be based on conjecture (6) ; such a legal remedy is not adequate. A diversion which is only threatened, and not yet existing, if immiment and likely to cause irreparable injury, may be enjoined (7). A diversion of water no greater in quantity than an amount which the defendant introduces into the stream above, will not be enjoined, as the plaintiff has no property in the water itself but only in its flowing, and this may be the same though the water is not the identical fluid naturally in the stream (8). It is held that in determining the propriety of an injunction the balance of injury between the plaintiff and the defendant will not be considered (9). In addition to an injunction, equity will also give damages

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(1) Pom. Eq. Jur. § 1976 ; *Debi* v. *Joynath*, 24 C. 865 P. C ; *Collector of Nasik* v. *Sanji Dasrath*, 7 B. 209.

(2) Per Kent Ch. in *Gardner* v. *Trustees*, 2 Johns. Ch. 162=7 Am. Dec. 526.

(3) Pom Eq. Jur. § 1976 ; High on Injunction § 808 ; see also *Bealey* v. *East*, 6 East 208 ; *Wright* v. *Howard*, 1 Sim & Stu. 190 ; *Pirie* v. *Kintore*, (1906) A. C. 484.

(4) *Elmhirst* v. *Spencer*, 2 Mac. & G. 45 ; *Kensit* v. *Great Eastern Ry. Co*, 23 Ch. D. 556 affirmed on appeal, 27 Ch. D. 122.

(5) *Moore* v. *Clear Lake Water works*, 68 Cal. 46 ; Pom Eq. Jur. § 1976.

(6) *Heil bron* v. *Fowler etc. Co*, 75 Cal. 426=7 Am. St. Rep. 183. Specific Relief Act s. 54 cl. (b).

(7) *Kimberley etc. Co*, v. *Hewitt*, 75 Wis. 371.

(8) *Society etc. Manfs* v. *Morris etc. Co*, 21 Am. Dec. 41 ; Pom Eq. Jur. § 197.6

(9) *Pine* v. *Mayor etc.* (N. Y.) 103 Fed. 337.

for past diversion (1). Obstruction of running water is a wrong of exactly the same character as diversion, being an interference with the riparian owners' right to have the stream in its quantity and manner, and as a subject of injunction is governed by the same rules (2). When the whole of water supply has not been cut off but only some of it, and when there has also been a general shortage of supply, it is very difficult for a party to prove the precise amount of diminution caused by the action of others or the precise amount of the particular damage caused by the diminution. Under such circumstances the injured party has a cause of action apart from proof of actual damage and has a right to an injunction if he establishes prospective probable damage (3). Where a water course has been illegally obstructed and completely fenced, the party injured is entitled to a mandatory injunction to compel the restoration of the water course to its natural form, and also to a permanent injunction to restrain the defendant from repeating the wrongful act (4).

Plaintiff sued for a declaration that the defendant had no right to make a new channel on his land and for an injunction directing the defendant to fill it up. Before the excavation of the new channel, all the waters that flowed from the defendant's land on to the plaintiff's land found their way there by natural flow or percolation and were not carried down by any definite water course. Whereas formerly, the water flowed from a large tract of defendant's land at different points, the effect of the alteration caused by the defendant, by means of the new channel, was to effect the collection of the water into a definite channel and throw it all in plaintiff's land at a particular point. *Held* that though no greater quantity of water might eventually be carried to plaintiff's land than hitherto ran into it, the new channel effected a material alteration in the mode of passage of the water from the defendant's land into that of plaintiff and that the plaintiff was entitled to object to such alteration. *Held*, further, that such alteration, without the consent of the plaintiff who was affected thereby, was clearly wrongful and that plaintiff was entitled to the injunction (5). The defendants, by blocking up the entrance of a small government channel irrigating the lands of the plaintiff deprived him of the use of the water of that channel, and the plaintiff prayed for an injunction restraining the defendants from repeating the obstruction; the defence was that, the supply of water for irrigation being made by the Government to the ryot on the footing of contract, the defendant obstructing the plaintiff's supply could be made liable, if at all, only on proof of actual damage, of which it was alleged there was no proof. *Held* that the plaintiff was entitled to the injunction (6). In the above case *White C. J.* said: "Whether the relations between the plaintiff and Government with reference to the supply of water be regarded as contractual,

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(1) *Robert* v. *Vest*, 126 Ala. 355.
(2) Pomeroy's Eq. Jur. § 1976.
(3) *Basavana* v. *Gowd*, 54 M. 793=A. I. R. 1931 Mad. 284.
(4) *Balbhadra Pershad Singh* v. *Najiban*, 4 C. L. J. 370=11 C. W. N. 85.
(5) *Raja of Venkatagiri* v. *Raja Muddu Krishna*, 28 M. 15.
(6) *Ram Odayan* v. *Subramania Aiyer*, 3 M. L. T. 273=31 M. 171=18 M. L. J. 178.

or whether the plaintiff's right to the water of the channel be regarded as a proprietory right appertunent to ownership of the land, the plaintiff was entitled to the injunction without any express finding as to damage. Even if damage is not to be presumed in such a case, the onus lay on the defendants to show that no damage was sustained by the plaintiff." In the same case *Miller J.* added: "In order that an injunction may be issued, it is enough to show that the act complained of was done in such a way as to be likely to damage the plaintiff, though proof of specific damage be not given."

In *Sheonarain* v. *Chandra Bhal* (1) the respondent owned a village on the bank of the river *Sai* and the appellent some other village about 12 miles higher up the river. The appellant built a dam across the river and the respondents thereupon sued to obtain a permanent injunction restraining them from hereafter building a dam across the river which would prevent the water from flowing down to the respondent's village or materially reduce the amount of the water that flows down. The court below granted an injunction restraining this appellants altogether from erecting a dam of any kind in future. In holding that the terms of the injunction were too wide, the court observed: "The injunction restrains the appellant altogether from erecting a dam of any kind in future. The evidence does not justify the conclusion that the appellants are not entitled to build a dam of any kind. No custom has been proved modifying the ordinary law applicable to the riparian owner. According to the ordinary law each owner has a right to the usufruct of the river or stream which passes through his land. That means not an absolute or exclusive right to the flow of the water in its natural state but to the flow of the water and the enjoyment of it subject to the similar right of all the proprietors of the banks on each side, to the reasonable enjoyment of the same. A riparian owner has the right to use and consume the water for irrigating the land abutting on a natural stream provided that he does not thereby cause material injury to others (2) Both parties have pitched their cases too high. If the present claim to an injunction were dismissed the result might be a claim by the appellants to dam up the river altogether. I think, therefore, that an injunction should be granted to the respondent restraining the appellants from damming up or otherwise interfering with the flow of the river in such a way as to cause injury to the respondents. The villages of the appellants and respondents are twelve miles apart. There is some very loose evidence that the crops on the banks of the river in the respondant's villages were rather poor in the year in which the appellants built their dam but there is no evidence that the dam materially interfered with the flow of the water or that the poorness of the crops was due to the action of the appellants, therefore, I allow this appeal, set aside the decrees of the coruts below, and in lieu thereof I grant an injunction restraining the appellants, their agents,

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(1) 10 Ind. Cas. 181.
(2) See *Dinkar* v. *Narain* 29 B. 357 =7 Bom. L. R. 265; *Devi Prosad* v. *Joy nath*, 24 C. 865 (P. C.)=24 I. A. 60.

servants and workmen from damming up the river in such a way as to stop the flow of the stream or cause material injury to the respondents (1)."

Percolating waters.—As a result of the legal rule that one has no rights in percolating water as such, it follows that equity will not interfere with their diversion or obstruction, even when the effect is to cause a spring or well of the plaintiff to dry up or diminish in flow (2).

As between owners of land no one has a right of property in water flowing underground in undefined and unknown channels of percolation. As a consequence of this, one owner has no right of action against another, who by sinking wells or by other works on his own land, draws off and appropriates the underground percolating water which would otherwise have flowed into his well or stream and makes it unavailable to him and this even when it is done from an improper motive or maliciously. But that the other owner cannot go on his neighbour's land, dig there and take the underground water found there and justify his action because the water was running in undefined channels, as that would be trespass and be actionable wrong. These things should be done on one's own property (3).

But this doctrine concerning percolating waters does not apply to subterranean waters flowing in a defined channel, and interference with their flow may be enjoined by a person injured, or a person lower down on the channel (4). Nor can a person by means of percolation interfere with the flow of a stream; this is no less a diversion than if he took the water directly from the stream by a ditch or other channel, and will be restrained in equity (5). The right to interfere with percolating water is confined to divering, obstructing, or abstracting it. If one pollutes it and in this condition it injures another, as by flowing into his well, it is a nuisance and as such may be enjoined (6); and the same thing is true if one causes water to percolate into the land of another and cause injury (7).

Waters in a well.—The under ground stream it is well settled is governed by the same law as a stream flowing above ground (8). In the case of a well it is well-known that the supply of water is in general furnished by percolation through the neighbouring soil, so that the digging of a deeper well therein will divert the water from its course, and thus dry up the former well. (9). Now

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(1) See also *Prankristo* v. *Har Chander*, 10 W. R. 435.

(2) Pom. Eq. Jur. § 1977 ; see *Trinidad etc. Co.* v. *Ambard*, (1899) App. Cas 594 ; see also *Bradford* v. *Ferrand*, (1902) 2 Ch. 655 ; *Mansell* v. *Vally Printing*, (1908) 2 Ch. 448.

(3) *Basavama Gowd* v. *Narayana*, 54 Mad. 793=133 Ind. Cas. 507=A. I. R. 1931 Mad. 284=61 M. L. J. 563 ; *Chasemore* v. *Richards*, 7 H. L. 349 ; *Acton* v. *Blundel*, 12 M. & W. 324 ; *Mayor of Bradford* v. *Pickles*, (1895) A. C. 587 ; *Ballad* v. *Tomlision*, 29 Ch. D. 115 (125).

(4) Pom. Eq. Jur. § 1977 ; see also *Wood* v. *Wand*, 3 Ex. 748 ; *Dickinson* v. *Grand Junction*, 7 Ex. 300 ; *Chasemore* v. *Richards*, 7 H. L C. 384.

(5) *Grand Junction etc.* v. *Sugar*, 6 Ch. D. 483.

(6) *Ballad* v. *Tomlinson*, 29 Ch. D. 115.

(7) Pom. Eq. Jur. § 1977.

(8) *Black* v. *Ballymena Com.*, 17 L. R. Ir. Ch. D. 459 ; *Ewast* v. *Belfast Guardians*, 9 L. R. Ir. 172 ; *Bradford Cor* v. *Ferrand*, (1902) 2 Ch. 655.

(9) *Gale on Easements* p. 277.

the question is will any action lie against the digger of a deeper well, for drying up the water in his neighbour's well. From English cases it is settled that no action will lie against a man who, by digging wells or cutting drains in his own land, thereby drains his neighbour's land also, whether by intercepting the flow of the water percolating through the pores of the soil, and which, but for such digging or draining would have reached his neighbour's land or by causing the water already collected in fact on his neighbour's soil to percolate away and from out of it (1). The right to intercept underground water has, perhaps, been carried furthest in *Bradford Corporation* v. *Ferrand* (2). In that case *Farwell J.* said: "The rights in relation to water flowing in a defined and known channel on or under the surface of the earth are well settled; every riparian proprietor has an equal right to the ordinary use of the water which flows in the stream adjacent to his lands as it has been wont to run (3). This right is an incident to the property in the land through which it passes (4), and does not depend on a supposed grant, but is *jure naturae* (5). But the right does not extend to water percolating through the strata in no known channels—*Chasemore* v. *Richards* (6)—or to common surface water rising out of springy or boggy ground and flowing in no definite channel (7). No English authority has yet dealt with the rights to water flowing underground in a defined but unknown channel; and although there is the express authority of the Court of Appeal in *Ireland*, I feel bound to form my own opinion on the point, as that decision does not bind me." Then after discussing various English cases his lordship continued: "There will be a declaration that there is no right in under ground water where the course of its channel is unknown." The principle of *Acton* v. *Blundell* (8), applies to the case of draining off the water already collected in a well, and merely to that of intercepting the water which would otherwise have flowed into it. So 'the percolating water below the surface of the earth is a common reservoir or source in which no body has any property, but of which everybody has, as far as he can, the right of appropriating the whole (9).," In *Grand Junction Canal Co.* v. *Shugar* (10), it appears, in the report contained in the Law Reports, that *Lord Hatherly, L. C. held* that although a land owner will not in general be restrained from drawing off the subterrenean water in the adjoining land, yet he will be restrained if in so doing he draws off the water flowing in a defined surface channel through the adjoining land. It is difficult to reconcile this decision with those referred to above if the facts showing only a withdrawal of underground water, but it

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(1) Gale on Easements p. 292; see also *English* v. *Metropolitan Water Board.* (1907) 1 K. B. 588.

(2) (1902) 2 Ch. 655.

(3) *Miner* v. *Gilmour*, 1 Moo. P. C. 131.

(4) *Embrey* v. *Own*, 6 Ex. 352, 368.

(5) *Shury* v. *Pigot*, 3 Bulsf. 339.

(6) 7 H. L. C. 382; see also *Mansel* v. *Valley Printing*, (1908) 2 Ch. 448; *Basavana* v. *Naraya*, 54 M. 793.

(7) *Rawstron* v. *Taylor*, 11 Ex. 369.

(8) 12 M. & W. 324; see also *The Salt Union Ltd.* v. *Brunner*, (1906) 2 K. B. 822.

(9) *Per Brett* M. R. in *Ballard* v. *Tomlison*, L. R. 29 Ch. D. 121.

(10) L. R. 6 Ch. 483.

appears that the case was decided on the footing that there was a direct tapping of the defined surface channel (1). But although a man is not bound to prevent the water percolating through his land from coming to his neighbour or may drain the water from his neighbour's land, he cannot foul the water percolating from his land to his neighbour's injury. (2).

Questions of surface water.—Questions of much nicety have occurred touching the exercise of the jurisdiction in cases involving the flowage of surface water. For example, when plaintiff is entitled to water flowing from surface springs on defendant's land by natural channels to and upon the land of plaintiff, defendant may be enjoined from diverting the water in such manner as to prevent its flowing in its natural course: (3) So the leading of surface water from one's premises upon those of another, causing overflow and injury to the latter, may be enjoined as a nuisance (4). Thus when, the defendant, by digging a ditch for that purpose, draws a surface water which has accumulated in a natural pond or reservoir upon his own premises, to and upon the premises of plaintiff adjoining, the injury being continuous in its nature afford sufficient ground for relief by injunction (5).

Pollution.—Injunction to protect water rights are very commom illustrations of equitable intervention because of the inadequacy of legal remedies. The principle governing the equitable jurisdiction are essentially the same as in nuisance, the legal wrong being in the same class of torts. For a mere detailed statement of these principles, therefore, reference should be made to the preceding chapter (6) ; herein are simply stated the more general rules as illustrated in the cases on water rights. Pollutiou of running waters is a matter of frequent injunction (7). The grounds of the jurisdiction are to prevent multiplicity of suits because of a continuing or recurring wrong (8), or to prevent irreparable injury (9), or the fact that the damages are not susceptible of estimation, and hence a verdict would be in the nature of conjecture (10). It is the general doctrine that since riparian owners have the right to have flowing water come to them in its natural purity, and so may bring repeated actions at law for pollution, even though it causes no damage, therefore equity will enjoin such pollution, regardless of the question of damages, in order to prevent multiplicity of suits (11). The grant of an

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(1) Gale on Easement 8th Ed. p. 292; see also the same case reported in 24 L. T. 402 ;and see *Jordeson* v. *Sutton*, (1899) 2 Ch. 217, per Vaughan Williams L. J. at p. 251 ; *English* v. *Metropolitan Water Board'* (1907) 1 K. B. 588 at p. 601.

(2) Gale on Easement p. 295, *Wood* v. *Wood*, 3 Exch, 748 ; *Hodgkinson* v. *Ennor*, 4 B & S. 229 : *Womersley* v. *Church*, 17 L. T. N. S. 190; *Ballard* v. *Tamlison* 29 Ch. D. 115.

(3) *Exnor* v. *Barwell*, 2 Giff. 410.

(4) *Pettigrew* v. *Evansville*, 25 Wis. 223.

(5) *Davis* v. *Londgreen*, 8 Neb. 43 ; High on Injunction § 809.

(6) Chapter XIX.

(7) *Golds mid* v. *Tunbridge*, L. R. 1 Ch. App. 349 ; *Holt* v. *Corporation*, L. R. 10 Eq. 354.

(8) *Clowes* v. *Stafford shire*, L. R. 8 Ch. App. 125.

(9) *Att. Gen.* v. *Mayor*, 58 N. J. Eq. 1.

(10) Pom. Eq. Jur. § 1975.

(11) *Penning ton* v. *Brin sop*, L. R. 5 Ch. D. 769 ; *Embrey* v. *Owen*, 6 Ex. 369 ; *Lyon* v. *Fish monger's Co*, 46 L. J. Ch. 68 ; *Young & Co*, v. *Bankier* (1893)

injunction is the proper remedy for violation of a riparian owner's right to receive an unpolluted flow of water from a water course, and such an order will be made although the stream is already polluted by the escape of polluting matter due to natural causes. The court will, if necessary, suspend the operation of the order for a specified period on a proper under taking being given (1). All streams which flow through cultivated fields and populous regions, or are utilized for mechanical and manufacturing purposes, must to some extent become impure, and for such pollution there is no remedy by injunction (2). It is only when the owner in the stream below is materially affected in his rights to use the water, by reason of its impurity as it enters his premises, that he has a remedy against the upper proprietor by whose use the quality of the water it impaired (3). In *Tipping* v. *Eckersley* (4), upon motion for a decree, the court granted a perpetual injunction, restraining the defendants from discharging heated water, so as to increase the temperature of the water the plaintiff used for condensing. So if the water of a stream be polluted, or otherwise rendered useless, or perhaps materially less useful than it was before, whether it be surface or sub-surface water, and damage ensued to another riparian owner, he can maintain action therefor unless a right to do the thing has been acquired by statute or by grant or by prescription (5). For a slight impairment of quality, necessarily resulting from a reasonable use of the stream or of the land abutting on it there is no liability (6). But any particular use of the water of a running stream which so pollutes it as to render it unfit for the ordinary purposes of life, may be enjoined at the suit of a lower riparian owner, so as to preserve it in its ordinarily natural state of purity (7). In *Parker* v. *American Woolen Co.*. (8), *Sheldon* . said : "We regard it as settled that no riparian proprietor has the right to use the waters of a natural stream for such purposes or in such a manner as will materially corrupt it to the substantial injury of a lower proprietor or to cast or discharge into it noxious and deleterious substances which will tend to defile the water and make it unfit for use (9)." A party is entitled to an injunction restraining the unnecessary discharge of polluting substances into a stream in quantities that appreciably affect the purity of the waters when they reach his premises below and render them materially less fit for domestic or other uses to which

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A. C. 691 ; *Jones* v. *Llawst*, (1911) 1 Ch. 393 ; *Crossley* v. *Light owler*, L. R. 2 Ch App. 478 ; *Sharp* v. *Wilson*, (1904) 21 T. L. R. 678 ; *Stoll meyer* v. *Trinidad*, (1918) A. C. 485.

(1) *Stoll meyer* v. *Petroleum Development*, 87 L. J. P. C. 83=1918 A. C. 498 note.

(2) *Wood* v. *Sutcliffi*, 2 Sim. N. S. 163.

(3) *Goldsmidt* v. *Tunbridge*, 1 Ch. 349 ; *Att. Gen.* v. *Borough of Birmingham*, 4 K & J. 528 ; *Fitzgerald* v. *Firbank*, (1897) 2 Ch. 96 ; *Clowes* v. *Staffordshire*, 8 Ch. 128 ; *Price's Patent Candle* v. *London County* (1908) 2 Ch. 526.

(4) 2 Kay & J. 274.

(5) Bigelow on Torts p. 286 ; see also *Clowes* v. *Stafford shire Water Works Co* L. R. 8 Ch. 125 ; *Gold smid* v. *Tunbridge wells*, L. R. 1 Eq. 161 affirmed L. R. 1 Ch. 349.

(6) H. C. Joyce on Injunction § 1111.

(7) *Forman* v. *Ford*, 6 Del. Ch. 47.

(8) 81 N. E. 468 (Mass).

(9) See also *Batchellor* v. *Tunbridge Gas*, 84 L. T. 765 ; *Young* v. *Bankier Disteblery Co*, (1893) A. C. 691.

they may be put than they were when they came to the land of the owner who polluted them (1). In such a case actual damage sustained by a riparian owner need not be proved (2). And as between independant wrong-doers there is no contribution and it will not avail as a defence that others with whom the complainant, in an injunction bill to restrain a nuisance, have no concern, have contributed to cause the pollution of the waters against which relief is sought (3).

If the pollution is only temporary and occasional, it will not be enjoined (4). In an action by mill owners,—riparian proprietors,—to restrain the discharge of water containing acid into a stream, where the defendant asked that damages, in lieu of an injunction, might be given, an injunction was granted (5).

"It is usually held," says *Prof Pomeroy* "too, that it is a taking of property and hence cannot be authorised by statute except by way of eminant domain with proper provision for making compensation (3); and even then it would not be constitutional if the taking is for private purpose, and equity may enjoin for these reasons (6)."

Pollution of streams by sewage.—Frequent ground of application for the preventive aid of equity by injunction is found in cases of the pollution of water by the flow of sewage from towns and cities into streams whose waters are thereby injured or rendered unfit for use. In cases of this nature, the preventive jurisdiction of equity is well established, the general doctrine being that the fouling or polluting of water in a stream by such sewage constitutes a nuisance and affords sufficient ground for relief by injunction (7). In conformity with this doctrine, the owners of land upon the banks of a river below a city may enjoin the city authorities from polluting the river by sewage (8). And when a public or municipal body, acting in excess of its lawful powers, is about to construct a sewer in such manner as to injure the water in a river, it may be restrained from proceeding (9). So an injunction is proper to restrain municipal authorities from opening additional sewers into a stream at a point above plaintiff's premises in such manner that the sewage fouls the water and renders it unfit for use (10). And a board of commissioners

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(1) *Mac Nama* v. *Taft* (Mass:1908) 83 N. E. 310; H. C. Joyce § 1111.

(2) *Crossby* v. *Light owler*, 2 Ch. 478; *Clowes* v. *Staffordshire Polteries*, 8 Ch. 142, 143; *Att. Gen.* v. *Acton Local Board*, 22 Ch. D. 231.

(3) *Doremus* v. *Mayer of Patterson*, 62 Att. 3, 4; *Crossley* v. *Light owler*, 2 Ch. 478; *Att. Gen* v. *Leeds Cor.* 5 Ch. 583; Pom. Eq. Jur. § 1975; H. C. Joyce § 1111.

(4) Pom. Eq. Jur. § 1975.

(5) *Pennington* v. *Brinshop Hall*, 5 Ch. D. 769.

(6) Pom. Eq. Jur. § 1975.

(7) *Att. Gen.* v. *Colney, Hatch Lunatic Asylum*, L. R. 4 Ch. 146; *Att. Gen.* v. *Leeds Corporation*, L. R. 5 Ch. 583; *Holt* v. *Corporation of Rochdale* L. R. 10 Eq 354; *Att. Gen.* v. *Bradford Canal*, L. R 2 Eq. 71; *Att. Gen.* v. *Council of Birmingham*, 4 Kay & J. 528; *Oldaker* v. *Hunt*, 6 De G. M & G. 376, affirming S. C. 19 Beav. 485; *Goldsmid* v. *Tunbridge*, L. R. 1 Ch. 349; *Lingwood* v. *Stowmarket*, L. R. 1 Eq. 161.

(8) *Att. Gen.* v. *Leeds Corporation*, L. R. 5 Ch. 583.

(9) *Oldaker* v. *Hunt*, 6 De G. M & G. 378, affirming S. C. 19 Beav. 485.

(10) *Att. Gen.* v. *Council of Birmingham*, 4 Kay & J 528. In this case the Court incline S to consider only the right of plaintiff to relief rather than the question

charged with the drainage of a town may be enjoined from permitting the sewage of the town to be discharged into a stream which passes through plaintiff's premises and supplies a lake thereon, when such sewage has an injurious effect upon the water in the stream or lake (1). So the owner of premises watered by a stream used for domestic purposes may enjoin a city from polluting the stream by the discharge of sewage to such an extent as to constitute a nuisance (2).

"In granting injunctions against local authorities for pollution of rivers by sewage matter, the practice is to grant an immediate injunction restraining any new communications with the river, but as to existing drains, to suspend the operation of the order for a longer or shorter period to enable the defendants to comply with the order by altering their works. Liberty to apply for a further suspension of the injunction is sometimes reserved, and if it be not reserved, further time is usually granted on the terms of paying the costs of the application (3)".

Obstruction to Navigation.—Obstruction to navigation of navigable streams are, of course, primarily public nuisances and as such subject to indictment or restraint at suit of the proper public officer. If the obstruction is in tidal or other waters in which the state is the actual owner of the soil, it may be one which causes no injury to any one. In such a case it is not a nuisance but simply a purpresture, which is an intrusion upon the proprietory rights of the state, or crown, which may be remedied, by an information of intrusion at common law or an information in equity at suit of the Attorney-General, and, in the latter event, it is said that the Court of Equity may refuse an injunction if the purpresture does no damage to any one (4). If, however, the obstruction actually interferes with navigation, it is a nuisance as well as a purpresture, and in this aspect it is subject to the usual rules concerning public nuisances. It may be enjoined at suit of the attorney-general or other proper public officer on behalf of the state, if the legal remedy is inadequate (5). If the question whether a nuisance exists or not is doubtful, a suit at law to establish the fact is required (6). Such nuisances may not only be enjoined by the proper public official, but also by a private individual who shows special damages to himself and that his legal remedy is inadequate (7).

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of inconvenience to defendants, although defendants represented a large population.

(1) *Goldsmid* v. *Tunbridge Wells*, L. R. 1 Ch. 349, affirming L. R. 1 Eq. 161. And see as to the violation of such an injunction and the punishment therefor, *Spokes* v. *Banbury Board of Health*, L. R. 1 Eq. 42. As to the right of a riparian owner to enjoin the pollution of a stream by an owner above, and as to the right of defendant, by prescription, to foul the stream by sewage, see *Blackburn* v. *Somers*, 5 L. R. Ir. 1.

(2) High on Injunction § 810.

(3) Kerr on Injunction p. 239.

(4) Wood on Nuisances 3rd Ed. pp. 107-125; Gould on Waters 3rd Ed. §§ 21, 93.

(5) *Georgetown* v. *Alexandria Coal*, 12 Pet. 91.

(6) *Earl of Ripon* v. *Hobert*, 3 Myl. & K. 169, *Crowder* v. *Tinkleri*, 19 Ves. 617.

(7) Pom. Eq. Jur. § 1978; see also *Original Hartlepool Collieries Co.* v. *Gibbs*, 5 Ch. D. 713.

Public Road—Nature of right—right of way.—The user of a road by the public openly and as of right will, as under the English law, give rise to the presumption that it has been dedicated for the public though such presumption might be rebutted by evidence that the user was only permissive (1). "There can be no easement" says *Lord Cairns L. J.* in *Rangeley* v. *Midland Rail Co.*, (2) "properly, so called, unless there be a servient and a dominant tenement. It is true that in the well-known case of *Doveston* v. *Payne* (3), *Mr. Justice Heath* is reported to have said, with regard to a public high way, that the freehold continued in the owner of the adjoining land subject to an easement in favour of the public ; and that expression has occasionally been repeated since that time (4). That however, is hardly an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement. It is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement where the occupation remains in the owner of the servient tenement subject to the easement." A Highway is a passage which is open to all the king's subjects (5). The interest of the public in a highway consists solely in the right of passage over it ; thus a highway over land (which is what is usually meant by a highway) gives the right of walking, driving and riding, unless it be only a foot way or a horseway (6). All streets are highways, although all highways are not streets. The franchise of every highway belongs to the sovereigns as a trustee for the

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(1) *Rana Ganpat* v. *Kangra Valley*, 62 P. R. 1898.

(2) L. R. 3 Ch. 310.

(3) 2 H. Bl. 527 ; 2 Sm. L. C. 6th Ed.

(4) See *e.g.*, *St. Marry, Newington* v. *Jacops*, L. R. 7 B. 47 (54).

(5) Before private land can become a public street or passage, it must be made so by statute or be dedicated specifically by the owner to the use of the public or there must be circumstances from which such dedication can be presumed. Dedication may be inferred from user by the public but it is difficult. if not impossible to establish a public right of way over a *cul de sac* by evidence of user alone without proof that public money is spent. A public highway must *prima facie* lead from one public place to another. *Jatindra Nath* v. *Corporation of Calcutta*, 58 C. 1124=130 Ind. Cas. 870=35 C. W. N. 397=A. I. R. 1931 Cal. 433. A right of way could be presumed by long user and the Government cannot close or divert a high way. *Ardishir* v. *Aimai*, 53 B. 187=A. I. R. 1929 Bom. 94.

In cases where the existence of a public highway is in issue, it is of crucial importance to distinguish between the grant to the public as such of a right of way and the permission which naturally flows from the use of the ground as a passenger or visitors to or traders with the tenants whose shops abut upon it. There cannot be a dedication to a limited part of the public. *Muhammad Rustum* v. *Municipality*, 25 C. W. N 122 P. C.=47 I A. 25 (P. C.) Inorder to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an intention to dedicate, of which user by the public is evidenced and no more. *K. K. Shelly Banerjee* v. *Commissioner of the Port of Calcutta*, 3 C. L. J. 585=33 C 1243 ; see also *Dhani Ram* v. *Abdul Karim*, 22 O. C. 168=53 Ind. Cas. 441. All the ground over which the public have a right of way whether metalled or unmetalled is a public road. *Municipal Board* v. *Suderson*, 12 A. L. J. 1137=37 A. 9=26 Ind. Cas. 206.

(6) Byrne's Law Dictionary.

public; and all the public streets are for public use, and the use is none the less for the public at large, as distinguished from the municipality. The Legislature of the State has full and paramount authority over all public ways; and by virtue of this authority, it alone can authorise acts to be done in and upon them, or legalize obstruction therein, which would otherwise be nuisances (1).

"High ways are no doubt dedicated *prima facie* for the purpose of passage: but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such (2)." The right of the public is a right which is in the nature of an easement to "pass along" a street for the purpose of legitimate travel, not to "be on" it except so far as their presence is attributable to a reasonable and proper use of the street as such (3). They have a right to pass and repass on the street without let or hindrance at all seasons of the year freely and at will. The primary and paramount use of the street is public travel for man and beast, and carriage of goods; and this use every one enjoys upon terms of equality with others. The right to travel on and along the streets of a municipality applies to the public and does not apply to its citizens alone. They can travel by any reasonable locomotion. If an obstruction is caused, according to the English law, a private individual, however will have no cause of action unless special damage is alleged and proved (4).

Following the English rule in *Siddeswar* v. *Krishna* (5), *Muthusami Ayyar J.* said: "The question argued before us is as to the maintainability of the suit. It is urged that the lane at least as far as the well being found to be a public street, and no special damage being alleged and proved, it is not competent to the respondent to maintain this suit on his own behalf (6), and in support of the contention, our attention is drawn to the decision of this Court in *Adamson* v. *Arumugam* (7), which followed the leading case on the subject, *viz. Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga* (8), wherein the question was fully discussed and several English decisions were cited. There is no doubt that the English rule, *viz.*, no action can be maintained by one person against another for obstruction to a highway unless special damage is proved, is applicable in India. As observed by my learned collegue (9), the principle on which this rule is founded is that

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(1) Aiyanger's Municipal Corporations p. 487.

(2) *Per Lord Esher M. R.* in *Harrison* v. *Rulland* [*Duke of*] (1893) 1 Q. B. 142 (C. A.) at p. 146; Aiyanger's Municipal Corporation p. 487.

(3) Aiyanger's Municipal Corporation p. 492 citing Halsbury's Laws Vol. 16, p. 49.

(4) *Ibid.*

(5) 14 M. 177.

(6) Vide also *Winters bottom* v. *Lord Derby*, L. R. 2 Ex. 316; *Cook* v. *Rath Cor.* 6 Eq. 177; *Benjamin* v. *Storr*, L. R. 6 C. P. 400; *Att. Gen.* v. *Barker*, 83 L. T. 248.

(7) 9 M. 463.

(8) 2 B. 457.

(9) In the same case *Best J.* said: "The rule in question is applicable to any public right the reason of the rule being the avoidance of multiplicity of suits, for to use the words of *Lord Coke*, 'If any one man might have action, all men might

of protecting the person causing the obstruction against being harassed by a multiplicity of suits and of providing, at the same time, a remedy for the common injury by indictment. I only desire to add that the special damage which it is necessary to plead and prove in order to take a case out of the rule does not necessarily consist in actual pecuniary loss and in a claim to compensation for the same. It is sufficient to show that the party suing has sustained special injury beyond what is sustained by the public (1)". In *Dobson* v. *Blackmore* (2), *Lord Denman C. J.* explains it as a 'damage brought on the individual complaining, which might perhaps be more properly styled particular damage, or a special damage more than what the rest of Her Majesty's subjects" ordinarily sustain in consequence of the obstruction, " and not that sort of damage only which may or may not ensue from the acts done, but which entitles the plaintiff when it does arise to specific reparation in the form of damages." The special injury, however, should not be merely consequential nor remote as in *Rickett* v. *The Metropolitan Railway Company* (3), nor should it consist in mere delay in getting to a place as in *Winter Bottom* v. *Lord Derby* (4). It should be an injury quite distinct from that of the public in general, and when such is the case, a Court of Equity will grant an injunction and such relief as may compel the wrong-doer to take active measures to discontinue the nuisance (5). In *Botiram Kolita* v. *Sibram Das*, (6), the Court said: "The nature of the special damage which must be proved in order to give a private person the right to sue for the obstruction of a public road is discussed in the case of *Satku Valad* v. *Ibrahim Aga Khan* (7), and various English authorities are there cited. The English law as to the right of suit in cases of this sort has been adopted by the Indian Courts on several occasions and as an instance of a case in which it has been followed in this Court we may refer to the case of *Mahomed Alam* v. *Dilbar Khan* (8). In that case the plaintiff in an action for obstructing a public way proved no

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have the like." A right of immediate access from private property to a public high way, as a private right, is distinct from the right of the owner of that property to use the high way itself as one of the public. An infringement of such private right of access amounts to a special damage to found a private action thereon against the infringement. *Hanuman Prosad* v. *Raghunath Prosad*, 82 Ind. Cas. 659=46 A. 573=22 A. L. J. 568; *Sheonarayan* v. *Dindoyal*, 27 N. L. R. 161=134 Ind. Cas. 673=A. I. R. 1931 Nag. 189. In *Lyon* v. *Fish monger's Co*, 46 L. J. Ch. 68 (80), *Lord Selborne* said after referring to several authorities: "Those authorities recognise such a right of immediate access from private property to a public highway as a private right, distinct from the right of the owner of that property to use the highway itself as one of the public."

(1) See also *Haji Heyat Buksh* v. *Musammat Lachmania*, 18 C. W. N. xcii; *Boyce* v. *Paddington*, (1903) 1 Ch. 114; *Sherringham* v. *Holsey*, 91 L. T. 225; *Att. Gen.* v. *Roe*, (1915) 1 Ch. 239; *Lyons* v. *Gulliver*, (1914) 1 Ch. 631; *Campbell* v. *Paddington*, (1911) 1 K. B. 869; *Evans* v. *Edinburgh*, (1916) 2 A. C. 451; *Mahomed-Din* v. *Atiraju*, 10 Pat, 568=A. I. R. 1931 Pat. 418, *Ganga*, v. *Jagat*; 12 A. L. J. 1026.

(2) 9 Q. B. 991.

(3) L. R. E & I. App. 175.

(4) L. R. 2 Ex. 316.

(5) *Satku Valad Kadir Sausar* v. *Ibrahim Aga Valad Mirza Aga*, 2 B. 457; but see *Siyid* v. *Siyid*, 29 C. W. N. (P. C.) 487.

(6) 25 C. W. N. 95.

(7) 2 B. 457.

(8) 5 C. W. N. 285.

damage peculiar to himself beyond being delayed on several occasions in passing along it and being obliged in common with every one else who attempted to use it either to pursue his journey by a less direct road or else to remove the obstruction (1). His action was held unmaintainable . . . . . The object of the rule requiring proof of special damage is that but for such a rule the defendant might be harrassed by separate suits from every individual member of the public whose right of way has been obstructed. Special damage does not mean serious damage, but means damage of a special nature, that is damage affecting the plaintiff individually or damage peculiar to himself, his trade or calling (2)". But according to a recent Privy Council decision no special damage need be proved in order to enable a private individual to sue for damages for preventing him from conducting a religious procession along a high way. So now a suit for declaration and injunction is maintainable without proof of special damage other than the obstruction to the procession. The older cases requiring proof of especial damages are expressly repealed (3). It is competent for the owner of a street to maintain an action (4).

Persons of all sects and creeds are equally entitled to carry religious or marriage processions along public streets and thoroughfares; and no particular sect can claim, on the ground of custom or immemorial use, an exclusive right to carry procession through such streets. All members of the public and every sect have a right to use the streets in a lawful manner, and it lies on those who would restrain them in its exercise to show some law or custom having the force of law depriving them of the privilege (5). Religious processions are lawful and legal and come within a power of user of the public highway and are always subject to the control of the District Magistrate and Police officers. Where a *Shia* community of a certain place sued for a declaration that they were entitled to stop their Muharram procession and perform the *matam* in a circle on the public thorough fare at the back of a *Jumma Musjid* and that the *Sunnis* had no right to offer obstruction to them to prevent them from doing so: *Held* that the repeated stopping of the procession was a nuisance inconsistent with the paramount idea that the right of the public along a public road was a right of passage and that as such they were entitled to pass along the road, but not to stop the procession so as to block the road and prevent the public from using it (6).

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(1) *Harihar* v. *Chandra Kumar*, 23 C. W. N. 91.

(2) See also *Benjamin* v. *Storr*, L. R. 9 C. P. 400; *Adamson* v. *Amnugan*, 9 M. 463; *Hussain* v. *Narasimhappa*, 23 M. L. J. 539.

(3) *Siyid* v. *Siyid*, 29 C. W. N. 486 (P. C.).

(4) *Harrison* v. *Duke of Rutland*, (1893) 1 Q. B. 142; *Hickman* v. *Maiysey*, (1900) 1 Q. B. 752; *Had well* v. *Righton*, (1907) 2 K. B. 349.

(5) *Aiyanger's Municipal Corporation* p. 495; *Dendapa* v. *Secretary of State*, 18 Bom. L. R. 460=37 Ind. Cas. 363; *Sda gopa Chariar* v. *Ram Row*, 26 M. 376; *Baslin gappa* v. *Dharmappa*, 7 Ind. Cas. 663=12 Bom. L. R. 586=34 B. 571.

(6) *Mahammad Zaman* v. *Manjur Hasan*, 63 Ind. Cas. 984=19 A. L. J. 740. "Now primarily the purpose for which a highway is dedicated is that of passage as is shown by the case of *Dovastan* v. *Payne*, 2 H. Bl. 525, and although in

An order by a Magistrate under section 144 of the Criminal Procedure Code, forbidding a person or body of persons from using a highway for the purpose of processions, invests the person or persons interdicted with a cause of action if they allege it to be an infringement of their legal rights, though such an order be in itself *intra vires* and no special damage is alleged or proved. A person or a body of persons who claim a right to go in procession along a public highway can bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage (1). *Seshagir Aiyar J* in delivering his judgment in the case said : "The earlier cases which laid down that for an injury which is common to himself and to the rest of the public, the complaining plaintiff should allege special damage, proceeded on the ground that otherwise there would be multiplicity of suits. That seems to have been the basis of the English decisions on the point. But in England, there is apparently no procedure by which the magistracy can prohibit particular clases, communities or bodies of persons from exercising civil rights. In my opinion, magisterial orders cause special injury to the persons prevented. Therefore the rule of English law is not strictly applicable in India. If I am right in this view, it would lead to no good to classify such orders into proper and improper ones and to invest the latter alone with the attributes of special injury. In both cases the party is equally affected. In both cases it is desirable that the party should have an opportunity of proving that his rights have been interfered with. I am of opinion that *Mannada Mudali* v. *Nallayya Goundan* (2), *Mathayya Reddi* v. *Sudalaimuthu Nader* (3) and *Andemopan* v. *Muthau Virama Reddi* (4) lay down the law correctly. In the Bombay High Court there are number of cases which hold that an order issued by the Police would not furnish a cause of action, but that special damage should be proved. *Virupayayappa Fakirappa* v. *Sherif Sab Mulla Masud Sab* (5) and *Dandappa Malappa Sigandhi* v. *Secretary of State* (6). They are inconsistent with *Balasingappa Parrappa Chedical* v. *Dharmapp Basappa Chedical* (7). Although this latter decision is based on a *Dictum* in *Sada Gopal Charier* v. *Rama Raw* (8) which is not found in it, the conclusion is that special injury need not be proved when

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modern times reasonable extension has been given to the use of a highway as such, the authorities show that the primary purpose of the dedication must be kept in view. The right of the public to pass and re-pass on a highway is subject to all those reasonable extensions which may, from time to time, be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilized, but they must be such as are not inconsistent with the maintainance of the permanent idea that the right of the public is that of passage."

(1) *Valan Pakiri* v. *Subbayan*, 49 Ind. Cas. 533=42 M. 271 (F. B.)=36 M. L. J. 79.

(2) 4 Ind. Cas. 870=32 M. 527=19 M. L. J. 467.

(3) 5 Ind. Cas. 902=20 M. L. J. 119.

(4) 29 Ind. Cas. 248=29 M. L. J. 91.

(5) 2 Ind. Cas. 494=11 Bom. L. R. 372.

(6) 37 Ind. Cas. 363=18 Bom. L. R. 460,

(7) 7 Ind. Cas. 663=34 B. 571=12 Bom. L. R. 586.

(8) 26 M. 376.

a portion of a public sues to establish a right of procession through a public highway. In my opinion this opinion is right. The *dicta* in *Muthealu Chetti* v. *Bapiru Sahib* (1), *Kanda sawmy Mudali* v. *Sabraya Mudali* (2) and *Kalmatappa* v. *Joish Narayan Bhat* (3) that unless the order of the Magistrate is *ultra vires* special damage should be proved, must be overruled."

In *Siyid Mazur* v. *Siyid Mahammad* (4), *Lord Dundin* said : "The case seems to their Lordships to raise for authoritative decision the question as to the right of religious processions to proceed along the roads in India, practising their religious observances, and the decided authorities in India are certainly conflicting. The first question is, is there a right to conduct a religious procession with its appropriate observances along a highway? Their Lordships think the answer is in the affirmative. In *Partha Sarathi Ayyanger* v. *China Krishna Ayyanger* (5), *Turner C. J.* lays down the law thus :—"Persons of what ever sect are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrate may lawfully give to prevent obstructions of the thorough-fare or breaches of public peace." In *Sundadram Chetti* v. *The Queen* (6), before a Full Bench the position was maintained, and it was further laid down that the worshippers in a mosque or temple which abutted on a high road could not compel the processionists to intervent their worship while passing the mosque or temple on the ground that there was continuous worship there. At p. 217 *Turner C. J.* says : "With regard to processions, if they are of a religious character, and the religious sentiment is to be considered, it is not less a hardship on the adherents of a creed that they should be compelled to intervent their worship at a particular point, than it is on the adherents of another creed, that they should be compelled to allow the passage of such a procession past the temples they revere.' In *Sadagopachariar* v. *A Rama Raw* (7), a civil case, the same view was taken, but in a criminal case in the same volume *Vijiaraghava Chrriar* v. *Emperor* (8), two judges held that to use a highway as a place of worship was not legitimate. One judge, who had taken part in the former case, dissented and at a former hearing, the Chief Justice has also dissented. The first of these cases came to this Board and no doubt was there thrown on the right of religious worship in a highway. Two other questions have, however, emerged. In several cases one sect claimed the exclusive use of the highway for their worship. This has been consistently refused. The other question, which goes deep into what ought to be done in the present case, is this :—Does a civil suit lie against those who would prevent a procession with its observances? Here there is an obvious discrepancy

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(1) 2 M. 140.
(2) 32 M. 478.
(3) 42 Ind. Cas. 337.
(4) 29 C. W. N. 487 P. C.=48 M. L. J. 23=A, I. R. 1925 P. C.=86 Ind. Cas. 236.
(5) 5 Mad 304. 309.
(6) 6 M. 203 (F. B.)
(7) 26 M. 376.
(8) 26 M. 554.

between Bombay and Madras and Calcutta upholds Madras. The leading Bombay authority in the case in *Satku Valad Kadir Sasar* v. *Ibrahim Aga valad* (1), *Westropp C. J.* and *Melvill J.* This was a suit by certain *Musalmans* who carried tabuts in procession along a public road. They were disturbed in so doing by *Musalmans* of a rival sect. The headnotes set forth the judgment accurately :—*Held*, in special appeal the plaintiffs could not maintain a civil suit in respect of such obstruction unless they could prove some damage to themselves personally in addition to the general inconvenience occasioned to the public. The mere absence of the religious or sentimental gratification arising from carrying tabuts along a public road is not any such particular loss or injury as would be sufficient, according to English and Indian precedents, to sustain a civil action. This judgment really proceeds entirely or English authorities, which lay down the difference between proceedings by indictment and by civil action.

"In their Lordship's opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India. The judgment was followed, as was natural, in *Kazi Sujaudin*, v. *Madhavandas* (2), by two judges. Nevertheless in the next case, *Baslingappa Parappas* v. *Dharmappa Basappa* (3), *Sir Basil Scott C. J.* and *Batchelor J.* disregarded the authority of their own Court in *Satku Valad Kadir* v. *Ibrahim Aga Valad* (1), and pronounced a judgment which without saying that it overruled *Satku Valad* v. *Ibrahim Aga Valad* (1), clearly did so. The lower Court had followed *Satku Valad's* case and dismissed the suit. The Madras cases already cited were all cases (except the criminal one) in which declarations were sought and either granted or, if asking for exclusive right, refused but in none of them was the idea entertained of special damage other than the obstruction of the procession being needed.....Their lordships are of opinion that the views of the Madras Courts are right and that the Bombay judgment is wrong (4)". So now any member of the public has got right to use a public street in any lawful manner and a declaration can be granted if he is prevented from doing so without proof of special damage (5).

The primary object of a public street is the free passage of the public, and anything which obstructs that free passage without reasonable necessity is a nuisance and may be restrained (6). In England a county council cannot

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(1) 2B 457.
(2) 18 B. 693.
(3) 34 B. 571.
(4) But see *Mahomed Din* v. *Atiraja*, 10 Pat. 568=A. I. R. 931 Pat. 48 ; *Sheonarayan* v. *Dindayal*, A. I. R. 1931 Nag. 189.
(5) *Muchumasi* v. *Ganganna* A. I. R. 1926 Mad. 830 ; see also *Suresh* v. *Jamini* A. I. R. 1926 Cal. 1159 vide foot notes 4 5, 6. at 489.
(6) *Att Gen.* v. *Brigton and Hoar Co operative*, 68 L. J. Ch. 204=(1900) 1 Ch. 276 ; see also *Att. Gen.* v. *W. H. Smith*, (1910) 103 L. T. 96=26 T. L. R. 482,

legally sanction the erection of a permanent structure, not authorized by the necessities of the public service, along or upon a county road. The Attorney General, as representing the public, is the proper person to prevent this by injunction (1). The owner of the soil of the public way is entitled to an injunction to prevent a stranger from laying down pipes therein, and from keeping there any already laid (2). Where a land-owner whose land adjoined a public promenade which had been used as a public highway for foot passengers was deprived of his access to the promenade by a fence erected by a local board in whom the promenade had been vested, it was held that a mandatory injunction must issue to compel the removal of the fence and an equiry as to damages be directed (3).

Highway—Procession—Public right of—It is the interest of every sect or community that they have right to conduct civil or religious processions attended with music through public streets, so that they do not interfere with the customary use of such streets by the general public and subject always to such directions as the magistrate may lawfully give to prevent obstructions of the thoroughfare or breaches of public peace. It is a natural right established by law and does not require any custom to support it. Mere non-user of it for any length of time or occasional opposition or obstruction will not extinguish the right and it lies on the party that opposes the exercise of such right to prove some law or custom having the force of law which will enable him to override the natural right (4). There is a right in British India to conduct a religious procession with its appropriate observances along a highway. No restrictions can be put on the right except that it should be exercised subject to the orders of the Magistrate and of the police authorities and of public rights (5). Where the plaintiffs have asked for a declaration from the Civil Court in regard to their rights to play music in a temple it is with the jurisdiction of the civil court to state to what extent the exercise of those rights would prove a nuisance to other persons who have rights in the neighbourhood. The following five propositions sum up the general law in India of religious worship: (*i*) every person has a right to worship; (*ii*) the right is independent of custom; (*iii*) the right is not absolute but is limited by the rights of others; (*iv*) the exercise of the right may be limited by order of the public authorities. Such orders may be passed under s. 144 of the Criminal Procedure Code to prevent urgent nuisance or breach of the peace, or under s. 133, Criminal Procedure Code, to prevent a nuisance in a public place, or under section 30, Act V of 1861, the Police Act, in the case of public assemblies and processions; (*v*) the exercise of the right may be limited

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(1) *Att. Gen.* v. *Mayo County Council*, (1902) 1 Ir. R. 13.

(2) *Goodson* v. *Richardson*, 43 L. J. Ch. 790.

(3) *Ramuz* v. *Southend*, 67 L. T. 169.

(4) *Venkata* v. *Muniswami*, 10 Mys. L. J. 258.

(5) *Janki Prosad* v. *Karamat Husain*, A. I. R. 1931 All. 674; *Masur Husain* v. *Muhammad Zaman*, A. I. R. 1925 P. C. 36=86 Ind. Cas. 236=52 I. A. 61=47 A. 151 (P. C.); *Madhava Rao* v. *Tirukappa*, 9 Mys. L. J. 417; *Dilli* v. *Emperor*, 26 Cr. L. J. 1325=89 Ind. Cas, 269.

by the civil courts on the ground of nuisance, public or private (1). A thakurdwara and a mosque were very close to each other. The plaintiffs in a representative capacity brought a suit for declaration of their right of worship and of taking out processions with music past the moseque and for an injunction restraining the defendants from interfering at any time with the aforesaid rights of the plaintiff. *Held* that the plaintiffs both in their individual capacity and as members of the Hindu Community have a right to take out religious and social processions accompanied by music along public roads even while passing the mosque and a right to perform worship in the thakurdwara accompanied by music subject in both the cases to any orders or directions issued by the Magistrate or the police under section 144, Cr. Pro. Code or under other enactments provided that the exercise of such rights did not amount to a nuisance recognized by law. The plaintiffs could not be granted the injunction asked for because the defendants have a right to claim that the plaintiffs should not commit a nuisance (2).

The public generally has the right to use a public thorough.fare and a Court is not justified in restricting that general right by the use of any permanent injunction to any particular individual. And where religious processions are taken out under license from the authorities it is for the authorities to impose such conditions as may be deemed necessary for the safe-guarding of the public peace and the freedom of every individual to use the public thorough-fares without any improper obstruction (3).

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(1) *Janki Prosad* v. *Karamat Husain*, A. I. R. 1931 All. 674 ; see also *Soltu* v. *De Held* 2 Sim. N. S. 133 ; *Gaunt* v. *Fynney*, 8 Ch. Ap. 8 ; *Webb* v. *Baker*, (1881) W. N. 158 ; *Motion* v. *Mills*, (1897) 13 T. L. R. 427 ; *Heath* v. *Mayor of Brighton*, 98 L. T. 718.

(2) *Janki Prosad* v. *Karamat Husain*, A. I. R. 1931 All. 674 ; see also *Jaffar Hussain* v. *Krishna Servie*, A. I. R. 1930 Mad. 701 = 53 M. 761 ; *Mahamed Jalil* v. *Ram Nath*, A. I. R. 1931 All. 341.

(3) *Chan dan* v. *Ghulam*, A. I. R. 1933. Lah. 344.

CHAPTER XXII.

Injunctions to protect Easements.

Nature and extent of the equity Jurisdiction.—The jurisdiction of equity over easements, as in trespass and nuisance, is for the protection of legal rights for the infringement of which legal remedies are inadequate. In the earlier cases, at least, it was thought that this limitation made the right to equitable relief markedly less extensive than the right to an action at law. In a leading case (1). *Lord Eldon*, in a suit to enjoin obscuring ancient lights, said: "The foundation of this jurisdiction, interfering by injunction, is that head of mischief, alluded to by *Lord Hardwicke*, that sort of material injury to the comfort of those who dwell in the neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be give in an action at law.....An action on the case.....might be maintained in many cases which would not support an injunction." But in a later English case (2). *Mellish L. J.* said: "Practically in my opinion, there is no difference with respect to light in the amount of damage, which would entitle a person to maintain an action at law and that which would entitle him to a bill in equity. The circumstance that all cases of light and air are brought to this Court, seems tolerably good evidence that the world at large does not consider that a plaintiff has a better chance of succeeding if he has a right to light tried before a judge and jury than if he carries it to this Court. I am most unwilling to make a difference between law and equity when I do not find it to exist" So now injunction is uniformly held to be a proper remedy to protect against an interference with the enjoyment of an easement. The explanation of the change doubtless is that, when once the jurisdiction of equity was established, it was found that most of the cases could be shown to be incapable of adequate legal remedy and hence came into equity (3).

Jurisdiction analogous to that in nuisance.—The general principles on which the jurisdiction of equity to restrain the violation of easement is based are similar to those which constitute the foundation of the relief against nuisances. Indeed so closely allied are the two subjects that it is difficult to draw the line between what constitute a violation of an easement and what a nuisance. In a generic sense every violation of an easement may be considered as a nuisance, although the converse of the proposition does not hold true. In both cases, to warrant the interposition of equity, an irreparable injury must be made to appear, which is not susceptible of adequate compensation in pecuniary damages, or which, from the nature of the case, would occasion a

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(1) *Att. Gen.* v *Nichol*, 16 Ves. 338.
(2) *Lech* v. *Schwider*, L. R. 9 Ch. App. 463, 476.
(3) Pom. Eq. Jur. § 1957.

constantly recurring grievance, such as loss of health, trade, business, or destruction of means of subsistance (1).

Violation of Easements—Instances.—Among the nuisances or wrongs in the nature of nuisances, which equity will readily prevent by injunction are those which consist in the interference with disturbance, or destruction, actual or threatened, of easements and servitudes, whether created by grant or by easement, or resulting from user. Some of the most common forms of such injuries which equity enjoins are the obstruction of ancient lights in England, and rights of air or of prospect, by erections of any kind ; the removal of the lateral support of land by excavations ; the interference with water rights by diverting or polluting streams. In fact, every disturbance of an easement or servitude, existing or threatened, will be thus restrained, whenever from the essential nature of the injury, or from its continuous character, the legal remedy is inadequate (2).

Grounds of the jurisdiction—Irreparable Injury.—The particular forms in which this inadequacy of the legal remedy manifests itself are substantially the same as in other torts which equity will enjoin. Chief among them, as shown in the decided cases (3), is that of irreparable injury, which here as elsewhere, means a destructive act to property of such peculiar character or use that its loss would not be adequately recompensed by the damages a tribunal would give (4). It should be noted that this is not saying the injury is beyoned any money value. The following language of *Wood, V. C.* in *Dent* v. *Auction Mart Co.*, (5) clearly illustrates this point : "It appears to me it cannot safely be held that this court will allow parties so to exercise rights which they may have in their soil as to inflict an injury on their neighbour, if the neighbour is unwilling to take any compensation ; or even though he be willing to take compensation, if he is not ready to submit to valuation of a jury, but insists on his own right to determine what the value of his property is. One of the points which was put in argument illustrates this view. It was said there had been negotiations, and Messrs. Dent were willing at one time to take £2,000 for their right to oppose the erection of these buildings. After that, it was said to be impossible to regard this as a case of irreparable injury, and that therefore the only ground on which a court of equity interposes in cases of trespass failed. If a man says he will take £2,000 that affords some measure of the amount of the injury. The argument therefore would result in this—that because a man says he considers the amount of inconvenience and annoyance is so great as not to be estimated by the amount of money damages which a jury would fix, but that he is willing as persons sometimes are, to sell his comfort and ease for a high pecuniary reward, therefore he is to be

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(1) High on Injunction § 848.
(2) Pom. Eq. Jur. § 1351.
(3) See also section 54 of the Specific Relief Act clauses (*b*), (*c*) and (*d*).
(4) Pom. Eq. Jur. § 1958.
(5) L. R. 2 Eq. 238, 246, 247.

compelled to go to the jury who might award him some £100 or £150. His comfort is to be taken away, not at his own valuation, but at the value which a jury might put on it.....It appears to me that is a mistaken view of the jurisdiction of the court."

From the nature of easements, their disturbance, if other than temporary, is necessarily destructive ; and because the easement is always connected with the use of real property, it is generally *per se* possessed of the peculiar quality which is not adequately to be paid for in damages. The free exercise of the right to an easement is generally essential to the enjoyment or beneficial use of land with which it is connected ; hence in most of the cases in which the question of jurisdiction is discussed at all, the ground of equitable interference is said to be preventive of irreparable injury (1).

Prevention of Multiplicity of suits.—A second ground of jurisdiction to enjoin disturbrance of easement is the prevention of multiplicity of suits (2). This ground of jurisdiction, while entirely different in character from that of irreparable injury is very apt to be present with it in facts of most cases. It is the element of continuance or permanence that causes repeated and harrassing litigation, to prevent which is the purpose of equity in enjoining because of multiplicity of suits. In many cases, irreparable injury, too, is present only because the infringement is permanent, or, at least, of considerable duration, when a merely temporary infringement would not be irreparable because it would not amount to a destructive act ; such are cases of obstruction of ancient lights or of a right of way. Hence the ground of jurisdiction is sometimes so expressed that it is not clear which of the two is meant, and it is doubtless generally true that the jurisdiction can be rested on either or both of them (3).

Where there exists no standard for ascertaining damages.—An injunction is also a proper remedy where the facts are of such a nature as to render the measure of damages speculative and impossible to ascertain with any degree of certainty, (4). This means that when the verdict of a jury necessarily would be in the nature of conjecture as to amount of damages, a sufficient ground of jurisdiction is shown (5).

The damage necessary to support an injunction.—As a matter of reason, it would seem that consistently with the ground of equity to enjoin a continuing tort in order to prevent multiplicity of suits, no discussion of the amount of damage to justify an injunction would be required ; that the question in every case would be the purely legal one. What damage is necessary to sustain an action at law ? and the rule thus ascertained would control in equity when the wrong complained of is a continuing or recurring one. It has been shown that in dealing with cases of nuisance this is the ground

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(1) *Jordeson* v. *Sutton & Co*, (1899) 2 Ch. 217 ; Pom. Eq. Jur, § 1958.
(2) Specific Reiief Act s. 54 clause (*e*).
(3) Pom. Eq. Jur. § 1959.
(4) K*eplinger* v. *Woolsey*, 4 Neb (Unof) 282.
(5) Pom. Eq. Jur. § 1960.

the Courts take ; hence, for example, a pollution of air will be enjoined only if it causes actual damage to the plaintiff, but a pollution of water may be enjoined, though it causes no such damage, this being the distinction generally made between the two cases in actions at law (1). In cases of easements, however, this rule of equity courts has not been followed. The language of *Lord Eldon* in *Attorney General* v. *Nichol* (2), is apparently responsible for the anomalous state of the law. That, it will be remembered, was a case of obstruction of ancient lights. The cases in which the question arose of the amount of damage necessary to sustain an injunction seem to have been almost exclusively cases of the same sort, with the result that *Lord Eldon's dictum* has been reduced to a rule of law expressed as follows: "We must not always give relief [it was so laid down by *Lord Eldon* and *Lord Westbury* (3)] where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this: that where substantial damages would be given at law as distinguished from some small sum of £ 5, £ 10, or £ 20, this court will interpose (4)". This doctrine has been recognized frequently by the English courts (5), though sometimes in language which indicates doubts of its soundness (6) and there is at least one case which seems hardly reconcilable with it (7). In America what authority

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(1) Bigelow, Torts. pp. 277, 287.

(2) 16 Ves. 338, where *Lord Eldon* said : "There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained ; or an action upon the case ; which however might be maintained in many cases which would not support an injunction".

(3) *Jackson* v. *Duke of New Castle*, 3 De. G. J. & S. 275.

(4) Per. *Wood V. C.* in *Dent* v. *Huction Mart* & Co. L. R. 2 Eq. 238.

(5) *Martin* v. *Headon*, L. R. 2 Eq. 425 ; *Robson* v. *Whittingham* L. R. 1 Ch. App. 442 ; *Straight* v. *Burn*. L. R. 5 Ch. App. 163 ; *Warren* v. *Brown*, 71 L. J. K. B. 12=(1902) 1 K. B. 15 ; *Martin* v. *Price* (1894) 1 Ch. 276 ; *Home etc. Stores* v. *Colls*. (1902) 1 Ch. 302 on appeal (1904) A, C, 17 9, 212 ; *Lazarus* v. *Artis tic etc, co* (1897) 2 Ch. 214.

(6) *Johnson* v, *Wyatt*, 33 L. J. Ch. 394, 397 ; *Leech* v. *Schwider*, L. R. 9 Ch. App. 463. 476 ; *Aynsley* v. *Glover*. 18 Eq. 544, 552.

(7) *Eccles, Comm's for England* v. *Kino*. L. R. 14 Ch. D. 213. In this case *Brett L. J.* adopted as the test for an injunction that "there must be a substantial deprivation of light, sufficient to render the occupation of the house uncomfortable or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done". In *Dent* v. *Auctom Mart Co.*, L. R. 2 Eq. 238, It was carefully explained that this was the rule for determining whether an action would lie at law but that it did not control the granting of an injunction. See, also, tending in the same way as *Brett's* view, the opinions of *Jame L. J.*, in the same case at page 220, and in *Kelke* v. *Pearson* L. R. 16 Ch. App. 809 812, and the opinion of *Lord Mac naghten*, in *Colls* v. *Home etc. Stores*, (1904) App. Cas. 170, 193. See, also, *Lloyd* v. *London, etc. Ry.* 2 De G. J & S. 567, 579. In *Pennington* v. *Binsopton etc. Co.* L. R. 5 Ch. D. 769, 773, *Fry J.* distinguishing the rule above considered from that applied in cases of the pollution of running water in which an injunction is granted, though there is no actual damage, on the grounds, first, that as obstructions of light are generally permanent the damages represent the depreciation in the value of the property affected, and that this is not true of the pollution of running water ; and second, that as the plaintiff's use of running water may vary, it is impossible to foresee the extent of damages done by polluting it, while (by way of inference, the says) this is not true of interference of light. The distinction is contrary to the following cases ; *Shadwell* v. *Hutchison*, 2 Burn & Adol, 97 ; *Battishill* v. *Mitchell*, L. R. 11 Ap. Cas. 127 ; *Crumbie* v. *Wall send etc.*

there is has divided on the question, though most of the cases adopted the view that substantial damage is necessary to support an injunction (1). In British India the decisions of the different High Courts are not uniform (2) and in those places where the Indian Easements. Act is in force, the following rule has been laid down by the legislature in sections 33, 34 and 35 for the guidance of the Court. Section 33 runs as follows :—The owner of any interest in the dominant heritage, or the occupier of such heritage may institute a suit for compensation for the disturbance of the easement, or of any right accessory thereto, provided that the disturbance has actually caused substantial damage to the plaintiff.

"*Explanation I.*—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by naturally diminishing the value of the dominant heritage, is substantial damage within the meaning of section 34.

"*Explanation II.*—Where the easement disturbed is a right to the free passage of light passing to the opening in a house, no damage is substantial within the meaning of this section, unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

"*Explanation III*,—Where the easement disturbed is a right to the free passage of air to the openings in a house damage is substantial within the meaning of his section if it interferes naturally with the physical comfort of the plaintiff, though it is not injurious to his health (3)."

(1891) 1 Q. B. 93. See Gale on Easements 8th Ed. 61, where the learned author after reviewing all the cases says : "In the case of light, the views of the judges as to what constitutes an injury so substantial as to call for an injunction has varied considerably. But the rule is now clearly established, that the Court will restrain by injunction, not indeed a trifling or immaterial interference with the legal right, but any obstruction which is calculated to render the dominant tenement, wherever situate, substantially less fit either for comfortable use and enjoyment as a dwelling house or for beneficial use and occupation as a places of business of any kind." The second distinction is contrary to *Tates* v. *Jack*, L. R. 1 Ch. App. 295 and *Aynsly* v. *Gloom*, L. R. Eq. 504, 10 Ch. App. 283 which establish fully the doctrine that the plaintiff's right to complain of an infringement of his easement of light does not depend on the use he is actually making of it, but on any use he wishes to make of it. Vide Pom. Eq. Jur. § 1962 note (40).

(1) Pom. Eq. Jur. § 1962. In *Danielson* v. *Sykes*, 157 Cal. 686 the Court said : "The rule is that if an obstruction to a private easement is continuous, exclusive, and under claim of right, so that it will eventually destroy an easement by adverse possession thereof, an injunction will be granted against such obstruction although substantial damage has not as yet been caused by the obstruction In such a case the damage will be substantial when the adverse occupation has extinguished the right of way. This is sufficient to justify an injunction to prevent the continued occupation."

(2) In this chapter under proper headings, all the cases have been discussed.

(3) Illustrations: (*a*) A places a permament obstruction in a path over which B, as tenant of C's house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.

(*b*) A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah over hanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot—passengers using the way. This is not substantial damage to A."

Section 34 enacts: "The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained." Section 35 lays down: "Subject to the provision of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement—(*a*) if the easement is actually disturbed—when compensation for such disturbance might be recovered under the chapter: (*b*) if the disturbance is only threatened or intended—when the act threatened must necessarily, if performed, disturb the easement."

Threatened Disturbances.—Nature of the threat.—In dealing with cases of threatened disturbances of easements the Courts apply the requirement used to cases of threatened injuries, *viz.*, that there must be imminent danger of the wrong occurring (1). Hence, when the defendant had erected a hoarding which obstructed the light coming to the plaintiff's building over the defendant's premises, for the purpose of testing the plaintiff's right, an injunction against the erection of a building of the same height as the hoarding was refused on the ground that there was no threat of erecting such a building, although the defendant was required to give an undertaking to give notice of his intention to build, and liberty to apply for an injunction was reserved to the plaintiff (2). If a defendant is planning to build, however, that is a sufficient threat, and an injunction may be procured before the building is even commenced (3). So it is held that a sufficient threat is shown if the defendant merely claims the right to do the anticipated wrongful act, although he denies any present intention to act upon it: or, if a wrongful act is being done, it seems that is a sufficient threat of intention to repeat it, even if it were put an end to by abatement in a suit at law or otherwise (4).

Nature of the Injury Threatened.—The character of the threatened injury which will justify an injunction is simply that which would support an injunction on any ground, if it were already being done. Thus in an English case of apprehended obstruction of ancient lights, the Court, after stating the principles which govern the subject, continued: "The applications of these principles is far more easy when the building which is complained of has been erected and damages only are claimed; but they have to be applied with great caution when the plaintiff comes for an injunction before the building has been erected. It is the duty of the Court to arrive at the best conclusion it can upon the effect which the proposed building, if erected, would produce; and if the Court is satisfied that in that event the plaintiff would have a cause of action, the

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(1) Pom. Eq. Jur. § 1964; The Indian Easements Act, 1882, s. 35 (2): "An injunction may be granted to restrain the disturbance of an easement if the disturbance is only threatened or intended—when the act threatened or intended must necessarily, if performed, disturb the easement.

(2) *Smith* v. *Baxter*, (1900) 2 Ch. D. 138.

(3) *Aynsley* v. *Glover*, L. R. 10 Ch. App. 283.

(4) Pom. Eq. Jur. § 1964.

plaintiff is entitled, as a matter of right, to an injunction to prevent the defendant from interfering with his ancient light; or, in other words, to restrain the defendant from committing a wrongful act (1)". Hence, if the threat is only of such a tort as would give jurisdiction to a Court of Equity for the purpose of preventing multiplicity of suits, an injunction will nevertheless issue (2).

Balance of Injury.—"The question how far a Court should be influenced in its decision, whether to grant or to refuse an injunction, by a comparison of the injury to the defendant from granting it with the injury to the plaintiff from refusing it, has aspects very similar to those presented by the same question in cases of trespass. On the one side, there is the argument against granting injunctions which are oppressive or harsh to the defendant, on the other, the consideration that to refuse the injunction is to compel the plaintiff to sell his property against his will at a valuation, and that, too, in a case in which his legal remedy is admittedly inadequate (for the question does not arise of course, till the jurisdiction of equity over the particular case has been established). It is probable that the apparent discrepancies between the cases on this point may, to some extent at least, be explained by the fact that the Courts tend to give effect to the considerations which, in the particular case before them, out-weigh on one side or the other, without a full discussion of the limits of the doctrine. None of the cases make a full statement of the conditions under which the balance of injury shall be considered. They all agree in one particular, however, *viz.*, that the defendant who would claim its consideration in his favour must have committed the tort innocently, a wilful wrong-doer is entitled to claim no favour. Doubtless all Courts will agree, too, in holding that it shall not have any weight against an injury to the plaintiff of an irreparable character; and probably it will be held that the disproportion of injury to be done by granting injunction or by refusing it must be very strong in favour of the defendant, to bar granting it. For in cases in which the legal remedy is admittedly inadequate Courts of Equity will not readily permit a wrong-doer to compel innocent persons to sell their right at a valuation (3).

Plaintiff's right an absolute one.—Defences to infringements of easements are often attempted on the theory that the plaintiff has no right to a definite thing, at least not so far as equitable protection is concerned, but only to a certain amount of utility or convenience over the defendant's

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(1) *Homes etc. Stores* v. *Colls*, (1902) L. R. 1 Ch. 302=71 L. J. Ch. 146. 'By the words, 'cause of action', in the above quotation the Court probably meant that substantial damage before referred to in the text which the English Courts seem to require to support an injunction against the obstruction of light. For in the same paragraph from which the quotation is taken the Court said: "without substantial interference there is no right of action; and, the addition, in order to obtain an injunction, the plaintiff must establish substantial injury suffered or threatened." Pom. Eq. Jur. § 1965.

(2) Pom. Eq. Jur. § 1965.

(3) Pom. Eq. Jur. § 1966.

land. This argument has been steadfastly denied by the courts, on the ground that the plaintiff has a definite property right, which he may protect just as he may his ownership of land (1). Hence, it has been held no defence to a bill that the plaintiff had more light (2), or a more extensive right of way (3) that he needed, and so was not entitled to enjoin an obstruction. Nor can the defendant justify on the ground that he is willing to give the plaintiff something equally beneficial but different from that to which the plaintiff has a legal right, as an aqueduct in place of a ditch (4). "It is the duty of the courts" said the Judge in this case, "to protect a party in the enjoyment of his private property, not to license a trespass upon such property or to compel the owner to exchange the same for other property to answer private purposes or necessities." And it has been held the same way with reference to giving reflected light instead of the direct rays to which the plaintiff was entitled, and which the defendant's building obstructed (5). Nor can the defendant take advantage of the fact that the plaintiff is himself obstructing his easement; it is nothing to the defendant what the plaintiff may wish to do with his own property (6). Within the same general principle are the cases in which it is urged that the plaintiff is not entitled to an injunction because he can easily obviate the injury by means of his own. This argument is admissible, if at all, only within very narrow limits (7). Thus when it was argued that the plaintiffs should be given an injunction against interference with their light because they might have made their windows larger, the court said: "I apprehend it is not for the defendants to tell the plaintiffs how they are to construct their house, and to say, 'you can avoid this injury by doing something for which you would have no protection.' It the plaintiff constructed their new windows it could be immediately obstructed as being a new window. They have a right already acquired by their old existing window: that right they wish to have preserved in tact; and I think they are clearly entitled to retain the right as they acquired it, without being compelled to make any alteration in their house to enable other people to deal with their property (8)."

Relief given.—In cases of disturbance of easements the courts have had occasion to discuss the granting of mandatory injunctions more often, perhaps, than in any other subject. because the tort more frequently than elsewhere conststs in the creation of some permanent obstacle in the way of the exercise of the plaintiff's right (9). In *Smith* v *Smith* (10). *Sir George Jessel* made

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(1) Pom. Eq. Jur. § 1967.
(2) *Theed* v. *Debenham*, L. R. 2 Ch. D. 165; see also *Dyers & Co*, v. *King*, L. R. 9 Eq. 438.
(3) *White* v. *Tide water Oil Co*, 50 N. J. Eq. 1.
(4) *Gregory* v. *Nelson*, 41 Cal. 278; see also *Martin* v. *Price*, (1894) 1 Ch. 276.
(5) *Dent* v. *Auction Mart*, L. R. 2 Eq. 238; *Straight* v. *Burn* L. R. 5 Ch. App. 163; *Hackett* v. *Baiss*, 20 Eq. 494.
(6) *Straight* v. *Burn*, L. R. 5 Ch. App. 163.
(7) Pom. Eq. Jur. § 1967.
(8) *Dent* v. *Auction Mart*, L. R. 2 Eq. 238.
(9) Pom. Eq. Jur. § 1968.
(10) L. R. 20 Eq. 500.

the following able criticism of a somewhat common attitude towards them and clear statement of their controlling principle. "As to mandatory injunctions their history is a curious one, and may account for some of the expressions used by the Judges in some of the cases cited. At one time it was supposed that the court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisances, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance (1). The court seems to have thought that there was some wonderful virtue in the form (2), and that extra caution (3) was to be exercised in granting it. To that proposition I can by no means assent. In looking at the reason of the thing there is not any pretence for such a distinction as was supposed to exist between this and other forms of injunction. If a man is gradually fouling a stream with sewage, the court never has any hesitation in enjoining him. What difference could it make if instead of fouling it day by day he stopped it altogether ?.....When once the principle was established, why should it make any difference that the wrong-doer had done the wrong or practically done it before the bill was filed ? I could make no difference where the plaintiff's right remained and had not been lost by delay or acquiescence." The argument thus made is sound in reason and has been frequently acted upon by the courts (4). "But in such a case the court may properly give effect to the balance of injury as a reason for refusing an injunction (5). In *Hakett* v. *Baiss*, (6), *Sir George Jessel* remarked : "I do not think with a completed building that the mere fact of its being a few inches too high could have induced the court to grant a mandatory injunction, even if the plaintiff's counsel had not waived it." Where the injunction is granted for diminution of light or of excessive or otherwise unreasonable use of a right of way, the courts should so frame the injunctions as to preserve to the defendant the right to do the acts in question within legal limits (7).

Granting of temperory Injunction.—In granting temporary injunction to protect easements, as in other cases, the Court does not take jurisdiction for the purpose of settling the rights of the parties permanently, but simply to preserve the property until the legal title to it is established. The title which the plaintiff must show in such a case is not, of course' an incontestable one ; "he makes out a sufficient case when he satisfies the court that his claim is a substantial one, and that there is reasonable ground for doubting the validity of the

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(1) See the form of Injunction in *Lane* v. *Newdigate*, 10 Ves. 192.

(2) For other criticisms of this roundabout form of mandatory injunction Vide *Blake more* v. *Glamor gon shire*, 1 Myl & K. 154 and *Jackson* v. *Normandy*, (1899) 1 Ch. 438.

(3) See *Durally* v. *Prilchard*, L. R 1 Ch. App. 244.

(4) Pom. Eq. Jur. § 1968.

(5) *Ibid.*

(6) L. R. 20 Eq. 494, 497.

(7) *Yates* v. *Jack*, L. R. 1 Ch. App. 295, 298 ; *Hall* v. *Byron*, L. R. 4 Ch. D. 667. In *Hackett* v. *Baiss*, L. R. 20 Eq. 494, the injunction specified the particular height to which a building might go. In *Walker* v. *Brewster*, 5 Eq. 25, the Court refused to adopt a specific form. See also *Parkerer* v. *First Ave*, 24 Ch. D. 282 ; Pom. Eq. Jur. § 1970.

title of his adversary. The injury against which protection is sought is that which is likely to occur before the question of title between the parties can be settled, that is, in the limited time before a decision of the pending suit can be had. Therefore the plaintiff must allege facts which show danger of such serious injury occurring in this time, as to require intervening of equity to protect the property, while the title to it is still in doubt. Hence the statement is frequently made that he must show a "strong and mischievous case of pressing necessity (1)" This ordinarily means that he must show danger of irreparable injury, though it might be sufficient if he should establish that the defendant was insolvent; or it would seem enough, if, for any reason, the legal remedy for the wrong done pending the litigation would be inadequate (2). As the injunction is always granted at the risk of restraining one in the use of property to which he may eventually prove entitled, and refused at the risk of denying protection to a plaintiff who is entitled to it, the courts may properly inquire into the balance of injury and this is the practice followed (3). Ordinarily the relief afforded by temporary injunctions is prohibitory in nature, and it is sometimes said that mandatory temporary injunction will not be readily granted (4) though it is admitted they can be used when a strong enough case is made (5). "The court is always very reluctant to grant a mandatory injunction on an interlocutary application, but where extreme or very serious damage would ensue from withholding it, as in cases of interference with easements, or other cases demanding immediate relief, it will be granted (6)" In *Deniel* v. *Ferguson* (7) the plaintiff filed a suit for injunction restraining the defendant from building so as to obstruct his ancient light and notice of motion for an interim injunction. The defendant therefore working day and night, ran up the wall to a height of 40 ft. *Mr. Justice Starling* granted an injunction restraining future building and ordering removal of the wall, and this order was confirmed on appeel (8). In a case (9) of protection of easement, the Court observed: "That I have the power to grant an interim mandatory injunction has been laid down by the Bombay High Court in a case reported as *Chamfrey Bhimji* v. *Jumna Flour Mill* (10) and the Madras High Court in a case reported as *Kanda Swami Chetti* v. *Subramania Chetti* (11). In fact the pleader for the defendant concedes that I have such power, but argues that a court in its discretion would use the power only in very exceptional circumstances. The argument no doubt is sound, but each case is to be considered on

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(1) *Robson* v. *Pittenger*, 2 N. J. Eq. 57.

(2) Pom. Eq. Jur § 1970.

(3) Pom. Eq. §1970 ; see also *Straight* v. *Burn*, L. R. 5 Ch. App. 163 ; *Ecclesiastical Com* v. *Kino*, L. R. 14 Ch, D. 213 ; *Bock* v. *Stacy*, 2 Russ. 121 ; *Lord Battersea* v. *Com.* (1895) 2 Ch. 708.

(4) *Ryder* v. *Bentham*, 1 Ves Sen. 543.

(5) Pom.Eq. Jur 1970.

(6) *White Car* v. *Michenor*, 37 N. J. Eq. 614 ; vide page 158 supra.

(7) (1891) 2 Ch. 27.

(8) *Ismail* v. *Samser*, 41 C. 436=18 C. W. N. 176=19 C. L. J. 42.

(9) *Farm Haroon* v. *Cowajee*, 94 Ind. Ind. Cas. 840=A. I. R. 1926 Sind. 201.

(10) 16 Bom. L. R. 566=28 Ind. Cas. 121.

(11) 41 M. 208=33 M. L. J. 448=41 Ind. Cas. 384=(1917) M. W, N, 501,

its own merits. In the present case the structure put up by the defendant which blocks up the five windows with which I am dealing is a miserable, flimsy and dilapidated shed built of old corrugated iron sheets riddled with holes and full of cracks. This structure I gather from affidavits before me has undoubtedly been hastily put up with hastily collected materials immediately before, if not partly after, the filing of the suit. In these circumstances, without expressing any view with regard to the effect on the two tenements containing the windows which are closed by the shed, I think I shall be exercising my discretion judicially in holding that *status quo* should be maintained, and in ordering that on the plaintiff's depositing the sum of Rs. 50 in court the defendant is to remove the obstruction to the five wtndows by the entire removal of the shed or in such other manner as may be agreed to by the pleaders for both parties." But where there is no urgency such injunction should not be allowed. In *Kanda sami* v. *Subramania* (1), the court in refusing such an injunction observed: "On the merits, however, we are of opinion that the present was not a case of such urgency as to make it necessary for the protection of the plaintiff's rights, that the defendants should be made to remove the screen put up by him before the rights of the parties were heard and determined in a regular suit which was filed for this very purpose. The fact of his case resemble those of *Bonner* v. *G. W. R. Co.* (2), in which a temporary injunction was disallowed. The question of what rights the plaintiff possessed to light and air through the window which the defendant blocked by his screen, might very well have been left to be decided in the suit without anticipating the result of it (3)".

So this reluctance of the Courts to grant such injunctions does not represent any difference of principle governing their issuance, but rather a difference in the state of facts. Here, as in applications for prohibitory injunctions, the Court must first be satisfied that there is a case of threatened injury for which the legal remedy will be inadequate, and, secondly, that the balance of injury does not even then require the injunction to be refused. And as the mandatory injunction required the defendant to destroy or remove property, the balance of injury to him from granting an injunction is by that much increased (4).

Effect of change of conditions pending suit—on permanent injunctions .....The refusal of a temporary injunction does not affect the decree which will be made at the hearing. The defendant who, pending the suit, damages the existing condition, as by the erection of a building, does so at his own risk that the right may ultimately prove to be in the plaintiff. He cannot in such cases claim the advantage that the balance of injury might otherwise allow him, because he has acted with full notice of the other parties' claim (5). And it is equally true, of course, that the plaintiff cannot rely upon

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(1) 41 M. 201=33 M. L. J. 448=41 Ind. Cas. 384=(1917)M. W. N. 501.

(2) 24 Ch. D. 1=48 L. T. 619

(3) See also *Gopyya* v. *Aukayya*, A. I. R. 1927 Mad. 210=93 Ind. Cas. 561.

(4) Pom. Eq. Jur, § 1970; see also *Ryder* v. *Bentham*, 1 Ves. Sr. 543; *Harvey* v. *Smith*, 1 Kay & J. 389; *Straight* v. *Burn*, L. R. 5 Ch. App. 163, 166.

(5) Pom. Eq. Rem. § 557; see also *Krehl* v. *Burrell*, L. R. 7 Ch. D 551

the granting of a temporary injunction to strengthen his case at the hearing, nor as giving him a warrant to change his position in the expectation of doing so. The decree at the hearing, in other words, is wholly unaffected by the disposition of the motion for a temporary injunction (1). A defendant who violates a permanent injunction, by doing some work which has been prohibited will, of course, be compelled to undo it; he is in contempt and it will be "a mild use of the judge's discretion" if he is required to do no more than this (2). But when a defendant who had been temporarily enjoined from erecting structures beyond a certain height, violated the temporary injunction by the erection of certain chimneys, the Court nevertheless on the hearing refused to order them removed because they caused no material injury (3). Here too, the defendant was in contempt and might have been punished for it, but as the hearing showed he ought not to have been enjoined from erecting the chimneys by the temporary injunction, clearly there was no ground for compelling him to tear down what he might afterwards build up again. The defendant had neither harmed nor helped himself as to the matter of final equitable relief, by disobeying the injunction (4).

Effect of change of conditions pending suit—on Temporary Injunctions.—A very similar question to this may be brought before the court on applications for temporary injunctions. A person who has been served with notice of a motion for a temrorary injunction against the erection of a building, rushes work on the building with a large force of men, till the hearing of a motion. Has he affected his case with reference to the granting of temporary injunction either for good or ill? All courts are agreed that he has not strengthened his position (5). They will not give any weight to the balance of injury in his favour thus created, and to do so, would be to encourage circumvention of the court's jurisdiction (6). On the other hand there are intimations in some of the English cases that such an erection will be ordered down even in cases in which it would not have been prohibited "on the gound that the erection of it was an attempt to anticipate the order of the court. (7)" This is clearly imposing punishment on the defendant, although

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affirmed 11 Ch. D. 146; *Parker* v. *First Ave Hotel*, 24 Ch. D. 287; *Home etc. Stores* v. *Colls*, (1902) L. R. 1 Ch. D. 302, 313, 314.

(1) *Daniel* v. *Ferguson*, (1891) 2 Ch. D. 27; *Von Joel* v. *Hornsey*, (1895) 2 Ch. 774; *Beadel* v. *Perry*, 3 Eq. 465.

(2) *Murphey* v. *Harker*, 115 Ga. 77.

(3) *Beadel* v. *Perry*, 19 L. T. N. S. 760 S. C. on earlier hearing L. R. 3 Eq. 165.

(4) Pom. Eq. Jur. § 1971.

(5) Pom. Eq. Jur. § 1972.

(6) *Smith* v. *Day*, 13 Ch. D. 651; *Daniel* v. *Ferguson*, (1891) 2 Ch. 27; *Von Joel* v. *Hornsey*, (1895) 2 Ch. 774; *Beadel* v. *Perry*, L. R. 3 Eq. 456.

(7) *Per Kay L. J.* in *Daniel* v. *Ferguson*, (1891) 2 Ch. 774; see aiso *Keeble* v. *Poole*, 105 L T. 474; *Colls* v. *Homes etc. Stores*, (1894) App. Cas. 179, 193. In *Von Joel* v. *Hornsey*, supra, the defendant for several days evaded service of writ in an action to enjoin him from erecting a new building, and in the meantime hurried the building on. The Court, on the hearing of the motion for a temporary injunction, ordered so much of the building as had been erected after the issuance of the writ to be pulled down, *Lindley L. J.* saying "If builders will take the chance of running up a

he is not in contempt, and may easily subject him to an interlocutory injunction in cases in which, tried by the rules of injunction as measured by the plaintiff s title to it, the facts are not appropriate for granting that relief:. It would seeem that if such cases were approached just as though the application were for the prohibitory injunction which would have been sought but for the defendant's attempt to gain a wrongful advantage, and if the mandatory injunction were granted or withheld according as the prohibitory injunction would, in that situation, have been granted or with held, better results would be reached (1),

Parties.—The parties who may enjoin disturbance of an easement are all those whose interest is such that it may be injured beyond the extent for which legal remedies will be adequate. Thus, it has been held that a tenant from year to year may procure an injunction (2); and so may a tenant whose tenancy had but two years more to run (3). It has also been held that one who had only an agreement to take a lease might have an injunction in order to protect his equitable interest (4). And an owner of property which he did not occupy was granted an injunction against obstruction of light (5). In *Dent* v. *Auction Mart* (6), *Wood V. C.* said: "I may suggest a case in which the Court would probably not interfere (not merely when the right is of short duration, for I have interfered in cases of very short duration with reference to the obstruction of light), but where the whole of the property is about to cease immediately—as, for instance, in the case of notice given under a Railway Act to take a house, when the house is about to be destroyed and razed to the ground in two or three days' time. That is one of the cases in which damage might be given at law, and yet this Court would not think it right to interfere."

Easements, nature and meaning of.—When A, the owner of a piece of land, has the right of compelling B, the owner of adjoining piece of land, either to refrain from so doing something on his (B's) land or to allow A to do some thing (including the taking of profits) in his (B's) land, then A is said to have an easement over B's land: A is called the dominant owner, and his land the dominant tenement; B is called the servient tenant, and his land the servient tenement (7). The two tenements may adjoin horizantally,

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building in that way, they must take the risk of pulling it down"

(1) Pom. Eq. Jur. § 1972. In *Daniel* v. *Ferguson*, (1891) L. R. 2 Ch. D. 27, *Lindley L. J.* said: "The plaintiff makes out a case entitling him to an injunction to keep matters in *statu quo* till the trial. That being so, the defendant, upon receiving notice that an injunction is going to be applied for sets a gang of man to work and runs up his wall to a height of thirty-nine feet but before he receives notice that an injunction has been granted. It is right that buildings thus run up should be pulled down at once without regard to what the result of the trial may be.

(2) *Simper* v, *Foley*, 2 Johns & H. 555.

(3) *Robson* v *Edwards* (1893) L. R. 2 Ch. 146.

(4) *Gale* v, *Abbot*, 8 Jur N, S, 937.

(5) *Wilson* v, *Townsend*, 1 Drew & S, 324,

(6) L, R, 2 Eq, 238, 247, 248,

(7) Vide s. 4 of the Indian Easements Act: "An easement is a right which the owner or occupier of certain land possesses as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent, and continue to prevent something being done, in or upon or in respect of, certain other land

as in the majority of cases, or vertically, as in the case of the owner of a stratum of minerals being entitled to work them in such a manner as to let down the surface of land owned by another man. Vertical easements are also to be found in rare cases of flats separately owned so that they are practically separate houses built one upon the other; the owner of an upper flat is then entitled to the support of a lower flat (1). As regards the servient owner, an easement is always negative, the obligation on him being either to suffer or not to do something. As regards the dominant owner, easements are divisible into affirmative and negative. An easement is affirmative when it entitles the dominant owner to make active use of the servient tenement, or to do some act which, in the absence of an easement, would be a nuisance and a trespass. The principal affirmative easements are rights of way, the right to lead or discharge water over or on a neighbour's land, the right to use or affect the water of a natural stream in a manner not justified by natural right, and the right to carry on an offensive trade. An easement is negative when it merely restrains the servient owner from exercising an ordinary right of ownership over his land; such are the rights of light and air; and the acquired right of support (1). According to the definition given in the Easements Act, easements include what are called "natural rights" or "natural easements" but from reading section 7 of the same Act it is apparent that "natural rights" do not come within the purview of the definition of the word "easements" under the Indian Easements Act, the term "easements" include profits a prendre (2). But according to English law, it is a privilege with profit (3). An easement although it is not a right of property is a right *in rem* like a right of property. So easements in British India must be distinguished from (*i*) rights of property or ownership, (*ii*) from natural rights, such as the natural right to support: and (*iii*) from licences, which are personal and confer no interest. The following are the principal kinds of easements :—(*i*) in respect of water; (*ii*) in respect of air; (*iii*) in respect of light; (*iv*) rights of way; (*v*) rights of support; (*vi*) in respect

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not his own. The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner." "An easement then is a right *in rem* (other than a natural right, which the owner or occupier of certain specific land possesses, as such owner or occupier, for the beneficial enjoyment of that land, to do and continue to do something (including the taking of profits), or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. In affirmative easements the dominant owner has the right to do and continue to do something. In what are called negative easements, he has the right to prevent and continue to prevent something being done. The servient owner is bound to permit the doing of that thing, or to refrain from doing that other thing. The dominant owner is entitled to enjoy the right without disturbance by any other person whatsoever." Mitra's Prescription and Easements p. 464.

(1) Byrne's Law Dictionary.

(2) Stoke's Anglo Indian Code Vol I p. 880.

(3) Gale on Easements p. 8. "An easement, in the strict sense, means a

of party walls and fences ; (*vii*) easements of recreation, that is to say, the right of the inhabitants of a particular place to walk, dance or hold lawful sports on the land of another (1). The English law does not recognise any easement of prospect or privacy (2). But the right of privacy is recognized by the customs of Gujrat, United Provinces and other places in British India (3).

Easements are either continuous or discontinuous, apparent or non-apparent. A continuous easement is one when enjoyment is, or may be continual without the act of man—as in the case of artificial water course or the right to light and air—as opposed to discontinuous easements, such as rights of way. So a discontinuous easement is one that needs the act of man for its enjoyment. Apparent easements are those the existence of which appears from the construction or condition of one of the tenements, so as to be capable of being seen or known on careful inspection by a competent person, by some permanent sign : such as drain or artificial water course. A non-apparent easement is one that has no such sign : such as right annexed to A's house to prevent B from building on his own land (4).

Easements for limited time or on condition.—An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose or on condition that it shall commence or become void or voidable on the happening of specified event or the performance or non-performance of a specified fact (5).

How easements are created.—Easements may be created (*i*) by express grant, as where A grants B a right of way over A's land ; (*ii*) by implied grant, either on the principle of the disposition of the owner of two tenements, or from the principle that a man cannot derogate from his own grant, (*iii*) by prescription ; (*iv*) by local customs ; (*v*) by estoppel and (*vi*) by the presumption of some lawful origin (6).

Acquisition of easements by express grant.—Easements are sometimes constituted by an express grant from the owner of one heritage (the servient), in favour of the owner of another (dominant). Such grant may be either *inter vivos* or by testament. The transfer of the dominant heritage passes an easement already in existence unless a contrary

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particular kind of servitude, namely a private and appurtenant servitude which is not a right to take any profit from the servient land. A right of way or of light or of support is an easement ; but a right to pasture cattle or to dig for minerals is in English law a distinct form of servitude known as a profit. This distinction is unknown in other systems." Salmond's Jur. p. 460.

(1) Byrne's Law Dictionary.

(2) Gale on Easements p. 337 ; Goddard 14th Ed. pp. 106-112 ; see also *Kamathi* v. *Garunada*, 3 M. 141 ; *Sayyad* v. *Amiru Bibi*, 18 M. 163 ; *Mahomed Abdur* v. *Birju*, 5 B. L. R. 676.

(3) *Gokul* v. *Radha*, 10 A. 358.

(4) Byrne's Law Dictionary ; The Indian Easements Act s. 5.

(5) The Indian Easements Act. s. 6.

(6) Byrne's Law Dictionary ; Mitra's Law of Prescription and Easements p. 527.

intention appears (1). "In the ordinary case of a grant" said *Swinfen Eddy* L. J, in *Baxerdale* v. *North Lambith Club* (2) "of a right of way to a house, the right would extend not only to the grantee, but to the members of his family, servants, visitors, guests and trades people, though none of these persons are expressly mentioned in the grant."

Implied grant.—The implication of the grant of an easement may arise in two ways : (*i*) upon the sverance of an heritage by its owner into two or more parts, (*ii*) by prescription (3). But we shall deal only with the first kind of easements under the head of "implied grant" reserving the other kind for the next "head." This class is also known as easements of necessity or *quasi* easements. Easements of necessity are those which are absolutely necessary for the enjoyment of a piece of land or building. The distinction between these classes of easements is of importance with reference to the rule that where the owner of a piece of land divides it, and conveys one part to a person without any stipulations on the subject, then the grantee becomes entitled by what is sometimes called 'the disposition of the owner of the two tenements"—(*i*) to all continuous and apparent easements, that is to such easements as will enable him to enjoy the property in the same way as it is evident, from its condition, that the owner enjoyed it, and (*ii*) to all easements of necessity (4). Thus, where the owner of land on which were some cattle sheds, made an artificial water course through another part of the land to supply them with water, and afterwards conveyed the cattle sheds to another person, it was held that the grantee was entitled to the apparent and continuous easement of receiving water from the water course on the grantor's land. So if I have a field enclosed by my own land on all sides and I alien this field to another, he shall have a way to it over my land as an easement of necessity, for without it he could not have any benefit of the field (5).

Easement by prescription.—In British India acquisition of easement by prescription is a statutory right. Such right can be acquired in British India by the Indian Limitation Act (6), and the Indian Easements Act (7). The Indian Easements Act originally extended to the territories respectively administered by the Governor of Madras in council and the Chief Commissioners of the Central Provinces and Coorg. Subsequently by Act VII of 1891, the same Act has been extended to the territories respectively administered by the Governor of Bombay in Council and the Lieutenant Governor of the North Western Provinces and the Chief Commissioners of Oudh. It has also been extended to Delhi Province by Act VII of 1915. In the rest of British India, and in those places where the Indian Easements Act is not in force the right of

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(1) Mittra's Law of Prescription and Easement p. 528.
(2) (1902) 2 Ch. 427 (429).
(3) Gale on Easements p. 111.
(4) Byrne's Law Dictionary ; The Indian Easements Act s. 13 and illustrations.
(5) *Ibid.*
(6) Act IX of 1908.
(7) Act V of 1882.

easement by prescription is acquired under ss. 26 and 27 of the Indian Limitation Act.

Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption for twenty years, and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption and for twenty years, the right to such access and use of light or air, way, water-course, use of water, or other easement shall be absolute and indefeasible. Each of the said period of twenty years shall be taken to be period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested. Where the property over which a right is claimed belongs to government, for the abovementioned "twenty years" the words "sixty years "should be substituted. Nothing is an interruption unless, where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorizing the same to be made (1). A suit is

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(1) Section 26 of the Indian Limitation Act (IX of 1908). Section 15 of the Indian Easements Act enacts: "Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, without interruption and for twenty years, and where support from one person's land or things affixed thereto, has been peaceably received by another person's land subject to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years, and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years, the right to such access and use of light, or air, support, or other easement, shall be absolute. Each of the said periods, of twenty years shall be taken to be a period ending within two years, next before the institution of the suit wherein the claim to which such period relates is contested. *Explanation I*—Nothing is an easement within the meaning of this section when it has been made in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption within the meaning of this section, unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorizing the same to be made.

Explanation III—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

Where the property over which a right is claimed under this section belongs to Government, this section shall be read as if, for the words 'twenty years' 'the words 'sixty years' were substituted." *Illustrations*: (a) A suit is brought in 1882 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto, as an easement and as of right, without interruption from 1 st January 1862 to 1 st January 1882. The plaintiff

brought in 1911 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption from 1st January 1890 to 1st January 1910. The plaintiff is entitled to judgment. In a like suit the plaintiff shows that the right was peceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, has asked his leave to enjoy the right. The suit shall be dismissed.

Where any land or water upon, over, or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life of any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is, within three years next after determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water (1).

Rights which cannot be acquired by prescription.—Easements acquired under section 15 of the Indian Easements Act are said to be acquired by prescription, and are called prescriptive rights. None of the following rights can be so acquired: (a) a right which would tend to the total destruction of the subject of the right or the property on which, if the acquisition were made, liability would be imposed; (b) a right to the free passage of light or air to an open space of ground; (c) a right to surface-water not flowing in a stream, and not permanently collected in a pool, tank or otherwise; (d) a right to under ground water not passing in a defined channel (2).

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is entitled to judgment. (b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that, for a year of that time, the plaintiff was entitled to possession of the servient heritage as lessee thereof, and enjoyed the right as such lessee. The suit shall be dismissed for the right of way has not been enjoyed "as an easement, for twenty years. (c) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had admitted that the user was not of right, and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years. Section 16 enacts: "Provided that, when any land, upon, over or from which any easement has been enjoyed or derived, has been held under, or by virtue of any interest for life or any terms of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years in case the claim is, within three years, next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land." *Illustration*: A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years, C had a life-interest in the land; that on C's death B becomes entitled to the land, and that, within two years after C's death, he contested A's claim to the right. The suit must be dismissed, as A with reference to the provisions of this section, has only proved enjoyment for fifteen years.

(1) Vide ss. 26 and 28 of the Indian Limitation Act (IX of 1908).

(2) Section 17 of the Indian Easements Act (V of 1882).

Customary easements.—An easement may be acquired by virtue of a local custom. Such easements are called customary easements (1). These customary easements (whether mere conveniences or profits *a prendre*) must be possessed of the same characteristics as those which are essential for the validity of customs generally. Thus they must be reasonable and certain. There must also be satisfactory proof of usage so long and invariably acted on in practice, as to show that it has by common consent been submitted to as the established rule of the district or part of the country (2). The following are the illustrations of customary easements: (a) By the custom of a certain village every cultivator of village land is entitled as such, to graze this cattle on the pasture. A, having become the tenant of a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom; (b). By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house (3).

Easement by estoppel.—An easement is sometimes acquired by estoppel—as for instance, if A, without title, profess to impose an easement in favour of B, A will be estopped from denying the right to such easement, if he subsequently acquires title to the servient heritage (4). "The Court will not permit" said *Lord Eldon* "a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstances of looking on is in many cases as strong as using terms of encouragement (5)".

Easement by the presumption of some lawful origin.—Immemorial user must be referred to a legal origin, that is either to a lost grant or to an agreement between the predecessors in title of parties (6).

Extinguishment of easement.—A right of easement may be extinguished—(i) by express release; (ii) by implied release, namely, (a) by merger or unity of possession, which occurs when the two tenements become united in the ownership of one person; (b) by necessity, as where the owner of the dominant tenement does, or authorises the owner of the servient tenement to do, an act which necessarily prevents the future enjoyment of the easement; (c) by alteration of the dominant tenement, so as to make the easement unapplicable (d) by non-user, evidencing an intention of abandoning the easement (7).

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(1) Section 18 of the Indian Easements Act, (V of 1882).

(2) Mitra's Prescription and Easement p. 540.

(3) Illustrations to section 18 of the Indian Easements Act (V of 1882).

(4) Mitra's Prescription and Easement p. 542.

(5) *Dann* v. *Spurrier*, 7 Ves. at p. 235.

(6) *Punja* v. *Baikuvar*, 6 B. 20.

(7) Byrne's Law Dictionary.

Air.—The right to the enjoyment of air is, generally speaking, at common law, governed by the same principles as those which regulate the passage of light (1). At common law, every owner of land is entitled to the enjoyment of air passing to and from his land over the land of another land-owner. But this right does not entitle a land-owner to claim that another land-owner shall not use his land in the ordinary way, as by building on it, and so obstructing the passage of air to or from adjoining land, unless an easement to the air has been acquired which gives the person possessing such an easement the right to prevent any such use of adjoining land as will interfere with the enjoyment of the easement. A right to the absolutely uninterrupted flow of air to or from adjoining land cannot be acquired (2). So in British India also a right to unobstructed air can only be acquired for the benefit of a building (3). Under section 17 of the Indian Easements Act, a right to the free passage of air to an open space of ground cannot be acquired (4). In the last mentioned case, *Cotton L. J.* added: "It was unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbour's property had been enjoyed as of right for a sufficient period, a right by way of easement could be acquired."

If land is conveyed for a specific purpose, the person who conveys the land will not, indeed, be permitted so to use the land which remains in his possession as to interfere with the use for such purpose of the land which he has conveyed; and so, where land is granted with a stable on it, the grantor will be restrained from interrupting the passage of air so as to render the stable useless (5). But except in such a case, an owner of land cannot be prevented from erecting buildings which, for instance, interfere with the access of air to a wind-mill on adjoining land (6), or which cause chimneys on adjoining land to smoke. But an easement can be acquired which gives a right to the passage of air into or out of a defined aperture, such as a window or ventilating opening (7); and an owner of adjoining land can be restrained from using land so as to interfere with such right. Such an easement can be acquired by prescription (8).

The English Prescription Act makes special provision for the acquisition of rights of light, but makes no mention whatever of air. The English law, however, recognises a right to air which is accustomed to flow to an ancient window or other apperture in a building, though it does not recognize a right

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(1) Gale on Easements p. 338.
(2) Byrne's Law Dictionary; see also *Harris* v. *De Pinna*, L. R. 33 Ch. D. 238.
(3) Vide s. 15 of the Indian Easements Act and s. 26 of the Limitation Act.
(4) See also *Webb* v. *Bird*, 10 C. B. N. S. 268; *Bryant* v. *Lefever*, L. R. 4 C. P. D. 172.
(5) *Aldin* v. *Latimer Clark*, (1894) 2 Ch. 437; see also *Hammer* v. *Jumbil*. (1921) 1 Ch. 217; *Cable* v. *Byant*, (1908) 1 Ch. 263; *Bass* v. *Gregory*, 25 Q. B. D. 481.
(6) *Webb* v. *Bird*, 10 C. B. N. S. 268.
(7) *Bryant* v. *Lefever*, L. R. 4 C. P. D. 172.
(8) Byrne's Law Dictionary.

to the streams of wind to flow to wind-mills or chimneys (1). In England it was the old practice in all suits relating to the interference of light to throw in a claim of air, as if the two things were *pari passu*, but it has been given up since *Lord Shelborne* made the observations which fell from him in the *City of London Brewery Company* v. *Tenant* (2),

The Indian Limitation Act, unlike two English Prescription Acts, places light and air on the same footing ; and the object of the Prescription Act and of the provisions of the Indian Limitation Act is not to enlarge the extent and operation of the easement, but to provide another and more convenient way of acquiring such easements—a mode independent of legal fiction and capable of easy proof in a court of law ; these Acts does not therefore alter in any way the pre-existing law as to the nature and extent of the right. (3).

In *Barrow* v. *Archer* (4) which was a case to restrain by injunction the defendants, a builder from building a wall on the adjoining premises on the ground of obstruction of ancient lights *Peterson J* said : "I have no doubt in my mind that, if it were shown satisfactorily that the building in question, when executed, would materially lessen the enjoyment of light and air, to which the plaintiff lays claim by presumptive right, I ought to grant the injunction. The plaintiff does not rest his title to the enjoyment of light and air, on the principle that if the light were sufficient, the access of air would be presumed to be sufficient, but seems to assume a principal that, having regard to the climate, a party gets a presumptive right to the south wind, and that as the right to light and air is co-extensive, that right to the light must go to the extent that, independently of the light being sufficient, he is entitled to a current of air, the same as a current of water, and that to the extent of such a current he is entitled to be free from all obstruction. The claim of the plaintiff is in fact this, that he gains by prescription a right to have the current of air inpinge direct upon his premises in the direction the wind blows, and that it is not sufficient that he gets air ample and sufficient for all sanitary purposes, but that he gets it in the direction from which it blows, undirected by any obstruction. Such a claim would be co-extensive with a claim to a prospect. The right to such was distinctly denied by *Lord Hardwicke* in the case of the *Attorney-General* v. *Doughty* (5). I cannot see on principle any difference between the particular ray of light forming a prospect, or the motion of a particular current of air forming a wind. The learned counsel cited a case mentioned in *Viner's Abridgment title nuisance* G. par. 19, where *Justice Wynot* said that when one erected a house so high that the wind was stopped from the windmills in *Finsbury fileds*, it was adjudged

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(1) Mitra's Prescription and Easement p. 512 citing Goddard 3rd Ed. p. 40 ; see also *Harris* v. *De Pinna*, 33 Ch. D. 238 ; *Chastney* v. *Ackland*, (1895) 2 Ch 389 S. C. (1897) A. C. 155 ; *Browne* v. *Flower*, (1911) 1 Ch. 226.

(2) L. R. 9 Ch. App. 218 cited in Mitra's Prescription and Easement p. 513

(3) *The Delhi and London Bank* v. *Hem Lall*, 14 C. 839.

(4) 2 Hyde 125.

(5) 2 Ves. Sn. 453.

it should be broken down. The only effect of the decision upon my mind is that of its absurdity (1). Were such a principle to be upheld, the consequences would be that to prevent an acquisition of right, the owners of adjoining property on all sides would be compelled to build up against a party in order to prevent his getting a right to the absence of everything that could obstruct the direct infringing of the wind. Were it not so, a series of buildings, even 50 to 100 yards off, would as effectually destroy the direct action of the current of air as one ten yards off. Were such a principle once admitted, it might be carried to the extent that a person should not be allowed to build on the lee side of premises, and thereby obstruct the free current of air by throwing back the air and destroying the current, as in the case of a water course. It must be known to any person that to have a current of air there must be a thorough draught. Although it was ably urged by the counsel for the plaintiff that I ought to decide this point, not on the cases as decided in England, but according to the circumstances of the country, and the particular winds prevailing, and that a direct breeze from the south was almost a necessity, it is equally necessary for me to see that in studying luxury and comfort I do not make the subservient tenement subservient to more than the law requires, especially as the easement gained is a curtailment of the legal rights of the owner of the subservient tenement. The point as to the right to the free use of air in a particular direction was settled in the case of *Webb* v. *Bird* (2); and although the principal point decided was as to whether a prescriptive right to the wind was within the meaning of 2 and 3 Will. IV, Cap. 71, it is quite clear from the judgment in that case that a party could not gain a prescriptive right to the wind. I may observe that as the prevailing winds are from the south west, even more than the south, the plaintiffs would have a similar claim as against the builders of the New Courts, should the buil ings in any way suffer from what thing originally were before demolition. The New Courts will far more effectually shut out the south west wind than Mr. Money's erection in the south. I cannot therefore, on principle treat the claim to the wind, as a right of easement : the right of air is co extensive with the right to light, and I am of opinion that when there is sufficient *adit* for light, it will be presumed there will be sufficient *adit* for air. With these views it is now incumbent on me, with the material before me to say whether there is sufficient before me to justify me, on the ground of exclusion of light to pass an order restrictive on Mr. Money's right to build on his own land. Having regard to the way in which day light is most sedulously excluded in this country, and having regard to the almost perpendicular rays of the sun for nine out of the twelve months, I cannot imagine that a wall 20 ft. high at a distance of 17 feet is such an obstruction as to call for the interference of the court, nor can I think (although it must obstruct

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(1) In view of the later English decisions this authority cannot any longer be considered as good authority. *Vide* Gale on Easements p. 339 where all the later cases are collected.

(2) 10 C. B. N. S. 268.

the direct action of the wind) that here is such an obstruction of air as to destroy the beneficial enjoyment of the premises.....I am of opinion that there are no sufficient grounds shown me for granting the injunction."

In *John George Bagram* v. *Khetra Nath Karformah* (1) *Norman J.* said: "As shown in *Aldred*'s case (2) the right acquired against the neighbour is limited to such easement as are necessary. It is there said, that for stopping a prospect which is matter of delight and not of necessity, no action lies, and yet it is a great recommendation of a house, if it has a long and large prospect. Again in *Fishmongers' Company* v. *The East India Company* (3), *Lord Hardwike* says, it is true that the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason for hindering a man from building on his own ground. In *Webb* v. *Bird* (4), and in the same case in error (5) it was held that no right to a free passage of air, to a windmill can be implied from 20 years' enjoyment. The reasoning of the court in that case is applicable to the claim for the free passage of air from a particular quarter, and it was so treated by *Mr. Justice Peterson*, sitting in this court in the case of *Barrow* v. *Archer* (6). To give a right of action (in a case where there is no express contract on the subject) for an interference with the access of air to dwelling houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house, in other words to render the house unfit for the ordinary purposes of habitation or business. Nothing of the kind is suggested here. The attempt to show that the ground floor was rendered damp wholly fails."

In *Modhoosoodun Dey* v. *Bissonanth Dey* (7) *Markby J.* said: "The law in Calcuttta upon this subject prior to the year 1871 was the law of England as it stood prior to 1832, subject to such modifications as the deffirent circumstances of the two countries might require.....So far then the plaintiff has established his case. But then it becomes necessary to see what are the particular rights which can in this case be inferred from the enjoyment. Here also I must apply the rules of the English Law. No doubt this leads to some inconvenience. The reasons for which apertures are made in the walls of houses in the two countries are very different. In England an apperture is made chiefly for light; the sun being less bright, and the air colder there, we desire to obtain all the light we can, and only to admit just as much air as is necessary for wholesome ventilation; for which reason we always use glass in our windows. In this country the object is precisely the reverse—to get as much air as posible, and to exclude the superfluous light. A comparatively small aperture will in this country light a room; but without a free current of air, a room would very often be uncomfortable and even unhealthy. Hence the frequent 'omission of glass, and the numerous

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(1) 3 B. L. R. O. C. J. 18.
(2) 9 Coke 58.
(3) 1 Dick. 163.
(4) 10 C. B. N. S. 268.
(5) 13 C. B. N. S. 841.
(6) 2 Hyde Rep. 129.
(7) 15 B. L. R. 361, 367.

contrivances for venandahs, jilmils, chiks, hoods, and so forth, which are all intended to shut out the light whilst the air is admitted.

"But unfortunately the law of England being fashioned upon the wants of the inhabitants of that country has specially favoured the acquision of the right to free access of light, but has taken very little notice of the right to free access of air. 'Light and air' have indeed very often been treated as one and the same easement the right being looked upon as the right to have the apperture unobstructed, the owner using it for whatever purpose he pleased. This was the mode to which I dealt with the case when assessing the damages in *Bagram* v. *Khetranath Karforma* (1) but the court of Appeals took a different view. As I understand *Sir Barnes Peacock's* Judgment, he considers that the right to 'air stands now, as it did when *Alfred's* case (2) was decided, upon the ground of health, and that the court interferes upon the ground of nuisance (3). This no doubt is in strict accordance with the English law. It is the same view as was taken by *Lard Hatherley* (then *V. C. Wood*) in *Dent* v. *The Auction Mart Co.*, (4) where he says: 'There are difficulties about the case of air as distinguished from that of light, but the court has interfered to prevent the total obstruction of air. He then states that the obstruction in that particular case was one which the court would recognize 'on the ground of nuisance;' and adds 'this is perhaps the proper ground on which to place the interference of the court, although in decrees the words 'light and air' are often used together as if the two things went *pari passu*.' I think, therefore, I am bound by authority to hold that, in Calcutta, as under the English law, independently of Act IX of 1871, the only right which can be gained in respect of air is that there shall not be an obstruction which is a nuisance or injurious to health (5)"

But in those places where the Indian Easements Act is in force, the owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement, or of any right accessary thereto, provided that the disturbance has actually caused substantial damage to the plaintiff. Where the easement disturbed is a right to the free passage of air to the opening in a house, damage is substantial if it interferes materially with the physical comfort of the plaintiff

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(1) 3 B. L. R. (O. C.) 18= W. R. Sup. 284.

(2) 9 Rep. 58.

(3) In that case *Sir Barnes Peacock C. J.* said: 'I am of opinion that by the use of the south window uninterruptedly for upwards of 20 years, the plaintiff did not acquire a right to enjoy the south breeze without obstruction. Such a right may be acquired by express grant, but it cannot be acquired merely by presumption arising from user, whether the presumption is a presumption of prescription or not."

(4) L. R. 2 Q. Eq. 238 (252).

(5) See also *Nandkishore* v. *Bhagubhani*, 8 B. 95; "An interference with the access of light and air to a window of a dweling house is *prima facie* an injury of a serious character. The access of air in this country is of hardly less importance than that of light. It must be taken as a matter of common knowledge that a material interference with it is injurious, not only to the comfort but to the health of the inmates of the house thus affected."

In a Bombay case the court observed that in dealing with the right to air, English decisions are not of much avail

though it is not injurious to his health (1). Similarly where the easement disturbed is a right to the free passage of light pasing to the opening in a house, no damage is substantial within the meaning of this section, unless it interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit (2).

In *Gale* v. *Abbott* (3) injunctions were granted to remove and prevent impediments to ventilation: But in *Johnson* v. *Wyatt* (4) an injunction to restrain the obstruction of air coming to ancient windows was refused, on the ground that the obstruction would be casual and temporary only, depending on the direction of the wind.

Light. According to section 3 of the English Prescription Act of 1833, "when the access and use of light to and for any dweling-house, workshop or other building shall have been actually enjoyed there with for the full period of twenty years without interruption, the right thereto shall become absolute and indefeasible.....unless it shall appear that the same was enjoyed by some covenant or agreement expressly made or given for that purpose by some deed or writing." A right to light so acquired is known as an ancient light; and before 1833 the term applied to light enjoyed for so long a time that the memory of man ran not to the contrary (5). By Statute of Limitation, 21 Jac, 1, C. 16, the period of the first year of Richard I., was adopted as the commencement of legal memory.

The right to flowing water in a natural stream it has already been shown, is an ordinary right of property requiring no length of time to fortify it. The right to light and air seems to depend, however, upon very different grounds. The passage of light and air over lands unencumbered by buildings must necessarily have existed from time immemorial; but the use of the light and air so passing, by means of windows in a house or otherwise, confers no right unless it has been continued during twenty years (6). The principle on which the acquisition of rights of this kind is based is very clearly and fully stated in the judgment of *Mr. Justice Littledale* in *Moore* in *Ranson* (7). The learned Judge said: "Every man on his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his land,

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because the conditions in this country are different from those of England, so far as air is concerned. In England more light is needed than here whereas more air is needed here than in England. *Framji* v. *Framji*, 7 Bom. L. R 352. To establish that the plaintiff has suffered substantial damage to his rights to light and air, he must show material diminution in the value of his heritage or material interference with his physical comfort. *Framji* v. *Framji*. 7 Bom. L. R. 825=30 B. 319.

(1) Section 33 of the Indian Easements Act.

(2) *Ibid*, see also *Nand kishore* v. *Bhaguebhai*, 8 B. 95.

(3) 8 Jur, N. S. 987.

(4) 2 De. G. J. & S. 18.

(5) Byrne's Law Dictionary.

(6) Gale on Easements p. 314; see also S. 26 of the Indian Limitation Act, (IX of 1908) and section 15 of the Indian Easements Act (V of 1882).

(7) (1824) 3 B & C 340=27 R.R. 375; referred to by *Couch J.* in *Pran-Jivan Das* v. *Mayaram*, 1 B. H. C. R. O. C. I. 151 note,

buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light he does not require any consent from the owner of the adjoining land. He, therefore begins to acquire the right to the enjoyment of light by mere occupancy. After he has erected his building, the owner of the adjoining land may afterwards within twenty years build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period." Referring to the above passage *Couch J.* in *Pranjivan Das* v, *Mayaram* (1) said : "Applying the principles there laid down to the present case, I consider that when a building assumes the shape and appearance of a house, and by placing of window frames the intention is indicated that by these means the access of light and air is to be had, then begins the time for persons interested in preventing such user from becoming a right, to challenge be same, and take steps to prevent such right from being acquired. Being of opinion that the time when such duty of challenge arises can be sufficiently ascertained, in this case, and that it runs from the time when the window-frames were placed, and the structure assumed the shape and appearance of a dwelling house, it is not necessary to consider the question when a house can to said to be completed. I agree with the Chief Justice that a perpetual injunction should be awarded as prayed, and with costs."

In *Gooch* v. *Morshall* (2) *Vice-chancellor Wood*, defines the right of such an easement thus : "When a man allowed his neighbour to enjoy free and uninterrupted access of light and air for upwards of twenty years, he barred himself from the right of raising any building which would impede that light and air which he had conceded for so long a period. In effect he gave away any right he might have to raise buildings which would have as their result the annoyance of his neighbour. Comfort, health, and other similar considerations were not to be lost sight of." In *Cotterell* v, *Griffths* (3) (which was an action for obstruction of lights) *Lord Kenyon* said : "That the plaintiff was clearly entiled to recover ; that to sustain this action a total privation of the light was not necessary ; anything which tended to deprive a person of the enjoyment of the light and air in the same quantity to which his house was entitled to an ancient messuage, entitled him to an action : that here it is admitted that since the erection of the nuisance complained of he had not the same quantity of light as before while the blinds remained, and that was such a privation as entitled him to recover in the action."

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(1) 1B. H. C R. A. C. 148 (151).
(2) 1L. T. N. S. 210.
(3) (1801) 4 Esp. 69.

It cannot be held that the law will only interfere where the obstruction of light is unreasonably excessive and destructive of the uses of the injured dwelling. The test to be applied is whether having regard to the amount of light the plaintiff has hitherto enjoyed and which is necessary to the carrying on of his business, the building of the defendant's house has appreciabiy interfered therewith and prevented the plainteff from exercising his trade as before, and thus independently of any considerations whether, by making fresh openings, he can obtain light from other sources (1).

Actionable obstruction to light—The right of the owner of the dominant tenement is a right to the reception of light and air in a lateral direction ; but to constitute an actionable obstruction, the same must amout to a nuisance. The question, that has to be decided, is not how much light is left in spite of the obstruction but whether there has been such a diminution of light as to constitute an actionable nuisance (2). In cases of obstruction of light and air, the rule of 45 degrees does not afford in all cases a correct measure of relief. The question to be determined in such cases is whether the obstruction causes such a privation of light and air to the house as renders the occupation of the same uncomfortable (3).

In *John George Bagram* v. *Khetranath Karforma* (4), *Sir Barnes Peacock C. J.* said : "The only remaining question is whether the defendant is liable to an action for obstructing the light. The acquisition of the right to light and air which are necessary for habitation stands upon a different footing from that to the enjoyment of a south breeze. But the only amount of light for a dwelling house which, in my opinion, can be claimed by prescription or by length of enjoyment without an actual grant (5), is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house It would be unreasonable to presume that the owner of the servient tenement intended to grant a right to the use of more light than was necessary for the comfortable and convenient habitation of the dwelling house, or that he intended to increase the value of his neighbour's house by reducing the value of his own land. Principles of general convenience, upon which the presumptions of right to light by prescription or grant depend, require that lights in a dwelling-house, which have been uninterruptedly used for a long time, should not be darkeend so as to

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(1) *Nur Muhammed* v *Alimullah*, Aw N. 1882 256.

(2) *Anath Nath Deb* v. *Galstaun*, 12 C. W. N 519=35 C. 601.

(3) *Chottalal* v. *Lalubhai* 6 Bom. L. R. 633=29 B. 157.

(4) 3 B. R. O. C. J. p. 18.

(5) "The extent of a right to a passage of light or air to a certain window, door, or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died, or the non testamentary instrument was made : the extent of a prescriptive right to the passages of light or air to a certain window, door, or other opening is that quantity of light or air which has been accustomed to enter the opening during the whole of the prescriptive period irrespective of the purposes for which it has been used." Vide s. 28 of Act IV of 1882.

render the house unfit for comfortable habitation, but they do not require such a presumption as would impede erection of buildings on the servient tenement, which would not deprive the dominant house of any degree of what was reasonably necessary for comfortable habitation." *Sir Barnes Peacock* lays down in *Bagram* v. *Khetra nath Karforma* (1), substantialy the same rule as to interference with light as was laid down by *Lord Cranworth* in *Clarke* v. *Clarke* (2) and was adopted by the *Lord Justices* in *Robson* v. *Whettingham* (3) (4). In the last mentioned case *Markby J.* added : "The case of *Bagram* v. *Khettra nath Karforma* (1) lays down the law independently of the Indian statute in accordance with the English Chancery Divisions independently of the English statute ; and this I must accept as the law of Calcutta also, namely, that, by enjoyment, only the right to so much air can be gained as is necessary to avoid a nuisance, and only the right to so much light as is necessary for comfortable habitation." In *Paul* v. *Robson* (5), *Stephen J.* in delivering the judgment of the first court said : "It is admitted that the law to be applied to this case as far as light is concerned is contained principally in the five judgments in *Colls* v. *Home and Colonial Stores* (6), summarized as it is in *Higgns* v. *Betts* (7) and further elucidated by its application to the other facts in *Kine* v. *Jolly* (8), The authority of *Colls* v. *Home and Colonial Stores* (6) needs no discussion ; but it is a matter of more than mere curiosity that it re-asserts a principle laid down in this court by *Peacock C. J.* in *Bagram* v. *Ktettra nath Karforma* (1) which has been twice followed in this court Sea *Madhoo soodan Dey* v. *Bissonath Dey* (9) and *Delhi and London Bank* v. *Hemlal Dutta* (10). The rule to be derived from these authorities, and which I consider to be applicable to the present case is as follows :—'The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, etc.....The single question in these cases is still what it was in the days of *Lord Hardwicke* and *Lord Eldon*,—whether the obstruction complained of is a nuisance. This passage occurs in *Lord Davey's* judgement in *Colls Case* (11). This rule supplies a test for the proper application of which no matters at least must be considered. One is the surrounding of the house, *e g.* whether the dominant tenement derives light from other sources than the windows in question. I deduce the rule as to those matters from *Lord Halsbury's* judgment in *Coll's Case* (11) and the judgement of *Romer L. J.* in *Kine* v. *Jolly* (12). As to the

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(1) 3 B. L. R. O, C. 18.
(2) L. R. 1 Ch. App. 16.
(3) L. R. 1 Ch. 442.
(4) Per *Markby J.* in *Madhoosoodn* v. *Bisso nath*, 15 B. L. R. 361,
(5) 39 C, 59.
(6) (1904) A. C. 179.
(7) (1905) 2 Ch. 210.
(8) (1905) 1 Ch. 480.
(9) 15 B. L. R. 361.
(10) 14 C. 839.
(11) (1904) A. C. 179, 185.
(12) (1905) 1 Ch. 480. 495.

consideration to be paid to the surroundings of the house there can be no question. The question whether in deciding the question of nuisance, I can take into consideration the fact that the dominant tenement derives light from other sources has been contested with some vigour. But looking at the language of *Lord Halsbury* in the passage I have referred to (where I think that the words "is that it" must have dropped out after the words "the value of the test") and at what is said by *Vaughan Williams L. J.* and *Romer L. J.* in *Kine* v. *Jolly* (1), I consider myself bound to hold that as long as the dominant tenement has sufficient light coming through ancient windows to satisfy the test described by *Lord Davey*, that is to say, to prevent a nuisance from being caused, no right of action arises on one or more ancient windows being obscured. It is to be observed that throughout all the judgments in *Colls Case* (2), the question in issue is treated as being whether rather too much light does or does not come to the premises than too much does or does not come to the windows. A question has been raised as to what constitutes the nuisance referred to in the latter part of the passage I have quoted from *Lord Davey*. I consider that the mention of the nuisance adds nothing to what goes before; and that the nuisance referred to is merely a diminution of the amount of light which is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind. This view is consistent with the other judgments in the case, and it is specifically adopted by *Farwell J.* in *Higgins* v. *Betts* (3).

On appeal from this decision (4), *Sir Lawrence Jenkins C. J.* said. "There has been much discussion before us as to whether, in investigating the alleged nuisance, regard is to be had to the state of things before the interference or not, and it has been contended that, on this point, there is a conflict of view between *Lord Macnaghten* and *Lord Lindley*, on the one hand, and *Lord Davey*, on the other, in *Colls* v. *Home and Colonial Stores* (2). And this conflict, it is suggested, has become more marked and irreconciliable by the adherence of *Cozens Hardy L. J.* to the one [*Kine* v. *Jolly* (5)] and *Farwell J.* to the other view [*Higgins* v. *Betts* (3)]. I doubt whether there is any real conflict: and it appears to me that the difference of expression on which the argument rests may be fairly referred to the difference in the facts or conditions under review, and the considerations that particularly engaged the attention of those by whom these divergent expressions were severally used. No one, I imagine, would suggest that in a suit for disturbance of light the character of the previous enjoyment could be wholly disregarded: nuisance implies comparison, and the previous state of affairs is a necessary standard for that comparison. In every case, therefore, that comes before the Court the previous enjoyment is proved or sought to be proved, and it is an element which must, from the

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(1) (1905) 1 Ch. 480 495.
(2) (1904) A. C. 179, 185.
(3) (1905) 2 Ch. 210.
(4) 39 C. at p. 77.
(5) (1905) 1 Ch. 480, 503.

nature of things, be present in the mind of the Court .....comfort and fitness are conditions that must depend on existing facts and regard must be had to the state of things as they exist for the purpose of determining whether a nuisance in fact has been proved. But this must be taken subject to one qualification: the opinion has been expressed by *Lord Lindley* in *Colls* v. *Home and Colonial Stores, Ltd.* (1), by *Lord Atkinson* in *Jolley* v. *Kine* (2), and by *Romer L. J.* in *Kine* v. *Jolley* (3), that light from other sources to which a right has not been acquired by grant or prescription, and of which the plaintiffs may be deprived at any time ought not to be taken into account. Whatever the difficulties this opinion may involve, I think I ought to regard it as at present conclusive."

Against the above decision an appeal was preferred to the Privy Council (4). *Lord Moulton* in delivering the judgment of the Judicial Committee of the Privy Council said: "This is a pure question of law, and it was admitted by counsel for the appellants that it practically turns upon the interpretation to be given to the well known decision of the House of Lords in the case of *Colls* v. *The Home and Colonial Stores Ltd* (1), when considered in connection with the latter decision of the House of Lords in *Jolley* v. *Kine* (2). Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the Courts prior to the decision in *Coll's* case (1). It sufficces to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of 20 years, there could be acquired an indefeasible right to the enjoyment of a like amount of light in the future (5). The conflicting stream of authorities countenanced the view that nothing constituted an infringement of rights to light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby. This conflict of views was fully recognized by the noble Lords who took part in the decision of *Coll's* case (1), and there can be no doubt that it was their intention to decide between them, and to lay down the law in such a manner as to prevent uncertainty in the future. *Mr. Justice Stephen* takes as expressing the law laid down by this decision the following quotation from the opinion of *Lord Davy* in that case:—

'The owner ..... of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankined. The single question in these cases is still what it was in the days of *Lord Hardwicke* and *Lord Eldon*—whether the obstruction complained of is a nuisance.' And the Court

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(1) (1904) A. C. 179, 201.
(2) (1907) A. C. 1, 7.
(3) (1905) 1 Ch. 480, 497.
(4) *Paul* v. *Robson*, 18 C. W. N. 933 P. C = 27 M. L. J. 117 = 16 Bom. L. R. 803 = 41 I. A. 108 P. C.
(5) Vide the Indian Easements Acts. S. 28 (C).

of Appeal although they do not so directly base their judgment on the above passage in *Lord Davey's* opinion, appear to their Lordships to have substantially taken the same test. But in their Lordship's opinion it is not necessary to examine minutely the verbal differences between the expressions used in the Court of Appeal and by the Judge of the First Instance. They accept in full the finding in fact of the Judge of First Instance, and they are of opinion that he has consistently applied to them the legal test above formulated. The only question therefore is whether it accurately formulates the law on the subject.

"It is evident on reading the opinion of *Lord Davey* that he intended the passage to be a precise formulation of the rights of a dominant tenement in respect of ancient lights, and his opinion was formally accepted by *Lord Robertson* who also took part in the decision. The opinion of the *Lord Chancellor* in that case is equally clear on the essential points that the easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription, and that there is no infringement unless that which is done amounts to a nuisance. It has been suggested that a different view is to be found in the opinions of *Lord Macnaghten* and *Lord Lindley*, but although there are passages in these opinions which might, if they stood alone, indicate that those noble Lords considered that to some extent the amount of light enjoyed in the past might have influenced the rights acquired for the future, there is no reeson to think there was any intention on the part of those noble Lords to differ from the conclusions of their collegues. It must be taken, therefore, that the House of Lords adopted the formulation of the law given by *Lord Davey* as mentioned above (1)". In *Jolly* v. *Kine* (2) *Lord Atkinson* said: "It would appear to me that that case established the principle that there must be an invasion of the legal right of the owner of the dominant tenement sufficient to amount to a nuisance in order to give him a right of action, and that as long as he receives through the windows of his dwelling house, or in the case of a particular room in his dwelling house, through the windows of that room, an amount of light, which, to use the words of *James L. J.* in *Kelk* v. *Pearson* (3) is sufficient according to the ordinary notions of mankind for the comfortable use and enjoyment' of his dwelling house, or of the rooms in it, as the case may be, no nuisance has as regards him been created, and no legal wrong has been inflicted upon him (4)."

In places where the Indian Easements Act is in force, in considering the question about the easement for light ss. 28, 33 and 35 have to be read

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(1) See also *Jolly* v. *Kine* (1907) A. C. 1, *Fishhmonger's Company* v. *East India Ltd.* 1 Dick 163.

(2) (1907) A. C. 1.

(3) L. R. 6 Ch. 809.

(4) See also *Ambler* v. *Gordon*, (1905) 1 K B. 426; *Higgins* v. *Betts*, (1905) 2 Ch. 214, 215; *Anderson* v. *Connolly* (1906) 2 Ch. 547 S C. (1907) 1 Ch. 678; *Anderson* v *Francis*, (1906) W. N. 160; *Litchfield Spear* v. *Queen Anne's Gate*, (1919) 1 Ch 411; *Simon & Co.* v. *Bradford Cor*, (1922) 2 Ch. 737; *Charles* v. *Bradford Cor.* (1927) 1 Ch. 75.

together (1). In the above case *Young J.* observed: "The appellant contends however that s. 28 (c), Easements Act gives her an absolute prescriptive right to the same quantity of light and air through the window which she has always had. If s. 28 remained by itself this view of the law would undoubtedly be right. We have however to read ss 28, 33 and 35 together. Section 33 clearly enacts that a suit for compensation for the disturbance of an easement only lies provided that the disturbance has actually caused sabstantial damage to the plaintiff. Explanation 2 takes this matter further and defines what is substantial damage and says substantial damage is that damage which 'interferes materially with the physical comfort of the plaintiff to prevent him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.' Section 35 enacts that 'an injunction may be granted to restrain the disturbance of an easement if the easement is actually disturbed when compensation for such disturbance might be recovered under this chapter.

"It is clear therefore in our opinion that damages may only be recovered if there has been substantial interference as described in Explanation 2, 'and that an injunction can only be granted when compensation might be allowed under s. 33 (2), that is, that both in the case of an action for damages or for an injunction simpliciter, it is necessary for tha plaintiff to show exclusively that there has been substantial interference with her physical comfort, etc. This view of the case has been supported in *Lakhmi Narain* v. *Ram Bhuson* (2) and *Gajadhar* v. *Kishori Lal* (3).....We may further note but the English law on this is substantially the same, and has been considered in *Colls* v. *Home and Colonial Stores* (4) and *Jolly* v. *Kine* (5) and also in *Paul* v. *Robson* (6), the last decision being a decision of the Privy Council, the English law being applicable to Calcutta."

In *Lazarus* v. *Artistic Photographic Co.* (7). *Kekewich J* said: "The question is whether this new studio, which the defendants had liberty to erect at their own risk, interferes with the access of light to the plaintiff's studio so as to diminish the reasonable, comfortable enjoyment of his studio. Mr. *Butcher* says that that means reasonable, and comfortable enjoyment for ordinary purposes, such as reading and writing, and also, I suppose, sleeping and living, but not for taking portraits by photography. He says that the plaintiff has not done that for twenty years, and that therefore be cannot claim that which has been called in the argument 'extra ordinary' or 'special' light, which really means

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(1) *Panna* v. *Ram Saran* A. I. R. 1933 All. 492; see also *Suraj Narain* v. *Kalyan Das*, A. I. R. 1929 All. 430=117 Ind Cas. 618 where all the contradictary judgments are discussed; *Durga* v. *Lachmi*, 22 A. L. J. 314. By section 32 of the Easements Act the owner of a dominant heritage is entitled to the enjoyment of an easement without disturbance of any other person. What amounts to an actionable disturbance is defined in s. 33 of the Act. *Baikashi Bai* v. *Pushotam Keshovji*. 25 Bom. L R. 239=72 Ind Cas, 406=1923 Bom 196.

(2) A. I. R. 1926 All. 764

(3) 28 Ind. Cas. 962.

(4) (1904) A. C. 179.

(5) (1907) A. C. 1=76 L J. Ch. 1.

(6) 24 Ind. Cas. 300=42 C. 46 (P.C.)

(7) (1897) 2 Ch. 214 (218).

a supply of light sufficient for this particular purpose. There are two classes of cases. If you interfere with the access of light to a man's window to the extent of 2 per cent or 3 per cent or even perhaps 10 per cent or more, where it enters in large quantities, the court declines to interfere. *Sir George Jessel* used to say that was a case in which no action could be maintained either in law or in equity. No jury would give damages, and the Court of Chancery would not grant an injuction. Then there is a second class of cases, where there is an interference of light of a serious character, but yet not really a practical interference with the comfortable enjoyment of the plaintiffs' premises. For here probably small damages would be sufficient. Then there is a third class of cases, where the interference is of a grosser kind; there of course, an injuction would follow with costs. Now it is quite possible that a case which would otherwise be one for damages only, might fall into the third class if the plaintiff is entitled to claim light for an extraordinary purpose. It seems to me to be incorrect to say, as a question of law, that the plaintiff cannot claim light for the extraordinary purpose of photography because he has not photographed in those premises for the whole period of twenty years (1). He is carrying on that business now, and has been doing so for some time before the erection of the defendant's studio; and I hold without going into the authorities (as I have fully considered them before), that he is entitled to the protection of the access of light so that it may be enjoyed by him, as heretofore, for the business of photography (2)."

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(1) In that case the plaintiff was in possession of that premises for 23 years, 14 years as a jeweller and for the rest of the period as a photographer. So the objection in that case was that although he occupied the premises for the statutory period, yet as a photographer he did not use that premises for the statutory period.

(2) The question raised in the above case was finally settled by *Ambler* v. *Gordon*, (1905) 1 K. B. 417. In that case *Bray J.* said: I now come to the second point which does raise a question of law namely, whether use or enjoyment of a special light for twenty years gives a right to that special light, and this enlarges his easement and increases the burden of the servient tenement. The only fact therefore, that I have to deal with is the use and enjoyment of the special light for twenty years. Does that give a right to it? Now this most important point was not decided in *Coll's Case* (1904) A. C. 179.....I think the result of the judgments in *Coll's Case* (1904) A. C. 179, is to show that the test of the right is whether the obstruction complained of is a nuisance. If one turns to nuisance cases, do we find any trace of a doctrine that a person in bad health or carrying on a delicate trade is entitled to more comfort or freedom from annoyance than ordinary people because for twenty years his neighbours have been aware of his state of health or the trade he was carrying on and have left him undisturbed? I am not aware of any decision which suggests it. Such a proposition scunds absurd. Again, I think in many of the judgments in *Coll's* case (1904) A. C. 179 and in other cases it is implied, if not expressed, that in measuring the quantum of light to which the owner of the dominant tenement is entitled, the purpose for which he desires to use or uses, the light should be disregarded, and does not either enlarge or diminish the easement which he has acquired. See specially the judgment of *Lord Davey*, where he says (1904) A. C. p. 203 'It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights or by not using the full measure of light which the law permits.....If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test

Whether the obstruction of light is substantial enough for the interference of the Court is a question which must depend on the special circumstances of each case (1). It has been held that the expression "carrying on the business beneficially" is not to be read as depending on the question whether or not the person carrying on the business is likely to lose a customer. The test is whether he could carry on the business less beneficially to himself *i.e.*, whether in discharging his duty to his customers on the one hand or in preserving his health and facility of transacting his business on the other (2).

Forty five degree rule.—The first case in which 45 degree rule was enunciated was the case of *Beadel* v. *Perry* (3). In that case *Vice-Chancellor, Sir John Stuart* says: "It seems to me that where, opposite to ancient lights, a wall is built not higher than the distance between that wall and the ancient lights, there cannot, under ordinary circumstances, be such a material obstruction of the ancient lights as to make it necessary for this Court to interfere by way of injunction". This rule is based on the analogy to the s. 85 of the Metropolis Management Amendment Act, 1862 passed on the 7th August, 1862. But in subsequent cases the existence of any such rule was denied. In *Theed* v. *Devenham* (4), *Bacon V. C.* declined to recognize any such rule. The learned judge said: "The regulation may be an illustration or guide, but there is none." Similarly in *Ecclesiastical Commissioners* v. *Kino* (5) *James L. J.* said: "The fact that forty-five degrees of light are left is only a small element in the case. It may be used as a sort of test in the absence of any other mode of arriving at a conclusion; but there is no rule of law, no rule of evidence, and no presumption except of the very slightest kind, that, where the angular height of an erection is less than forty five degrees, the access of light is not substantially interfered with." In the same case *Cotton L. J.* said: "I think that the way in which the provision as to forty five degrees has been dealt with by Judges in the Chancery Division is unfortunate, the Metropolitan Buildings Act having been loosely referred to without looking at the clause. That clause is intended to deal with the width of street (6), and is not intended to lay down any rule applicable to the light which a man is entitled to enjoy in the city of London. The angle of forty five degrees is not taken from the windows, but from the top of one house to the level of the street on the other

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where the use has been of a special or extra ordinary character in excess of that standard ?"'.

(1) Kerr on Injuuction p. 161.

(2) *Dent* v. *Auction Mart Co.*, 2 Eq. 238.

(3) L. R. 3 Eq. 465; see also *Hackett* v. *Baiss*, L. R. 20 Eq. 494; *City of London Brewery* v. *Tennant*, L. R. 9 Ch. 212.

(4) L. R. 2 Ch. D. 165.

(5) L. R. 14 Ch. D. 213.

(6) "No building, except a church or chapel, shall be erected on the side of any new street of a less width than fifty feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of such street, without the consent in writing of the Metropolitan Board of Works, nor shall the height of any building erected at any time be subsequently increased so as to exceed such distance without such consent; and, in determining the height of such building, the measurement shall be taken from the level of the centre of the street immediately opposite the building up to the parapet or eaves of such building."

side ; and therefore, to derive from that enactment any rule to guide us in saying whether or no there has been a substantial interference with the use and enjoyment of the building as regards light, is, in my opinion, looking to a rule laid down for one purpose as a guide in an entirely different matter. When the buildings do not rise above the prescribed angle, there will probably, under ordinary circumstances, be no substantial interference with the enjoyment of light ; but that is not a rule to guide a jury or the Court in coming to a conclusion as to whether there is a substantial interference ; it is only a circumstance which will very often be a sufficient guide, but which in the circumstances of the present case appears to me to furnish no guide at all (1)". Finally the point has been set at rest by the decision of the House of Lords in *Colls* v. *Home and Colonial Stores Ltd.* (2), where *Lord Lindley* said : "There is no rule of law, that if a person has forty-five degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window (3). But experience shows that it is generally speaking a fair working rule to consider that no substantial injury is done to him where an angle of forty-five degrees is left to him, especially if there is a good light from other directions as well. The late *Lord Justice Cotton* pointed this out in *Ecclesiastical Commissioners* v. *Kino* (4) ; see also *Parker* v. *First Avenue Hotel* (5)" In *Delhi and London Bank Ltd.* v. *Hemlal Datta* (6), *Trevelyan J.* said : "This is, it is true, not a positive rule of law, but it is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obstruction is not definite and satisfactory. Of course where lights are closed up by high buildings at the sides, this rule is not applicable, but here there is no circumstance of that kind."

In a recent Lahore case (7), the court in granting a perpetual injunction passed the following order : "The window in the northern wall of the room of the first floor is however much more valuable to the plaintiff as a source of natural light and air, and the pecuniary compensation cannot afford adequate relief to her. For the threatened infringement of this easement, the only appropriate order that can be passed is the grant of a perpetual injunction directing the defendant to so construct her house as to leave forty five degrees of unobstructed light to enter into the window of the room in the first floor of the plaintiff's house (8).

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(1) See also *Parker* v. *Avenue Hotel*, 24 Ch. D. 282. Now the Metropolitan Management Act has been repealed by 25 & 26 Vict. S. 85 which by s. 101. lays down "Nothing in this Act shall authorize any interference with the easement of light, or other easements, in or relating to a party wall."

(2) (1904) A. C. 179 (210).

(3) L. R 2 Ch. D. 165.

(4) 14 Ch. D. 228.

(5) 24 Ch. D. 282.

(6) 14 C. 839 (858).

(7) *Jaskuar* v. *Bhag Devi* A. I. R. 1933 Lah. 29.

(8) See also *Barrow* v. *Archercor* 9 : An injunction restraining the erection of buildings in Calcutta was refused, a wall of 17 feet height at a distance of 20 ft. not being such an obstruction as to call for the interference of the Court. See also *Mt. Chandan* v. *Narain*, 73 Ind. Cas. 531 = 1923 A. 542 ; *Chotalal* v. *Lallubhai*, 29 B. 157 ; *Abdulla* v. *Beg Mahomed* 5 Bom. L. R. 446 ; *Framji* v. *Framji*, 7 Bom. L. R. 73 on appeal 7 Bom. L. R. 825.

Colls v Home and colonial stores Ltd.—In *Colls* v. *Home and colonial stores Ltd* (1). *Lord alsbury L. C.*, said: "The question may be very simply stated thus; after an enjoyment of light for twenty years, or if the question arose before the Act for such a period as would justify the presumption of a lost grant, would the owner of the tenement in respect of which such enjoyment had been possessed be entitled to all the light without any diminution whatsoever at end of such a period? My Lords, if that were the law it would be very far-reaching in its consequences, and the application of it to its strict logical conclusion would render it almost impossible for towns to grow, and would formidably restrict the rights of people to ultilize their own land. Strictly applied it would undoubtedly prevent many buildings which have hitherto been admitted to be too far removed from others to be actionable, but if the broad proposition which underlies the judgment of the Court of Appeal be true, it is not a question of 45 degrees, but any appreciable diminution of light which has been enjoyed (that is to say; has existed uninterruptedly for twenty years) constitutes a right of action and gives a right to the proprietor of a tenement that has had this enjoyment to prevent his neighbour building on his own land.

"My Lords, I do not think this is the law The arguments seem to me to rest upon a false analogy, as though the access to and enjoyment of light constitutes a sort of proprietory right in the light itself. Light, like air is the common property of all, or to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none.....The test of the right is, I think, whether the obstruction complained of is a nuisance, and as it appears to me, the value of the test makes the amount of light acquired depend upon the surrounding circumstances of light coming from other sources, as well as the proximity of the premises complained of."

In the same case *Lord Macnaghten* said: "It is an easement belonging to the class known as negative easements. It is nothing more or less than the right to prevent the owner or occupier of an adjining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement.....With the present case I may deal very briefly. It cannot be disputed that some diminution of light is caused by the defendant's buildings; but such as it is, I think, it is exactly what *Best C. J.* described as partial inconvenience rather than serious injury. I am satisfied that if the case had been tried at law before the question was so much enbarrassed by the muliplicity of decisions, no jury would have given any damages." *Lord Davey* added: "The court of appeal reversed this judgment. The legal grounds of their judgment are contained in a single sentence. 'If ancient lights' says *Coens Hardy L. J*, 'are interfered with substantially, and real damage thereby ensues to tenant or owner, the tenant or owner is entitled to relief.' By the expression 'interfered

(1) (1904) A. C. 179.

with substantially,' I understand the *Lord Justice* to mean, if the amount o light having access to the premises by means of the ancient windows is substantially diminished.' This proposition appears to me to assume or imply that the owner of the dominant tenement is entitled to have the full amount of light which has gained access to the tenement by the ancient windows during the previous twenty years maintained without substantial dlminution, The 'real damage' may be occasioned by an alteration in the internal structure of the dominant tenement which has been made within the period of twenty years, or its adaptation within that period to some special use for which an extra ordinary amount of light is required, But never the less, if the proposition be sound, the owner or occupier of the tenement is entitled to be protected in the enjoyment of the light required for his altered premises or for the special use to which he has put them . . . . . The question for your Lordships to determine is whether this view of the law is correct, or in other words, what is the true nature and extent of the English law of the easement of light . . . . . M Lords you will find that in the earlier authorities the obscuration of light to a tenement having ancient lights is dealt with on the footing of a nuisance (1).

"According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement, does not affect the question. The actual user will neither increase nor diminish the right. The single question in these cases is still what it was in the days of *Lord Hardwicke* and *Lord Eldon*—whether the obstruction complained of is a nuisance."

Lord Robertson said: "The purpose for which a person may desire to use a particular room or building in future does not either enlarge or diminish the easement which he has acquired. If he chooses in future to use a well—lighted room or building for a lumber room-for which little light is required, he does not lose his right to use the same room or building for some other purpose for which more light is required. *Aynsley* v. *Glover* (2) is in accordance with this view. But if a room or building has been so built as to be badly lighted, the owner or occupier cannot by enlarging the windows or altering the purpose for which he uses it, increase the burden on the servient tenement. *Marten* v. *Globe* (3) where a malthouse was turned into a workhouse, may I think, be upheld on this principle ; and the observations

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(1) *Aldred's Case*, 9 Rep. 57 (*b*); *Robson* v *Whithingham*, L. R. 1 Ch. 442. *Fishmonger's Co.*, v. *East India Co.*, 1 Dick. 163 ; *Back* v. *Stacy*, 2 C. & P. 465; *Clark* v. *Clark* L. R, 1 Ch. 16 ;

(2) L. R. 18 Eq 554.

(3) 1 Camp. 320.

tions of *Wood V. C.* on *Marten* v. *Globe* (1) in *Dent* v. *Auction Mart Co.*, (2) support this view . . . . .

"My Lords, the result of the foregoing review of the authorities is not altogether satisfactory. The general principle deducible from them appears to be that the right to light is in truth no more than a right to be protected against a particular form of nuisance, and that an action for the obstruction of light which has in fact been used and enjoyed for twenty years without interruption or written covenant cannot be sustained unless the obstruction amounts to an actionable nuisance; and this often depends upon consideration wider than the facts applicable to the complainant himself. There are elements of uncertainty which render it impossible to lay down any definite rule applicable to all cases. First, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance; and, secondly, there is the uncertainty as to whether the proper remedy is an injunction or damages But notwithstanding these elements of uncertainty, the good sense of judges and juries may be relied upon for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies (3).

Principle on which injunction should be granted.—In England the preventive jurisdiction of equity is frequently called into exercise for the purpose of protecting easements in ancient lights which have been long enjoyed, and the right to the uninterrupted use and enjoyment of such light is freely protected by injunction (4). In cases of this nature, equity proceeds upon the principle that when there is a material and substantial injury to a clear, legal right and when from the nature of the case damages would not afford a complete compensation, it is proper to interfere by injunction (5). It is not, however, every deprivation of ancient lights that will authorize the interference by injunction, nor is the diminution of the value of the premises by the erection of buildings so as to darken one's windows alone a sufficient ground, nor the fact that an action on the case would lie for damages resulting from such diminution. To warrant the relief there must be such material injury to the comfort of those dwelling in the neighbouring houses as requires the exercise of a preventive as well as remedial power (6). In

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(1) 1 Camp. 320.

(2). L. R. 2 Eq. 238.

(3) See also *Jolly* v. *Kine* (1907) A. C. 1; *Paul* v. *Robson*, 18 C. W. N. 933=27 M. L. J. 117=16 M. L. T. 204=24 Ind. Cas. 300=12 A. L. J. 1166=16 Bom. L. R. 803=20 C. L. J. 353 (P. C.); *Bonomali* v. *Mokund*, 23 Ind. Cas. 959; *Balthajur* v. *Patail*, 49 Ind. Cas. 458.

(4) *Straight* v. *Burn*, L. R. 5 Ch. 163; *Theed* v. *Debenham*, 2 Ch. D. 165; *Potts* v. *Levy*, 2 Drew. 272; *Gale* v. *Abbott*, 8 Jur. N. S. 987; *Maguire* v. *Grattan*, L. R. 2 Eq. 246; *Kelk* v. *Pearson*, L. R. 6 Ch. 809; *Beadel* v. *Perry*, L. R. 3. Eq. 465; *Marten* v. *Headon*, L. R. 2 Eq. 425; *Dent* v. *Auction Mart Co.*, L. R. 2 Eq. 238; *Weston* v. *Arnold*, L. R. 8 Ch. 1084; *Dyers Company* v. *King*, L. R. 9 Eq. 438; *Leech* v. *Schwader*, L. R. 9 Eq. 463; *Marten* v. *Price* 63 L. J. N. S. Ch. 209; *Home & Colonial Store* v. *Colls* (1902) 1 Ch. 302; *Cowper* v. *Laidler* (1903) 2 Ch. 337.

(5) *Straight* v. *Burn*. L. R. 5 Ch. 163.

(6) High on Injunction § 859.

Att. Gen. v. *Nichol* (1) the general principles underlying the jurisdiction of equity to interfere for the protection of easements in lights are well laid down by *Lord Eldon* in these words : "The foundation of this jurisdiction, interfering by injunction, is that head of mischief alluded to by *Lord Hardwicke*, that sort of material injury to the comfort of the existence of those who dwell in the neighbouring houses requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be given at law. The position of the building, whether opposite, at right angles or oblique, it not material. The question is whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences, which upon equitable principle should be not only compensated by damages, but prevented by injunction.....I repeat the observation of *Lord Hardwicke*, that a diminution of the value of the premises is not a ground ; and there is as little doubt that this court will not interfere every degree of darkening ancient lights and windows. There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained or an action upon the case ; which, however, might be maintained in many cases which would not support an injunction. These affidavits, therefore, stating only that the ancient lights will be darkened in a sufficient degree for this purpose, will not do."

Prior to *Lord Cairn's*, Act (21 & 22 Victoria, Chap. 27), the Courts of Equity in England had no jurisdiction to award damages. Section 2 of that Act gave them this power, although in *Selpher* v. *City of London Electric Light Co.*, (2), it was held by the Court of Appeal that in cases of a continuous nuisance the jurisdiction to avoid damages ought only to be exercised under very exceptionable circumstances. The question was raised in *Coll's case* (3), *Lord Macnaghten* in his judgment in that case observed that the question of giving damages in addition to or in substitution for an injunction was a delicate matter. He continued : "It is a matter for the discretion of the court and the discretion is a judicial discretion. It has been said that an injunction ought to be granted if substantial damages would be given at law. I have some difficulty in following out this rule.....In some cases of course, an injunction is necessary if, for instance, the injury cannot fairly be compensated by money, if the defendant has acted in a high handed manner, if he has undeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court might incline to damages rather than an injunction."

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(1) 16 Ves. 338.
(2) (1895) 1 Ch. 287.
(3) (1904) A. C. 179=73 L. J. Ch. 489.

Illustration (*a*) to section 55 of the Specific Relief Act runs as follows : "A, by new buildings, obstructs light to the access and use of which B has acquired a right under the Limitation Act Part IV. B may obtain an injunction, not only to restrain A from going on with the buildings but also to pull down so much as obstructs B's lights." So the granting of injunction is discretionary with the court. Moreover this equitable jurisdiction should be assumed by the court (*i*) when there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion ; (*ii*) where the invasion is such that pecuniary compensation would not afford adequate relief, (*iii*) where it is probable that pecuniary compensation cannot be got for the invasion ; or (*iv*) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

In *Dhunjibhoy Cowasji* v. *Lisboa* (1), *Sargent C. J.* said : "The question however whether damages are sufficient compensation does not, we think, present itself to the court of this country in precisely the same manner and form as it does to a Court of Equity in England. This latter court in awarding damages under *Lord Cairn's* Act, exercises a discretionary power in departing from the specific relief which it had hitherto exclusively afforded, and could scarcely be expected to take so broad a view of the subject as the court of this country whose duty it is under the Specific Relief Act not to grant an injunction where damages afford adequate relief." In *Ghanasham Nilkant* v. *Moraba Ram Chandra* (2) at p. 488 *Farran J.* said : "It does not however follow that in auch cases a plaintiff is entitled as a matter of right to an injunction. Under the Specific Relief Act the courts are given the discretion to grant or withhold an injunction, as in England they have a discretionary power to award damages in lieu of injunction. In this view of the the law the court has to consider in each case not merely whether the plaintiff's legal right has been infringed, or even materially infringed but also whether under 'all the circumstances of the case he ought to be granted an injunction as the proper and appropriate remedy for such an infringememt. Two principles are I think, deducible from the English cases, which may be deemed binding upon the Courts (i) that the courts ought not to interfere by way of injunction when obstruction to light is very slight and the injury sustained is trifling, except in rare or exceptional cases : *Dent* v. *Auction Mart Co* (3) and *Herz* v. *Union Bank of England* (4), Goddard on easements p. 438 and (ii) that where the defendant is doing an act which will render the plaintiff's property absolutely useless to him unless, it is stopped. In such a case, in as much as only compensation, which could be given to the plaintiff would be to compel the defendant to purchase his property out and out, the court will not, in the exercise of its discretion, compel the plaintiff to sell his property to the defendant by refusing to grant him an injunction,

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(1) 13 B. 252.
(2) 18 B. 474.
(3) 2 Eq. 238.
(4) 2 Gift. 686.

and awarding him damages on that basis: see *Holland* v. *Worlay* (1). Between these two extremes where the injury to the plantiff would be less serious, where the court considers the property may still remain with the plaintiff and be substantially useful to him as it was before and where the injury is one of a nature that can be compensated by money the courts are vested with a discretion to withhold or grant an injunction having regard to all the circumstances of the particular case before them including the fact that the premises are in a city like this where land suitable for buildings is limited and very valuable and where property owners should so far as is possible consistently with the existing rights of their neighbours be allowed to utilize it to the utmost (2)".

In *Mahammed Azum Ismail* v. *Jagannath* (3), the court observed: "But I have a discretion. The properties are situated in the heart of Rangoon where building land is scarce and very valuable. To issue an injunction would practically prevent the defendant from building at all on his land and prevent the lessening of a great scarcity of accommodation. To refuse an injunction and grant damage on the suggested principle would be to give the plaintiff the chance of putting his house in as good a position or better than it was in before as regards air and light and place him in no worse position than all the owners of interior houses in this part of Rangoon." In *Bhimaji Basudev* v. *Yeshvant* (4), the Bombay High Court took the view that where the case was one of irreparable or very substantial injury, a mandatory injunction should be granted. In *Anath Nath Deb* v. *Gaulstan* (5), a mandatory injunction was refused by the Calcutta High Court, as permission to build at his own risk had been given to the defendant who accordingly had put up a large and expensive building. At the time of the trial the defendant could not comply with the mandatory injunction except by pulling down his building or by pulling down such part thereof as would made the remainder practically useless. The plaintiff's house was a small house and would in the ordinary course have been pulled down in a few years' time and rebuilt. *Fletcher J.* who tried the case, after taking into consideration the delay on the part of the plaintiff and other circumstances came to the conclusion although not without hesitation that the proper remedy was by way of damages and not by way of mandatory injunction. It would however appear that the decision would have been otherwise if the plaintiff had not given permission to the defendant to build at his own risk and had not delayed taking action. The Court rejected as irrelevant the argument that the plaintiff could by making internal alterations improve the light coming to his building (6).

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(1) 26 Ch. D. 578.

(2) See aiso *Lee Paik* v. *Tankin Eng.* A. I. R. 1933 Rang 344; *Ellerman* v. *Pazun dang* A. I. R. 1933 Rang. 359.

(3) A. I. R. 1925 Rang. 327=87 Ind. Cas. 800=3 Rang 230.

(4) A. I. R. 1929 Bom. 388=120 Ind. Cas. 365.

(5) 35 C. 661=12 C. W. N. 519.

(6) *Ellerman* v. *Pazun Daung*,

The mere fact that the plaintiff possesses a prescriptive easement of light and air on the property of the defendant, is not by itself sufficient to justify the grant of an injunction. In order to entitle him to this relief it is further necessary to show that the obstruction complained of amounts to an 'actionable nuisance'. When the deprivation of light and air is very substantial and the plaintiff has suffered a legal wrong, reflected light is not to be taken into consideration in considering the question of granting perpetual injunction to him. Reflected light is a different kind of light from that which the plaintiff is entitled by prescription (1). In *Price* v. *Hilditch* (2) *Mangham J.* said : "It has been well settled for at least a generation that reflected light is not to be taken into consideration in a matter of this kind. It was originally settled in *Dent* v. *Auction Mart Co.* (3) that glazed tiles would perhaps afford to the plaintiffs such light as he had before the alteration, but *Wood V. C.* pointed out that there was nothing to compel the defendant or his successors to tile the wall with glazed tiles or to maintain the tiles ; and it was in any case a different kind of light from that to which he was entitled by prescription."

Where the plaintiff's neighbour re-built his house in such a manner as to completely darken some of the principal rooms of the plaintiff's thereby rendering it unsuitable for occupation during the day without artificial light, held that the grant of a mere money compensation can not be an adequate redress for the injury, and that the Court should grant a mandatory injunction ordering the defendant to pull down as much of his house as would stop the injury (4). But under the Specific Relief Act, an injunction is not to be given when the remedy in damages can be considered adequate (5). The Allahabad High Court in *Yaro* v. *Sonaulla* (6), held that it was not intended by s. 54, Specific Relief Act, 1877, that a man should not have an injunction granted to him unless his property would otherwise be practically destroyed if the injunction were not granted. In the Madras Presidency the Indian Easements Act, applies. There is however no difference in the principles governing the question whether an injunction shall issue or a decree for damage be granted instead. In the case of *Muthu Krishna Aiyyar* v. *Somalinga Munina Gandrien* (7), the Madras High Court held that damages were not an adequate remedy when the plaintiff's house had been darkened so as to make it uncomfortable and in part useless. The proper remedy was an injunction. The defence raised the argument that by making alterations in his building the plaintiff could provide fresh sources of light and air. This argument was held to be unsuitable

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A. I. R. 1933 Rang. 351 ; see also *Mathu Krishno* v. *Somalinga*, 36 M. 11 (14).

(1) *Jas kuar* v. *Bhag Devi*, A. I. R. 1933 Lah 29=140 Ind. Cas. 238.

(2) (1930) 1 Ch. 500=99 L. J. Ch. 299.

(3) 2 Eq. 238.

(4) *Jamnadas* v. *Atmaram* 2B. 133 ; see also *Nandkishor* v. *Bhagubbai*, 8 B. 95 ; *Lackerstein* v. *Taruknath*, Cor. 91 ; *Yaro* v. *Sana ullah*, 19 A. 259 ; *Kallian Das* v. *Tulsi das*, 23 B. 786 ; *Framji* v. *Framji*, 30 B. 319.

(5) *Boyson* v. *Deane*. 22 M. 251.

(6) 19 A. 259.

(7) 36 M. 11=11 Ind. Cas. 642.

as it would permit the wrongdoer to take advantage of his own wrong to compel another person to change his own building to suit his convenience. "A party causing an injury to another could not object to appropriate relief being granted to his opponent, on the ground that he would suffer serious injury by being compelled to undo his own mischief. The question whether an injunction shall issue or whether the plaintiff must be content with an award of damages must depend on the circumstances of each particular case. If it is clear that damages will afford adequate relief to the injured party and the defendant has not been guilty of any high handed action or unneighbourly conduct an award in damages is in my opinion an appropriate remedy. But by this I do not mean that a person should for a monetary payment be compelled to surrender his property or be deprived to a large extent of the beneficial use of it, but if the property is still substantially useful to him a depreciation in value can be met by a decree for damages. Further, it is clear that a person entitled to an easement of light and air cannot be compelled to reconstruct his building to suit the convenience of the wrong-doer (1)".

In cases of obstruction of ancient lights, where the Court is called upon to exercise its power of mandatory injunction, ordering the defendant to restore things to the condition in which they were before the old building was removed, each case must be decided upon its own peculiar circumstances (2). There is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before filing the bill. In a case of obstruction of lights, and in any other cases of injury to easements, the Courts look to the particular circumstances of each case. It will interfere by way of mandatory injunction, only in cases where extreme or very serious damage will ensue from non-interference (3). Where a person entitled to an easement of light and air has given notice to one erecting a building that he intends to bring an action to enjoin its erection and the builder evades service of the writ until a substituted service is had and continues with the construction of the building, it is decided that he may be compelled by mandatory injunction to tear down that part of the building which was erected after he received the warning (4).

Grant of Injunction for obstruction of lights—English cases.—In cases where relief by injunction is sought to prevent a deprivation of ancient lights, the question for determination is usually as to the degree of deprivation. And where substantial injury is shown to result from the proposed erection and the darkening of plaintiff's lights, a Court of equity may properly interfere (5).

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(1) *Per Leach J.* in *Ellerman* v. *Pazundang*, A. I. R. 1933 Rang. 351.

(2) *Isenburgh* v. *East India House*, 3 De. G. J. & F. 263 ; Joyce on Doctrines p. 210

(3) *Durell* v. *Pritchard*, L. R. 1 Ch. 244 ; *Beadel* v. *Perry*, 17 W. R. 185 ; *Shareling* v. *Clarson*, 17 W. R. 518 ; *Robson* v. *Whettingham* 12 Jur. N. S. 40.

(4) *Von Joel* v. *Hornsey*, (1895), 2 Ch. 774.

(5) *Maguire* v. *Grattan* L. R. 2 Eq. 246 ; High on Injunction § 860

The test to be applied is, whether plaintiff's house is, by the obstruction which he seeks to enjoin, rendered in a substantial degree less fit for purposes of occupation than before. In other words, the diminution of light must be a substantial diminution, or one which renders plaintiff's house substantially less comfortable. This being shown equity may interfere, even to the extent of making its injunction mandatory by directing the restoration of matters to the condition in which they were before the defendant's erection was begun (1). And in the case of obstruction to ancient lights a mandatory injunction has been allowed, even before the hearing (2). But where it is not shown that the obstruction which it is sought to enjoin is such as to interfere with the ordinary occupations of life, an injunction will be withheld, the real question to be determined being whether the light is so obstructed as to cause material inconvenience to the occupants of plaintiff's house in the ordinary and accustomed occupations of life (3). And when plaintiffs fail to show any substantial damage as is likely to result to themselves, the relief will be withheld (4). When it is sought to enjoin an obstruction to ancient lights of premises used for business purposes, the Court will not interfere unless the obstruction to the lights renders the building less suitable for the business conduct, but will leave the person aggrieved to his damages at law; the foundation of the jurisdiction being that injury to the property which renders it in a material degree unsuitable for the purposes to which it is applied, or which lessens considerably the owner's enjoyment. And it would seem that the test is to be applied with reference to the injury to the business then being conducted upon the premises, and not as regards their possible future use for other purposes (5). And the obstruction by new erections of ancient lights upon plaintiff's premises has been enjoined, although plaintiff's building has been torn down and there are no existing windows whose light is obstructed by the structures which defendant is erecting (6). Equity may enjoin the erection of a building in such a manner as to obstruct plaintiff's lights, even though he may have enlarged his windows, since in so doing he has only exercised natural right of property, and cannot thereby lose any other right which he may have acquired (7). And when a house has been destroyed and rebuilt, in determining whether the character of ancient lights attaches to the windows of the new house so as to entitle the owner to protection by injunction, the principle to be applied is, whether the

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(1) *Kelke* v. *Pearson*, L. R. 6 Ch. 809; High on Injunction § 860.

(2) *Beadel* v. *Perry*, L. R. 3 Eq. 465; High on Injnnction § 860.

(3) *Clark* v. *Clark*, L. R. 1 Ch. 16; *Durell* v. *Pritchard*, L R. 1 Ch. 244; High on Injunction § 860.

(4) *City of London Brewery Co.* v. *Tenant* L. R. 9 Ch. 212; High on Injunction § 860.

(5) *Jackson* v. *Duke of New castle*, 33 L. J. Ch. 698; see also *Kind* v. *Rudkin*, 6 Ch. D. 160; *Western* v. *Arnold* L. R. 6 Ch. 1084; High on Injunction § 861; *Back* v. *Stacy*, 2 Rus. 121; *Sutton* v. *Lord Monfort*, 4 Sim. 559.

(6) *Ecclesiastical Com.* v. *Kino*, 14 Ch. D. 213.

(7) *Aynsley* v. *Glover*, L. R. 10 Ch. 283; High on Injunction § 863: *National Provincial Glass Co*, v. *Prudatlal Insurance Co*, 6 Ch. 757; *Andrews* v. *White*, (1907) 2 Ch. 509; *Smith* v. *Baxter*, (1900) 2 Ch. 138.

new windows would impose upon the servient tenement a servitude additional to or different from that to which it was previously subjected. Whenever therefore, it appears in such case that the servitude or burden imposed by the new windows is neither greater than nor different from that which formerly existed, the new windows may be regarded as ancient lights and an injunction may be allowed, if there is a substantial and material obstruction to the light (1). And applying the same principle, whenever the alteration in plaintiff's premises creates an entirely new sevitude, and the owner of the ancient light has so dealt with it as to essentially alter its character and to convert it into a different easement over his neighbour's land, thereby preventing defendant from enjoying his property as he might otherwise have done, an injunction will be refused and plaintiff will be left to seek his remedy at law (2).

Who can sue for injunction in cases of obstruction of lights.—A tenant from year to year is entitled to protection by injunction to prevent an obstruction of ancient lights upon demised premises (3); but in such a case, the injunction should be limited to the period of plaintiff's tenancy (4). So also where plaintiff, seeking to enjoin the obstruction of an ancient light, is a lessee whose lease has expired during such obstruction, but he has agreed for a renewal of the lease, he will not be denied an injunction upon that ground (5). The reversioner may also sue, either alone or conjointly with the tenant, on the ground that the injury to the reversion is of a 'permanent' nature (6). As between lessor and lessee, it is held that the lessor will not during the continuance of his lease, be allowed an injunction to restrain his lessee from darkening windows in the demised premises and obstructing light where it is not shown that the injury is irreparable and not susceptible of compensation in damages (7). It is not necessary that a party filing a bill for an injunction to restrain obstruction should be in actual occupation, of the property nor is it necessary that he should continue to occupy it (8). An obstruction of a lesee's ancient lights by the reversioner, however slight, which would injure the lessee in his business, will be restrained (9). A suit to enforce an easement can be brought not only by the owner of the land but also by the occupier (10).

Balance of Injury.—When the alleged nuisance consists in a diminution of light and air to plaintiff's building, but not so serious or irreparable injury is shown, the Court may balance the relative inconvenience to the parties which

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(1) High on Injunction § 863 ; *Curriers Company* v. *Corbett*, 2 Dr. & Sm. 335 ; *Straight* v. *Burn*, L. R. 5 Ch. 163 ; *Newson* v. *Pender*, 27 Ch. D. 43 ; *Ankerson* v. *Connolly*, (1906) 2 Ch. 544 ; *Andrews* v. *Waite*, (1917) 2 Ch. 510 ; *Bailey* v. *Holburn*, (1914) 1 Ch. 602 ; *Scott* v. *Pope* 31 Ch. D. 554.

(2) *Heath* v. *Bucknall*. L. R. 8 Eq. 1 ; see aiso *Scott* v. *Poke*. 31 Ch. D. 554 ; High on Injunction § 863.

(3) *Dent* v. *Auction Co*. L. R. 2 Eq. 238 ; *Colls* v. *Home and Colonial Stores*, (1904) A. C. 179 ; *Andrews* v. *Waite*, (1907) 2 Ch. 500.

(4) *Simper* v. *Foley*, 2 John & H. 555.

(5) *Gale* v. *Abbott*, 8 Jur. N. S. 987 = 10 W. R 748 ; High on Injunction § 864.

(6) Kerr on Injunction 160.

(7) High on Injunction § 864.

(8) *Wilson* v. *Townsend*, 1 Dr. & Sm. 324

(9) *Herz* v. *Union Bank*, 1 Jur. N. S. 127.

(10) *Khub chand* v. *Balchand*, A. I. R. 1930 Sind. 152.

would result from its interference, and may refuse the injunction (1); especially when plaintiff's only right is as a tenant from year to year, and when he has already received notice to quit (2). So if the evidence is so conflicting upon the notice for an interlocutory injunction that it is a matter of great difficulty to determine between the conflicting witnesses, the Court may properly be governed by considerations of the relative inconvenience which would result to the parties from granting the relief. And if, upon weighing such considerations, it is apparent that the inconvenience which would result to defendants by granting the injunction would be far greater than that to plaintiff by its refusal, the injunction may be refused *in liminil.* It is proper, however, in such a case to put defendants under terms of abiding such order as the Court may make at the final hearing concerning the removal of their buildings, if they should prove to be an obstruction to plaintiff's ancient lights (3). In granting or refusing injunction a Court should always exercise judicial discretion (4).

Effect of delay.—Although the obstruction to plaintiff's ancient light is satisfactorily established, yet when such obstruction has been permitted to go on for a period of six years with full knowledge upon the part of plaintiffs before bringing their action, such delay will have much weight with Court in refusing the injunction (5). Where, however, plaintiff's delay in instituting proceedings has been due to promises upon the part of defendant to remove the obstruction, such delay will not be treated as acquiescence barring the right to relief, and the injunction may still be granted if sufficient grounds are shown to warrant the exercise of the jurisdiction (6). A delay of seven months, coupled with an offer at one time by the plaintiff to accept a sum as compensation, and the fact that very great damage would be caused to a defendant by an injunction, will disentitle the plaintiff to a mandatory injunction (7). But a month's delay after the completion of the obstruction to the access of light and air, is not such laches or acquiescence on the part of the owner of the adjoining property, when he is not himself in possession or occupation of it, as to disentitle him to a mandatory injunction (8). Where it appeared that though the light and air had been sensibly diminished the occupation of the house had not been rendered uncomfortable and the plaintiff neglected to bring his suit before the building was completed, held that the claim for mandatory injunction should be rejected on both grounds and the plaintiff's only remedy was to claim compensation (9).

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(1) *Anath Nath Deb* v. *Gaulston*, 35 C. 66=12 C. W. N. 519 ; High on Injunction § 865.

(2) *Mackey* v. *Scottish Society*. I. R. 10 Eq. 114.

(3) *Stokes* v. *City officers Co.*, 2 H. & M. 650 ; High on Injunction § 865.

(4) *Shamnugger Jute* v. *Ram Narain*, 14 C. 189.

(5) *Gaunt* v. *Fynney*, L. R. 8 Ch. 8.

(6) *Gale* v. *Abott*, 8 Jur. N. S. 987 ; High on Injunction § 867.

(7) *Semor* v. *Pawson* L. R. 3 Eq. 330 ; see also *Cocks* v. *Romanie*, 14 L. T. N. S. 390

(8) *Gort* (*Viscountess*) v. *Clark*, 18 L. T. N. S. 343 ; Joyce on Doctrines p. 212 ; See also *Narain Das* v. *Khan Chand*, 93 Ind. Cas. 1011.

(9) *Bhimji* v. *Jasvant*, 31 Bom. L. R. 771=A. I. R. 1929 Bom. 388 ; Peacock on Easements p. 634 ; *Binode Comaree*

When relief should be refused.—If an offer is made which will have the effect of putting a plaintiff in as favourable a position as before the erection of the building or obstruction complained of, the Court ought not to interfere to compel the pulling down of such building, or restrain its completion (1). Although the building by defendant of a house upon his own premises adjoining those of plaintiff may render the prospect from plaintiff's house less pleasant than before, that will not of itself suffice for an injunction (2). When the structure complained of as an obstruction to plaintiff's light and air consists in the erection of a screen of glass, but there is no actual evidence of obstruction of light and air, and only the opinions of witnesses are presented, the Court may refuse to enjoin (3).

Obstruction of Lights and Injunction—Illustrative Indian Cases.—Where in a case of obstruction of an easement of light and air into a kitchen the Court granted injunction and also directed restoration of the former conditions so that the easement may be enjoined. *Held* that the discretion of the Court that injunction and not damages was the proper remedy need not be interfered with (4). An injunction to restrain the disturbance of an easement of light can only be granted where substantial damage is proved to have been caused (5). An injunction for the protection of light and air can only be granted when the closure amounts to an actionable nuisance. Mere reduction of light is not enough. There must be substantial deprivation of light to an extent which would render the house uncomfortable and unfit to carry on business as beneficially as before. The existence of the other source of light should also be considered (6). A permanent injunction must be granted restraining the defendant from putting up a wall on his own land, if the erection, of such a wall will interfere with the right of easement of the adjoining house-owner to light and air (7). There can be no doubt that any act by the defendants which results in obstructing the free access of the light and air to which the plaintiff is entitled is *prima facie* an injury of a serious character for which compensation in money would hardly be an adequate relief. In cases of this nature injunction is the rule and damages the exception (8).

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v. *Saudaminey*, 16 C. 252; *Abdul Rahaman* v. *D. Emile*, 16A. 69; *Ghansham Nilkant* v. *Moraba*, 18 B. 474; *Kashi bhai* v. *Vallabbhai*, 24 Bom. L. R. 305=67 Ind. Cas. 356; *Thakur Das* v. *Abdul Hamid* 2 Lah L J. 701; *Nar sagar* v. *Madan Lal*, 38 Ind. Cas. 148; *Haji Sayed* v. *Gulab Rai*, 20 A. 345; *Dawson* v. *Princes*. A. I. R. 1928 Rang. 268; *Becharam* v. *Benode*, A. I. R 1928 Cal. 510.

(1) *Lowe* v *Innes*, 10 Jur. N. S. 1032; Joyce on Doctrines p. 212.

(2) *Fish mongers Co*, v. *East India Co*, Dick. 163.

(3) *Radcliff* v. *Duke of Port land*, 3 Giff. 702.

(4) *Jatendra* v. *Probodh*, 35 C. W. N. 963.

(5) *Suraj Narain* v. *Kalyan Das*, 117 Ind. Cas. 618=A. I. R. 1929 All. 862.

(6) *Sohan Singh* v. *Jagat Singh* A. I. R. 1928 Lah. 98; see also *Sri Dwarka* v. *Dewa Singh*, 108 Ind. Cas. 53=A. I. R. 1928 Lah. 735; but see *Jadooie* v. *Kisun*, 105 Ind. Cas 39.

(7) *Ammant Ammal* v. *Ranga nayaki* 96 Ind. Cas. 94=A. I. R. 1926 Mad. 898=51 M. L J. 304.

(8) *Jawor Singh* v. *Sewa Singh*, 5 Lah. L. J. 487=79 Ind. Cas. 572=1924 Lah. 97; see also *Thakur Das* v. *Abdul Hamid*, 67 Ind. Cas. 288; *Thadomal* v. *Jesumal*, 6 S. L. R. 255=19 Ind. Cas. 843; *Mothunal* v. *Javernal*, 6 S. L. R. 265=19

In cases of threatened obstruction to light and air, the plaintiff must show that by the defendant's act violation will be the inevitable result ; that is not in the sense of there being no possibility the other way, but in the sense that there must be such great possibility, that in view of the ordinary men using ordinary sense the injury would follow (1).

The plaintiff had a three storeyed house, his neighbour the defendants owned a single storeyed one in *Amritsar*. The latter began to build a second and third storey thus obstructing the plaintiff's right to light and air. The defendants nevertheless finished the building Under these circumstances the plaintiff was held entitled to mandatory injunction (2). The non-user of an easement is not an implied release of it, and the transfer of the dominant tenement carries with it the easement which then existed, although in suspense for the time being. The easement of light and air falls within the definition of immoveable property and can be extinguished by the dominant owner releasing it, expressly or impliedly, to the servient owner. If an easement enjoyed by the dominant tenement is expressly released. after the latter is attached under a decree, it is an alienation of a portion of that property, within the meaning of section 276 of the Code of Civil Procedure (XIV of 1882), and the transaction would be void. Mere blocking up of the appertures of ancient windows would not necessarily amount to an abandonment of rights of easements. Therefore in such a case a decree in favour of the plaintiff for mandatory injunction in the usual form, for the removal of so much of the defendant's wall as has been built in front of the four apertures in the first floor of the south wall of the Plaintiff's premises was passed (3). Defendant's house was at right angles to the plaintiff's. He built a balcony to his house which did not diminish the access of light and air to the plaintiff's small windows in the upper storey of his house. He enlarged his windows and encountered obstruction from the balcony : *Held* that the erection of the balcony did not infringe the existing prescriptive rights of the plaintiff and the interruption of light to the enlarged windows gave him no right to relief, which if granted, would impose a new burden (4). It cannot be held that the law will only interfere where the obstruction of light is unreasonably excessive and destructive of the uses of the injured dwelling. The test to be applied is whether, having regard to the amount of light the plaintiff has hitherto enjoyed and which is necessary to the carrying on of his business, the building of the defendant's house has appreciably interfered there with and prevented the plaintiff from exercising

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Ind. Cas. 908 ; *Mohant* v. *Ram Singh*, 48 P. W. R. 1917=39 Ind. Cas. 778 ; *Esa* v. *Jacob*, 33 M. 327 ; *Rama rajulu* v. *Apparanji*, 9 Ind. Cas. 417 ; *Mathu* v. *Soma linga*, 36 M. 11.

(1) *Arjun Das* v. *Ganesh Das*, 172 P. W. R. 1913=21 Ind. Cas. 249.

(2) *Kripa Ram* v. *Gurbaksh* 2 P. R. 1893.

(3) *Krishna dhone Mitter* v. *Nandaranee Dassee*, 12 C. W. N. 969=35 C. 889, followed in *Bijoy Chandra Nag* v. *Banku Bihari Mozumdar*, 13 C. W. N. 451 ; *Chota lal* v. *Lallu bhai*, 29 B. 157.

(4) *Rallia Ram* v. *Huzuri Mal*, 99 P. R. 1876.

his trade as before, and this independant of any considerations whether, by making fresh openings, he can obtain light from other sources (1). In an action for the removal of an obstruction to the plaintiff's right to light and air for his tenement, the *ratio decidendi* is that the interference with the access of light through the ancient windows of the plaintiff must be of such a character as to sensibly interfere with the comfort or convenience or usefulness of the building, according to its character as a residence or a place of business or warehouse, or whatever else it may be, according to the ordinary notions of mankind, and unless it amounts to that there is no cause of action; the mere deprivation of a certain percentage of light being insufficient for a suit. In considering the sufficiency of the light the locality and the light coming from other quarters should be considered, not how much light had been taken, and whether that was enough to materially lessen the enjoyment and use which the owner previously had of the house, but how much was left and whether that was enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind. And where substantial injury is found to have been caused to the plaintiff's rights, no pecuniary compensation, but an injunction is the remedy (2). Where a person opens new windows in place of old ones, but has them larger in size or at a higher level, the easement for his new windows becomes a new easement, which he can acquire only by enjoying it for the required lengh of time (3). In a suit for an injunction to remove a wall erected by the defendant, the wall obstructed the light which the plaintiff was accustomed to get through the window in his wall. The plaintiff had not however, enjoyed the light for the prescriptive period. The land on which the wall was built did not belong to the defendant but was paramboke or Government land: *Hold* that it was not necessary for the plaintiff to establish prescriptive rights of easements against a wrong doer, and the mere fact of plaintiff's enjoyment was sufficient to entitle him to an injunction (4).

To constitute an actionable obstruction of ancient lights and unobstructed flow of air, it is not enough that the light is less than before and the plaintiffs enjoy a less flow of air. The test is 'whether the obstruction complained of is a nuisance. The surroundings and circumstances of lights coming from other sources as well as the question of the proximity of the premises complained of must be looked into (5). Where it appeared that the defendant's

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(1) *Nur Muhammad* v. *Ali mullah*, A. W. N. 1883, 256.

(2) *Vir Bhan* v. *Ramji das*, 8 P. R. 1909=33 P. L. R. 1909=1 Ind. Cas. 441; *Paul* v. *Robson* 12 Ind. Cas. 60; see also *David Sasoon* v. *Edalji*, 3 S. L. R. 36=1 Ind. Cas. 961; *Kine* v. *Jolly*, L. R. 76 Ch. 174=(1905) 1 Ch. 480; *Higgins* v. *Bett*, (1905) 2 Ch. 210; *Grace* v. *Nandi*, 8 O. C. 356; *Ammant Ammal* v. *Ranga nayak*, A. I. R. 1926 Mad. 598; *Lachmi* v. *Ram*, A. I. R. 1926 All. 764.

(3) *Hariganga* v. *Trikam lal*, 26 B. 374=4 Bom. L. R. 34

(4) *Acchanna* v. *Venkamma* 5 M. L. J. 24.

(5) *John Alexander* v. *Hur Dut Roy*, 9 C. W. N. 543; *Dhunu Mal* v. *Bhagwan*

proposed building would merely cast a shadow on the plaintiff's wall and that it would not interfere with the plaintiff's enjoyment of light and air. *Held* that the plaintiff's suit for injunction restraining the defendant from erecting the building should be dismissed (1). Where it appeared that though the light and air had been sensibly diminished the occupation of the house had not been rendered uncomfortable and the plaintiff neglected to bring his suit before the building was complete, *held* that the claim for mandatory injunction should be rejected on both grounds and the plaintiff's only remedy was to claim compensation (2). Where there was a restrictive covenant not to build on the adjacent land so as to obstruct or interfere with the light and air to the windows on the plaintiff's cottage and the assignee of the adjacent land having full notice of the covenant chose to erect a wall so as to restrict the light and air to the windows belonging to the plaintiff. *Held* that the plaintiff was entitled to a mandatory order to pull down so much of the defendant's wall as materially interfered with the access of light and air enjoyed by the plaintiff. In such a case the court had no jurisdiction or discretion to force the plaintiff to accept damages in lieu of injunction (3).

No injunction can be granted to prevent the obstruction of light and air, where no right of easement has been acquired by prescription (4).

Injunction against easements of support.—The right of support to land is either a natural right or an easement. Easements relating to support may give rise to two distinct sorts of right. It may confer rights to save supports on servient heritage or it may entitle the owner of the servient heritage to take away the natural support. The easement of support to a building by a building, or the right of the owner of a building to have it lean against and be supported by a building belonging to his neighbour, seems to stand in the same position as a right to natural support, already dealt with. The natural right of support for the soil, unencumbered by buildings, is one which *prima-facie* exists in all cases as between the owner of the land and his neighbour, whether adjacent or subjacent; but that neighbour may, in some cases, enjoy the right to work in the adjacent or subjacent soil, so as to cause subsidence (5). Such a right is an easement (analogous to a right of way), and may be created either upon the original severance of the land between two owners (whether by an ordinary conveyance or by any statutory conveyance, or an enclosure award), or at any subsequent period, or may be acquired by user (6). This right was

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Das, 138 P. L. R. 1902 ; *Ramanjulu* v. *Apparanji*, 9 M. L. T. 383=21 M. L. J. 313=9 Ind. Cas. 417 ; see also *Ganga Charan* v. *Satkari*, 53 C. L. J. 604 ; *Ramji* v. *Ramji*, 30 B. 319.

(1) *Hakim* v. *Earle*, A. I. R. 1931 Lah. 443=32 P. L. R. 371=131 Ind. Cas. 104.

(2) *Bhimaji* v. *Yesavant*, 31 Bom. L. R. 771=A. I. R. 1929 Bom. 388 ; see also *Dwarka* v. *Bishambhar*, A. I. R. 1927 All. 191.

(3) *Achili* v. *Tovel*, (1927) 2 K. B. 243.

(4) *Elliot* v. *Bhuban Mohan* 19 W. R. 194=12 B. L R. 406 P. C.

(5) *Rowbothan* v. *Wilson*, 8 H. L. C. 348.

(6) Gale on Easement p. 374.

recognized in England very long ago. In *Palmer* v. *Fledhers* (1), decided in 1675 A. D. this right was recognised. In *Hide* v. *Thornborough* (2), *Parke B.* said: "If there was twenty years' enjoyment by the plaintiff of the support of the house from the defendant's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support (3)".

But the owner of the dominant heritage has no right to impose additional burden. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained (4). Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive) an injunction may be granted to restrain the disturbance of an easement—(a) if the easement is actually disturbed—when compensation for such disturbance might be recovered under Chapter IV of the Easement Act; (b) if the disturbance threatened or intended must, necessarily, if performed, disturb the easement (5). So also in cases of threatened removal of support, where damage is apprehended to be serious, injunction is a proper remedy (6). The relief will be extended for the protection of an easement to support where defendant's acts tend to the destruction of the right. Thus, the owner of one-half of an ancient solid party wall has been enjoined from removing a portion thereof, and erecting a new wall on his own land at a distance of two inches from that left standing, the original wall having been long used for the support of buildings on other side (7). In the absence, however, of some contract or obligation to the contrary an easement in a party wall between adjacent premises continues only so long as the buildings continue, and upon their destruction by fire one of the parties may restrain the other from replacing or using the wall (8). The jurisdiction of Courts in equity to prevent by injunction adjoining land owners from digging in the soil of their own land so as to endanger their neighbours' building is well established. A land owner has a right independent of prescription, to the lateral support of his neighbour's land so far as that is necessary to sustain his soil in its natural state; and he may acquire by twenty years' enjoyment the right to lateral support for the additional weight of buildings erected on the land (9). Where residences and other buildings on one's own premises are injured by mining operations in adjoining land which

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(1) 1 Sid. 167, cited in Gale on Easements p. 391.

(2) 2 C. & K. 250=80 R. R. 841.

(3) See also *Gayford* v. *Nicholls*, 9 Exch. 708; *Rowbothom* v. *Wilson*, 8 El. & Bl. 140; *Angus* v. *Dalton*, 6 App. Cas. 740; *Humphries* v. *Brugden*, 12 Q. B. 749.

(4) Section 34 of the Easement Act (V of 1882).

(5) *Ibid* s. 35.

(6) *Dugdale* v. *Robertson*, 3 K. & J. 701; *Proud* v. *Bates*, 34 L. J. Ch. 312; *Siddon* v. *Short*, 2 C. P. D. 577; *Darby Main Colliery* v. *Mitchell*, 11 A. C. 45; *Proud* v. *Bates*, 34 L. J. Ch. 412.

(7) High on Injunction § 852; see also *Jones* v. *Pritchard*, (1908) 1 Ch. 635.

(8) High on Injunction § 852.

(9) Spelling on Injunctions and other Extra-ordinary Remedies § 230; see also *Hunt* v. *Peake*, Johns. 705.

would cause the soil to subside unless their continuance be prevented, a decree for purpetual injunction as well as for compensation will be awarded. Such relief in this class of cases has often been afforded by English Courts of Equity (1). Where plaintiff's roof rests on the defendant's wall he may be enjoined from interfering with it in any way (2).

Party wall and support.—Where a party wall belongs to plaintiff and defendant as tenants-in-common the defendant is entitled temporarily to pull it down for the purpose of building a stronger and better wall provided he does the work in a reasonable manner and without negligence and so as to cause as little inconvenience as possible to plaintiff and provided he rebuilds the wall without undue delay (3). Where demolition of the party wall is likely to seriously endanger the plaintiff's buildings and the lives of its inmates and property the Court ought to grant a temporary injunction (4). In order to entitle the plaintiff to a temporary injunction it is necessary for him to make out a strong *prima facie* case (5). *Jessel M. R.* in *Standard Bank* of *British South America* v. *Stokes* (6), differentiated the case where there was danger (7). Where two persons own adjoining houses separated by a party wall neither may under pin in the wall, unless it can be done without injury to the other house (8).

Rights to Water.—Water is either public or private. Public waters are the sea and its branches, navigable rivers etc. Private waters are rivers, streams, lakes and ponds, etc. Private waters passing through or between the lands of different proprietors may be subject to two kinds of rights natural and acquired. Natural or proprietary rights are those possessed by every riparian proprietor, and consist principally in the right to have the water flowing in its accustomed manner, without sensible disturbance or diminution by the superior or inferior riparian proprietors, and the right to the reasonable use of the water which is flowing past his land, including its use for domestic purposes for turning mills, etc. The law is the same with regard to subterranean water flowing through a defined channel : but with regard to water which merely percolates through gravel, etc., the law is different and a land owner can appropriate such water to the exclusion of a neighbour under whose land it would otherwise percolate, although he may not so deal with

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(1) *Caledonian Ry.* v. *Sport*, 2 Mac. H. L. C. 449 ; *Humphries* v. *Brogden* 12 Q. B. D. 739 ; *Rowbotham* v. *Wilson*, 2 El. & Bl. 593 ; *Arkwright* v. *Gell*, 5 M. & W. 203 ; *Acton* v. *Blundell*, 12 M. & W. 321 ; *Dickinson* v. *Grand Canal*, 7 Exch. 282 ; *Chasemore* v. *Richards*, 7 W. R. 685 ; *Solomon* v. *Vinter's Co.*, 28 L. J. N. S. Ex. 370.

(2) *Ramkrishna* v. *Ramanath*, A. I. R. 1929 Mad. 819 ; see also, *Rama Krishna* v. *Setharam*, 37 M. 527.

(3) *A. K. Marvi & Sons* v. *Ahmadali*, A. I. R. 1933 Sind. 244 ; see also *Cubitt* v. *Porter*, 8 B. & C. 257 ; *Standard Bank* v. *Stokes*, 9 Ch. D. 68 ; *Joliffe* v. *Woodhouse*, 10 T. L. R. 553.

(4) *A. K. Morvi* v. *Ahmadali*, A. I. R. 1933 Sind. 244 ; *Dentsche Damps* v. *Pestonji*, A. I. R. 1925 Sind. 347=89 Ind. Cas. 321=21 S. L. R. 170.

(5) *Ibid.*

(6) 9 Ch. D. 68.

(7) See his remarks at p. 73.

(8) Halsbery Vol. 3 p. 37 ; see also *Bradhu* v. *Christ's Hospital* 4 M. & G. 714 (761) ; *Mayfair Property Co.* v. *Johnston*, (1894) 1 Ch. 500.

that it flows under his neighbour's land in a polluted state (1). The following are the natural rights as regards water: (*a*) The right of every owner of land that, within his own limits, the water which naturally pours or percolates by, over, or through his land, shall not, before so passing or percolating, be unreasonably polluted by other persons; (*b*) the right of every owner of land to collect and dispose, within his own limits, of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel; (c) The right of every owner of land that the water of every natural stream which passes by, through, or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature; (d) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of the adjacent lower land to run as naturally thereto; (e) The right of every owner of land abutting on a natural stream or lake or pond to use and consume its water for drinking, house-hold purpose, and watering his cattle and sheep, and the right of every such owner to use and consume the water for irrigating such land, and for purposes of any manufactory situate thereon, provided he does not thereby cause material injury to other like owners (2). Easements to waters are restrictions to one or other of the above natural rights, or in other words acquired rights are those easements which entitle a riparian proprietor to interfere with a natural stream of water to an extent not justified by his natural or proprietary rights, *e,g.*, by diminishing or obstructing the flow of water, or by polluting it, etc., or which entitle him to the use of artificial water course. Acquired rights in respect of water may exist in the inhabitants of a district by virtue of a custom (3). A right to surface water not flowing in a stream, and not permanently collected in a pool, tank or otherwise, and a right to under ground water not passing in a defined channel, cannot be acquired by prescription (4). Section 17 of the Easements Act is intended to apply not to rights of irrigation in a natural stream but to rights in the nature of profits *a prendre* which do not include a right to water (5). The right of easement may be acquired with respect to water which is discharged over the surplus weir of a tank, by user and enjoyment for a sufficient length of time and as matter of right, as laid down in the Indian Easements Act.

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(1) Byrne's Law Dictionary.

(2) Vide illustrations (f) to (j) of section 7 of the Easements Act. (V of 1882).

(3) Byrne's Law Dictionary.

(4) The Indian Easements Act. s. 17, clause (*c*) and (*d*).

(5) *Thakurji* v. *Rajmangal*, 7 Pat. L. T. 547.=A. I. R 1926 Pat. 187

This section (s. 17) implies that a right of easement in connection with the use of water of artificial channels or of water derived from artificial tank or pool can be acquired by prescription. Such a right can also be acquired by grant or some arrangement of that nature, and a grant may be presumed in a proper case (1).

A right of easement to the supply of water from a natural stream can be acquired under section 26 of the Limitation Act by continuous use as of right for more than twelve years prior to the suit (2). Where through an opening in a tank water flowed in and through another flowed out of it, and the plaintiff was enjoying from time immemorial the tank water for irrigating his land through those openings, *held* (*a*) that a presumption arose of legal origin of the enjoyment, conferring a right to the use of water and (*b*) that, the plaintiff was entitled to an injunction restraining the defendant from closing up either of the openings (3). But different mode of user does not give rise to a right of easement (4),

Easement in water—Injunction against, disturbance of.—An easement or servitude in water is, under some circumstances, entitled to protection in equity, and an injunction will be granted in a proper case, Thus. riparian proprietors of a private stream, entitled to the use and enjoyment of the stream without diminution or alteration, will be protected by injunction from violation of their right (5). But as an easement is a limiting right or a right iu *alieno solo*, the relief awarded should certainly not be more extensive than what is necessary to its beneficial enjoyment (6). No injunction should be granted where no right has been invaded, and no damage accrued and the defendants disclaim all intention of injuring the plaintiffs (7). In the above case *Kernan J.* cited in support of his judgment the well known passage of *Turner L, J.* in *Goldsmid* v. *Tunbridge Wells Com.* (8): "The interference of this Court in cases of prospective injury very much depends, as I apprehend, upon the nature and extent of apprehended mischief, and upon the certainty or uncertainty of its arising or continuing." So where only a casual and occasional infringement of right is shown, as by defendant's using more than his share of water for mill purposes, no suit at law having been brought to test the question of right, equity will withhold its interference, on the ground that no mischief is likely to ensue which can be remedied at law (9). "It must

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(1) *Boddaloree Nagayya* v. *Bachu chaichu ramaya*, 33 M. L. J. 674 ; see also *Ponnu sami Tever* v. *Collector of Madura*, 5 M. H. C. R. 6.

(2) *Abdul* v. *Muhammad*, 46 Ind. Cas. 441=57 P. R. 1918 ; see also *Kirpal Singh* v. *Lal Khan*, 33 P. R. 1895.

(3) *Madhab Das* v. *Jogesh Chandra*, 30 C. 281 ; see also *Arkwaight* v. *Gill*, 5 M & W. 203 ; *Bir ming ham* v. *Poro*, L. R. 38 Ch. D. 295 ; *Wood* v. *Waund*, 3 Ex. Ch. 748 ; *Barrow* v. *Long*, (1901) 1 Ch. 502.

(4) *Kristo Das* v. *Joy Narain*, 8 C. W. N. 158.

(5) High on Injunction § 870.

(6) *Perumal* v. *Rama swani*, 11 Mad. 16 (19).

(7) *Kristna Ayyan* v. *Venkata, Chella* 7 M. H. C. R. 60 (71).

(8) L. R. 1 Ch. App. 354.

(9) High on Injunction § 870.

appear from the circumstances in evidence in each ease that the interference or obstruction complained of is not a trivial but a substantial injury which is not capable of being fully estimated in pecuniary damages as respects the future as well as the past. This principle I consider, may fitly be applied here, and governed by it, the circumstances of the present case seem to me to entitle the plaintiff to the order of injunct on prayed for (1)."

In *Krishna Ayyan* v. *Venkata Chela*, (2). *Kernan J.* said: "But such enjoyment or user cannot evidence or establish a right greater than the beneficial use made by the plaintiffs of the water. In *Williams* v. *Mor land* (3), *Bayley J.* observed: 'Flowing water was originally *publici juris.* So soon as it is appropriated by an individual, his right is co-ex-tensive with the beneficial use to which he appropriates it.' See also *Bayley* v. *Shaw* (4). 'Any exclusive right is to be measured by enjoyment' page 213, *Graham B*, which decision was up held. See also other cases collected in Kerr on Injunction page 387; There were however, cases of natural water courses but *Wood* v. *Waund* (5) and *Sutcliff* v. *Both* (6), show that the circumstances under which artificial course was created may give rights similar to those of a riparian proprietor."

The right to pollute water may be acquired by prescription (7). "It may be doubted" says *Mr. Spelling* "whether one may by user and acquiescence acquire the right to corrupt the waters of a stream, even though the rights affected are strictly private, to the extent of rendering them unfit for the ordinary use of the household and a farm conducted according to the usual methods. Assuming that a prescriptive right to do so could be acquired, it could only be by the continuance of a perceptible amount of injury for twenty years at common law or for the prescription period fixed by the statute (8). If a prescriptive right to foul a stream may be acquired at all, the fouling must not be considerably enlarged to the prejudice of other people, and the fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one (9)." The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right without some evidence of an intention to abandon it; but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin, the court held that any right of fouling a stream attached to them was lost (10).

The Government has a right to maintain the *status quo*, the long established customary method of storing water in their tanks. The whole system

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(1) *Per Scotland C. J.* in *Ponnu swami Tevar* v. *The Collector of Madura*, 5 M. H C. R. 6 (24); see also *Prankristo Roy* v. *Huro Chandra*, 10 W. R. 435.

(2) 7 M. H. C. R. 60 (69).

(3) 2 B & C. 913.

(4) 6 East. 208.

(5) 3 Ex. Ch. 777.

(6) 32 L. J. Q. B. 136.

(7) Kerr on Injunction p. 228 citing *Magor* v. *Chadwick*, 11 A. & E. 571; *Baly* v. *Clark*, (1902) 1 Ch. 649; see also Easements Act s. 7.

(8) *Goldsmid* v. *Tunbridge Wells*, L. R. 1 Eq. 161.

(9) *Crossley* v. *Light owler*, L. R. 2 Ch. 478=L. R. 3 Eq. 279; Lewis on Injunction and other Extraordinary Remedies § 316.

(10) *Ibid.*

of tank irrigation and the right of wet raiyats to water for irrigation in India has no counter part in England and in English common law. The law on such matters here is determined by custom and customary right. Submersion of lands on the fore shore of a tank when it is at its full tank level is no uncommon occurrence and is a feature of the recognized irrigation system. Where such submergence is a matter of the customary conditions of the locality then a tank is at its full tank level and is not the result of a direct and proved interference. With these customary conditions, no cause of action for any of the wet raiyats does arise and no suit can be brought to restrain Government or other wet raiyats for a declaration that they have no right to submerge the lands of the plaintiff on the foreshore of the tank and for an injunction to restrain them from doing so (1). When the whole of water supply has not been cut off, but only some of it, and when there has also been a general shortage of supply, it is very difficult for a party to prove the precise amount or diminution caused by the action of others or the precise amount of the particular damage caused by that diminution. Under such circumstances the injured party has a cause of action apart from proof of actual damage and has a right to an injunction if he establishes prospective probable damage (2). In case of obstruction to the right of the use of water acquired by prescription an injunction should be granted (3).

Where a lower riparian owner has been enjoying an uninterrupted flow of water for more there 30 years and then the upper riparian owner put up a dam which interfered with plaintiff's supply of water, he is entitled to sue for an injunction for the removal of the dam (4).

In a suit by plaintiffs for recovery of possession of certain *ryotwari* lands from their lessees, the defendants, the plaintiffs also asked for a declaration of their rights and an injunction restraining the defendants from causing obstruction to the flow of water from a Government channel called *Diguva* to the suit lands. The Government however was not made a party to the suit. It was found that according to the Government register the source of supply to that suit lands was another Government channel but that the defendants who were in possession of the suit lands as lessees had, under some arrangement with the Government, been irrigating them for the last 20 or 30 years with the water of *Diguva* channel which was the proper source of irrigation for the defendant's own lands. It was also found that the plaintiffs had not acquired a right of easement or any right to take water from *Diguva* channel by prescription. The plaintiffs claimed that they must be deemed to have been in possession of the right to take water for the suit lands from the *Diguva* channel through their lessees, the defendants, and that as their possessory right

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(1) *Seshadri Aiyanger* v. *Nara sinha chari*, 140 Ind. Cas. 28=A. I. R. 1932 Mad. 532,

(2) *Bansavana* v. *Guod Narayan*, 54 M. 793=133 Ind. Cas. 507=A. I. R. 1931 Mad. 284.

(3) *Bipin* v. *Ramanath*, 47 C. L. J. 480=32 C. W. N. 1109.

(4) *Bali Ram* v. *Bela Singh*, 1923. Lah. 594.

had been threatened by the defendants they were entitled to a prohibitory injunction consequent upon a declaration of their rights. *Held* that in the circumstances of the case, the plaintiffs were not entitled to the declaration and injunction prayed for (1).

A plaintiff who derives title by a grant from a Hindu widow which may or may not be binding on the reversioner, can, during the life-time of the widow, maintain a suit for permanent injunction restraining the defendant from diverting the course of natural flow of surface water so as to affect his land (2). Where a decree in a previous suit clearly declared the right of a person to use the water of a tank, the filling up of the tank, for it was overgrown with weeds means the infringement of that right and should therefore be restrained by a perpetual injunction especially when the party who has acquired the easement offers to clear the weeds (3). Where it was found that, in pursuance of a grant from the government, the plaintiffs had been taking water upto 1862, through a channel, which mostly ran through Government lands, after 1862 and till 1892, they had not been removing silt and using the channel and the defendants began to take water through the channel; *Held* that the plaintiffs were entitled to maintain a suit for injunction restraining the defendants from using the channel (4).

Right of way.—There are three different modes of acquiring a right of way, namely by (*i*) express grant, (*ii*) by immemorial user and (*iii*) by prescription. In *Chunilal* v. *Ramkishen Sahu* (5), *Wilson J.* in delivering the judgment of the Full Bench said: "It may be useful to premise that by the common law of England there are three distinct classes of rights of way and other similar rights. First there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly there are rights belonging to a certain class of persons, certain parties of the public such as the freeman of a city, the tenants of a manor, or the inhabitants of a village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the Queen's subjects; and the source of these is ordinarily dedication. It is unnecessary to enquire whether the mode of acquiring each of these classes of rights is necessarily the same in all cases in England and in India. But it is, I think, important to remember that these three classes of rights exist in the one country as well as in the other. The first class, strictly private rights, we are all familar with. The third class, of public rights, is of frequent occurrence. The second class, of rights belonging to a portion of the public, is also to be found in India. They are expressly recognized by the Legislature in s. 42

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(1) *Mahan kali* v. *Karnan Narayan*, 34 M. L. J. 425=45 Ind. Cas. 80.

(2) *Earail jool Tea Co.* v. *Nagendra Nath*, 41 Ind. Cas. 47.

(3) *Atul Behary* v. *Rameswar*, 35 Ind. Cas. 40.

(4) *Anantha* v. *Viswa natha*, 18 M. L. T. 515.

(5) 15 C. 460 (464) F. B.

illustration *a*(1) and s. 54, illustration *p*(2) of the Specific Relief Act. It is specially important that this class of rights should be clearly understood and borne in mind in a country like India, where interests of the most essential importance depend so largely upon custom".

A right of way is the right of passing in a particular line and it does not mean the right of altering it at pleasure (3). Under section 26 of the Limitation Act, the *onus* is on the plaintiff to prove that the user for the period indicated has been as of right (4). A road or path over which individuals or a limited class of public have a right of passage is not a high way (5). A right of way imports the right of passing in a particular line and not the right of varying it at pleasure. A right of way of any one kind does not include a right of way of any other kind (6).

Who can sue in case of obstruction.—Where it is alleged that there is a public path way which has been infringed by the defendant before the plaintiff can maintain an action for avoidance of the infringement, special damage must be proved. But where it is more or less a village path way, wherein residents on either side of the path way and round about, may be considered to have a right acquired by long user of passing to and fro and this right is referrable to a grant or agreement on the part of the *Zemindar*, it is not necessary to prove any special damage and the residents of the neighhourhood can maintain an action for the avoidance of the obstruction without proving any special damage. Even if a proof, of special damage is necessary a very small amount of inconvenience will entitle the plaintiff to the relief claimed (7). But the Calcutta High Court in a very recent case has held, relying on the Privy Council case of *Manzar Hosan* v. *Mahamad Zaman* (8) that a member of a public can maintain a suit for removal of obstruction of a public high way, if his right of passage through it is obstructed without proof of special damage. In delivering the judgment the court observed: "That no proof of special damage is necessary appears to be established on the authority of *Manzur Hosan* v. *Muhammad Zaman* (8) in which their Lordships of the Privy Council overruled the contrary view held in the case of *Satku kadir* v. *Ibrahim Aga* (9). The Bombay case was followed later in the

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(1) "(*a*) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for a declaration that they are not entitled to the right so claimed."

(2) "(*p*) The inhabitants of a village claim a right of way over A's land. In a suit against several of them A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.

(3) *Khewan* v. *Dewan*, 80 P. R. 1867.

(4) *Khoda Buksh* v. *Taja udain*, 8 C. W. N. 359.

(5) *Mahommed* v. *Jahangir*, A. I. R. 1932 Oudh. 274.

(6) *Mahommed* v. *Jahangir*, A. I. R. 1932 Oudh. 274.

(7) *Loknath Tewari* v. *Jadunandan Tewari*, A. I. R. 1933 All. 919, relying on *Satku* v. *Ibrahim*, 2 B. 457.

(8) A. I. R. 1925 (P. C.) 36=86 Ind. Cas. 236=52 I. A. 61=47 A. 151 (P. C.)

(9) 2 B. 457.

case of *Mohammad Din Mian* v. *Atirajo Kuer* (1), in which no reference is made to the Privy Council case. In the latter case (2) *Lord Dunedin* says: 'The Judgment [*Satku kadir* v. *Ibrahim Aga* (3)] really proceeds entirely on English authorities, which lay down the difference between proceedings by indictment and by civil action. In their Lordships' opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on the high way is a distinction peculiar to English law and ought not to be applied in India. His Lordship then referred to the case of *Baslin gappa* v. *Dharmappa* (4) on which he says that the learned Judges without saying anything over ruled *Satku Kadir* v. *Ibrahim Aga* (3). Their lordships were dealing with a suit for damages for preventing the plaintiffs from conducting a religious procession along a high way and for a permanent injunction against the defendants, but it seems clear that the same rule is applicable to all cases of obstruction of a high way and, just as in that case and certain Madras cases referred to by their Lordships, *Partha sarathi Ayyanger* v. *Chinna Krishna Ayanger* (5); *Sundara Chetti* v. *The Queen* (6) and *Sadagophachariar* v. *A Rama Row* (7), it was held that no special damage, other than the obstruction of the procession, was needed, so here I would hold that no special damage is required further than the plaintiff's inability to carry large articles into her house owing to the obstruction (8)".

Obstruction to right of way—Injunction against.—The jurisdiction is based upon the prevention of irreparable injury and avoiding multiplicity of suits. Any violation of an easement right if vexatiously persisted in, may constitute a nuisance. The commonest form of easement is a right of way, which may consist in the right of private egress and ingress over another's lands, or in the right to enjoy a public road or street in common with the community and it may be stated generally that any permanent or repeated obstruction of a right of way, either public or private, will warrant the granting of an injunction to prevent its continuance (9). When there is no reasonable doubt of plaintiff's legal title, and the obstruction to the right of way is clear, it is proper to enjoin it in the first instance (10). The owner of an inn having a right of way to his stable in the rear, over the land of an adjacent owner, may have the aid of equity to restrain defendants from blocking up or obstructing such right of way. And the fact that the obstruction is caused by several persons, and that the amount or degree of obstruction caused by each, individually, may not of itself afford ground of complaint, will not prevent the relief as against the obstruction caused by all (11). And equity will protect a right of way by injunc-

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(1) A. I. R. 1931 Pat 418=133 Ind. Cas. 463=10 Pat, 568.

(2) *Mansur Hosan* v. *Muhammad Zaman*, 47 A. 151 (P. C.)

(3) 2 B 457.

(4) 34 B 571.

(5) 5 M. 304.

(6) 6 M. 203 (F. B.)

(7) 26 M. 376.

(8) *Bhagwan* v. *Town Mag, Bedaun*, A. I. R. 1929 All. 767; but see *Jawad Singh* v. *Sardar Singh*. 64 P. R. 1901.

(9) Spelling on Injunction § 221.

(10) *Melville* v. *Fulton*, I. R. 6 Eq. 458.

(11) *Thorpe* v. *Brumfitt* L. R. 8 Ch. 650, High on Injunction § 890.

tion although there may have been for a period of many years a non-use of the right, if the plaintiff lad resumed it before the doing of the acts complained of as an obstruction to the easement (1). Where defendant had persisted in erecting an obstruction to plaintiff's right of way after full notice of the right and after suit begun for an injunction, and the Court upon the hearing found plaintiff entitled to the injunction, it was made mandatory and defendant was ordered to remove within a given time the erections made since the commencement of the suit ; and this even under a statute authorizing the Court in its discretion to award pecuniary damages to the person injured in lieu of an injunction (2). A suit for an injunction on the ground that an encroachment is a public nuisance is not maintainable when the nature and extent of the encroachment made on the public road is not of such a description as would lead to an inference that the plaintiff's house has materially suffered thereby (3).

The right of a person to go and take water from a well standing on a neighbouring land is a right of easement and the Court can grant an injunction restraining a stranger from interfering with the plaintiff's right. It is not necessary for the plaintiff to prove that the servient tenement is the tenement of the particular defendant who has not interfered with his right (4). Where upon the construction of a conveyance, the plaintiffs were considered to have acquired, not a right in the soil of a passage, but only a right of way over it *held* that they were entitled to complain of any acts of the defendant which obstructed them in the enjoyment of that right of way, and to an injunction against future obstructions, and that the use of doors opened out by the defendant from his house into the passage to clean privies was a serious obstruction to the use of the plaintiff's right of way (5). Plaintiff brought a suit for an injunction to restrain the defendants from passing and repassing over his land adjoining the defendant's house and for closing a newly constructed door-way opened by the defendants in their own wall for the free egress and ingress across plaintiff's land. *Held*, that the mere prospect of a possible easement which might by prescriptive user be established could not justify a court in directing that such newly erected door way should be closed and that the proper relief to be granted in such a case is a perpetual injunction in favour of the plaintiff prohibiting the defendants from using their door way in such a manner as to pass or repass over the land belonging to the plaintiff (6). The plaintiff owned a bunglow situated to the north of the defendant's railway, egress from and access to which was afforded over the lines through a gate way at a level crossing. The defendants having closed this gate way and opend a new one further down the line, the plaintiff brought the present suit to have the old

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(1) *Cook* v. *Mayor*, L. R. 6 Eq. 177.
(2) *Krehl* v. *Burrell*, 7 Ch. D. 551.
(3) *Kashmira Singh* v. *Mathra Singh*, I. R. 1932 Lah. 622.
(4) *Ram chandra* v. *Sher Ali*, 27 A. L. J. 1120=118 Ind. Cas 42=A. I. R. 1929A. 779.
(5) *Madan Mahan* v. *Chandra Kumar*, 9 B. L. R. 328=18 W. R. 379.
(6) A. W. N. 1888, 270.

gate-way re-opend. It was found that the plaintiff had no easement over this level crossing, but had a public right of way there, that it was obstructed by the defendants, and that the destruction had caused special damage to the plaintiff; and that the inconvenience caused to the plaintiff was real and substantial. *Held* there that the plaintiff was entitled to the user of the right of way, and that the proper relief to be granted to the plaintiff was an injunction against its obstruction, and not merely compensation (1).

Right of privacy.—Every owner has got the right to open appertures in his own wall and unless by doing so he invades the privacy or any other pre-existing and well-established right vested in his neighbour, the latter cannot force them to close the appertures. The neighbour's remedy is to build on his own land or otherwise obstruct the appertures (2). In England no action would lie for the loss of privacy or amenity by the opening of windows in a neighbouring house (3). A right of privacy cannot be acquired under s. 26 of the Limitation Act but may arise by express grant or local usage (4). So the invasion of a privacy by open windows is not a wrong for which an action will lie (5). Where a person alleges that another infringed upon his right of privacy he must prove that the customary right of privacy exists in the neighbourhood in which he lives and further that he is individually or as member of his particular class entitled to take advantage of such custom (6). In the above case the Court observed: "But for circumstances which we shall presently state, we might then have felt compelled to reconsider whether the decision in *Gokul Prosad* v. *Radha* (7), should still retain its full force after nearly half a century has passed, when it is manifest that the force of customs especially the custom of *parda*, may be very largely varied in the course of so long a period. We have not, however, to reconsider that case now, for there is another fatal defect in the claim of the plaintiffs. Assuming that the decision to which we have referred should still have full force, it cannot amount to more than this that customary right of privacy is not unknown in the United Provinces. It cannot possibly be suggested that the effect of the decision was that customary right of privacy exists at every single spot in the United Provinces, or that every single individual in the United Provinces is entitled to rely upon such a custom (8). The decision was passed before the Easements Act, V of 1882, was applied to these Provinces, but there can be little doubt that much of the language used was taken from s. 18 of the Easements Act, and more particularly from illustration (b) to that section. That

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(1) *G. I. P. Ry.* v. *Nowroji*, 10 B. 390.

(2) *Kashi Nath* v. *Ram Jiwan*, A. I. R. 1933 Lah. 847.

(3) *Chandller* v. *Thomson*, (1811) 3 Camp. 80; *Cf. Potts* v. *Smith*, L. R. 6 Eq. 311 (318).

(4) *Srinarain* v. *Jadunath*, 5 C. W. N. 147; 149, 150; *Kesho Sahu* v. *Mt. Muktakiman*, 10 Pat. 280=A. I. R. 1931 Pat. 212.

(5) *Sayyad Azup* v. *Ameer bibi*, 18 M. 163.

(6) *Bhagwam Das* v. *Zamarrad*, 27 A. L. J. 1028=119 Ind. Cas. 883=A. I. R. 1929 A. 676.

(7) 10 A. 358.

(8) The customary right of privacy which prevails in various parts of the

illustration particularly refers to the existence of a custom in any particular town. The Act has since been applied to these Provinces by Act VIII of 1891, and the present case has undoubtedly to be decided having in view the terms of that Act. The plaintiffs have made no effort of any sort whatever to prove, have not even alleged that a customary right of privacy exists in the particular neighbourhood in which the plaintiffs were living, much less have they alleged or attempted to prove that they were individually or as members of their particular class entitled to take advantage of any such custom."

In *Gokal Prasad* v. *Radho* (1), it has been held that a customary right of privacy, under certain conditions, exists in India and in the North-Western Provinces, and is not unreasonable (2). But where the customary right of privacy is established, there the injunction is a proper remedy to prevent the breach of that right (3). The right of privacy exists in Guzerat (4). In *Keshav Harka* v. *Gampal Hirachand* (5), *Melville* and *Kamball JJ.* decided that the opening by the defendant of a window which looked, not into the plaintiff's private apartments, but into an open courtyard outside his house, was not an invasion of the plaintiff's privacy which would entitle him to have the window closed. In *Kamathi* v. *Guranandan* (6), the Madras High Court held that there was no right of privacy in Madras. In *Srinivas Udhirao* v. *Reid and others* (7), the acting Judge of Dharwar found on the evidence that it was the custom in Dharwar that a person could not make a new aperture, which might invade the privacy of his neighbour, but the High Court observed as follows: "It may be taken to have been correctly found by the Judge that the window complained of would, to a certain extent, make the third defendant's compound less private than heretofore, but it is within the power of the defendant to adopt some arrangement by which the inconvenience arising therefrom, if any, may be avoided; and it is more reasonable that the defendant should protect himself, than that the plaintlff should be deterred from improving his own house, for as was observed by *Mr. Justice Markby* in the case reported at p. 676 of 5 B. L. R. (8) 'to hold that privacy is a right and the invasion of it an injury would lead, as it appears to me, to the most alarming consequences to the owners of house-property in towns.' But in the Punjab it has been held that with regard to the usages and habits of natives, the right of privacy in a dwelling house may be a cause of action. When the

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North Western Provinces is a right which attaches to property and is not dependent on the religion of the owner thereof. *Abdul Rahaman* v. *D. Emile*, 16 A. 69 (72); see also *Fazal* v. *Fazal*, 26 A. L. J. 49=A. I. R. 1928 All. 210.

(1) 10 A. 358.

(2) See also *Enayat Hussain* v. *Bilkis*, 24 Ind. Cas. 683; *Laja Ram* v. *Faquira*, 74 P. L. R. 1915=29 Ind. Cas. 154; *Jamil uddin* v. *Abdul Majid*, 13 A. L. J. 361=28 Ind. Cas. 674.

(3) *Mani sankar* v. *Trikam*, 5 Bom. H. C. R. (A. C) 42; *Kuverji* v. *Bai Javer*, 6 B. H. C. R. A. C. 143; *Keshav* v. *Ganpat*, 8 B. H. C. R. A. C. 87; *Joogul Lal* v. *Musammat*, H. C. R. N. W. P. (1871) 311;

(4) *Mani sankar* v. *Trikam*, 5 B. H. C. R. 42; *Kuvarji* v. *Bai Javer*, 6 B. H. C. R. 143.

(5) 8 B. H. C. R. A. C. J. 87.

(6) 3 M. H. C. R. 141.

(7) 9 B. H. C. R. A. C. 266.

(8) *Mahomed* v. *Birju*, 5 B. L. R. 676.

defendants opened a new door in an upper storey so as to invade the right of privacy of plaintiff the Court could make a special order directing the close of the door (1). No right of privacy can exist in respect of a sitting room appropriated to males (2). Where the defendant opened certain appertures towards the plaintiff's house, which was already overlooked by the defendant's house in several places, *held* that there was a substantial and material invasion of the right of privacy (3). A right of privacy is assumed to exist in all Indian towns. Each case must be governed by its particular facts but the question in each case is whether the construction amounts to a substantial interference with the right of privacy. Where it was found that the window was useless and that it was set in the wall merely to infringe the right of privacy of adjacent owner, *held* that its removal should be directed (4).

Projecting eaves—removal.—The plaintiff's eaves had projected over the defendant's roof, which rested on the common wall between the parties for more than 30 years. The plaintiff had thus acquired a right to have the water carried from this roof on the defendants' roof. The defendant raised the common wall and removed the plaintiff's eaves. *Held*, that the plaintiff was entitled either to damages or to mandatory injunction (5).

Right to pollute air.—There is nothing in the law against a right to discharge smoke through smoke holes in a wall over a neighbour's land being acquired by prescription. The definition of easement in the Easements Act is too wide enough to embrace such a right and s. 28 cl. (d) expressly recognises the right to pollute air—a right capable of being acquired by prescription (6).

Right to submerge adjacent lands.—The proprietor of an estate constructed an irrigation tank. Subsequently the estate was partitioned into two estates but a considerable part of the tank bed was kept in common ; later on the Court of Wards who had taken over the management of one of the estates conveyed lands including a portion of the tank bed to the plaintiff. The proprietors subsequently repaired the tank and the plaintiff apprehending submersion of his lands sued for an injunction to restrain the estate-holders from doing so. *Held* that the right to submerge the adjacent lands could not be claimed by the alienating proprietors as an easement falling under cls. (*c*) and (*d*) of s. 13 (7). Where through his own fault flood water accumulates on a man's land, his neighbour has a right to put up *bunds* to protect his land. The former cannot claim a right of natural drainage and restrain the latter from putting up the *bunds* (8). Every one has a right, in

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(1) *Nanuck chand* v. *Lalla*, 21 P. R. 1869 ; see also *Gohree* v. *Jaintee*, 91 P. R. 1899 ; *Shib dyal* v. *Golab*, 96 P. R. 1876.

(2) *Sital Ojha* v. *Rekha*, A. W. N. 1892, 159.

(3) *Abdul* v. *Bhawan*, 4 A. L. J. 445 = 29 A. 582.

(4) *Sarugam Madho* v. *Ram Narain*, 6 O. W. N. 854 = A. I. R. 1929 Oudh 437 ; *Fazal* v. *Fazal*, 26 A. L. J. 49 = A. I. R. 1928. All. 201.

(5) *Nasar bhai* v. *Munshi*, 16 B. 533.

(6) *Kashi Nath* v. *Narayana*, 22 B. 831.

(7) *Gajapathi* v. *Rajah of Vizianagram*, A. I. R. 1931 Mad. 561 = 60 M. L. J. 662.

(8) *Mok sodali* v. *Mahli*, 1 Rang. 427.

the absence of controlling right of easements or servitude in respect of his premises to protect them against the flow of water from adjacent lands or houses. The claim of the plaintiff was that rain water from the premises of certain third parties had previously flowed over the premises of the defendant, and the defendant by raising the height of his building or earth work had directed the water, which previously flowed over his premises, to the premises of the plaintiff. It was not alleged by the plaintiff that either he or anybody else possessed a right of easement by which he was entitled to claim that the water should flow as before over the defendant's premises. He asked for an injunction against the defendant but the suit was dismissed. *Held* that the plaintiff had no cause of action and the suit was rightly dismissed (1).

Prescriptive right of passing surplus water.—The fact that the water discharged from the dominant tenement flows over the surface of the servient tenement without a definite channel for its carriage cannot prevent the acquisition of easement (2). An owner of land may have a customary or prescriptive right to drain water coming to his land by the falling of rain or drained from upper fields or brought by himself for purposes of irrigation on to adjoining land. An injunction as to easements which have been broken should be confined to a direction to the party breaking not to obstruct the exercise of the easement and should not descend into details, so as to prevent the servient owner from taking advantage of the privilege given to him by section 22 of the Easements Act (3). The right of easement and natural rights are distinct rights and when one is claimed the other does not arise. Where a plaintiff claims a right as an easement and fails to establish it, it is not open to the court to make a new case for him (4).

Drainage of rain water.—Where it was established by and the possibility of a doubt that a person had enjoyed a right of easement as to the flow of rain water from his house for 40 or 50 consecutive years, and the opposite side had failed to show that anything had happened to deprive him of his right or to diminish the right : *Held* that he was entitled to an injunction restraining the opposite side from interfering with the exercise of the right (5). In granting relief to the holder of an easement the courts ought not to place galling restrictions on the opposite side, provided the holder gets what he wants (6).

Right of drainage and easement.—In a case where the court found that the effect of obstruction to the flow of roof and refuse water seriously diminished the value of the plaintiff's premises and his comfort in the enjoyment of

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(1) *Jai Ram* v. *Khan Bahadhur*, 248 P. L. R 1912=259 P. W. R. 1912.

(2) *Munsi Misser* v. *Bhimrajman*, 17 C. W. N. 306 (F. B.), over ruling *Bidhu bhusan* v. *Benoy Madhab*, 8 C. W. N. 244 ; see also *Kali Pooree* v. *Manik Sahu*, 20 W. R. 287 ; *Iman Ali* v. *Poresh Mandal*, 8 C. 468 ; *Balabin Keshab* v. *Maharu*, 20 B. 788.

(3) *Doraiswami* v. *Muttachi*, 23 M. L. T. 210=(1918) M. W. N. 167.

(4) *Mahomedan* v. *Nabin*, 57 Ind Cas. 504.

(5) *Ram Lal* v. *Makhan Lal*, 55 Ind. Cas. 710.

(6) *Ibid.*

them, and rendered then unfit for habitation, an injunction was properly granted as pecuniary compensation would not afford adequate relief (1).

Right of fishery.—A person has no right to erect a *bund* on his own land with the result of intercepting the passage of fish in a natural stream and thereby render another's right of fishery therein less profitable, unless the *bund* has existed for many years without objection (2). But by catching fish in paddy land belonging to himself peaceably and uninterruptedly for over 20 years, a plaintiff does not acquire a right of easement which entitles him to restrain the defendant, the owner of paddy land on a higher level, from catching on his land fish which by reason of the water on plaintiff's land being fed by water flowing down from defendant's land would have come with the water into plaintiff's land (3).

Allowing discharge of water—Subsequent suit for injunction.—The plaintiff built his house within six months. The plaintiff had been allowing the defendants to discharge the water on the vacant site of the plaintiff for some years. But the defendant had not acquired any easement to the discharge of the water. Held, that the fact that the plaintiff allowed the defendants to discharge the water for some years was no ground to refuse the injunction (4).

Right to bury dead-body.—No body can acquire by prescription to bury dead-body in land belonging to other persons, such easement being unknown to the land (5).

Defendants constructing spout.—An injnnction can be granted to the plaintiff where the defendant has constructed a water spout or *pornala* leading water in to the plaintiff's land unauthorised even though his action does not amount to a nuisance (6),

Interference with easement—form of decree.—Injunctions against interference with natural rights or easements should not descend to details but should be confined to a direction to defendant not to obstruct its exercise. The mandatory injunction granted by the lower courts against the servient owner to restore the original level of his lands were set aside (7).

Customary right to use well.—No fixed period of enjoyment is laid down by law as necessary to establish a customary right, and customary right to use a well may exist apart from a dominant heritage (8). The

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(1) *Sultani* v. *Ram Saran*, P. L. R. 1900 p. 173=49 P. R. 1900.

(2) *Ramdas* v. *Sonatun*, W. R. 1864, 275.

(3) *Kaladar Mandal* v. *Ajimaddi* 21 C. W. N. 599.

(4) *Haru Ram* v. *Kaliyana Ram*, 109 Ind. Cas. 638=10 Lah. L. J. 395.

(5) *Jiwan Singh* v. *Karam Din*, 103 Ind. Cas. 678=A. I. R. 1927 Lah. 664.

(6) *Abdul Majid* v. *Imam Din*, 96 Ind. Cas. 1006=A. I. R. 1926 Lah. 681.

(7) *Doraiswami* v. *Nanbiappa*, 23 M. L. T. 210=44 Ind Cas. 500.

(8) *Pulaniandi Tevan* v. *Puthiram Gonda* 20 M 389; see also *Chunna ram Pillay* v. *Manu Puttur*, 1 M. L. J. 47; *Shanmugam* v. *Venkateswara*, 2 M. L. J. 290.

inhabitants of a town contended that they where accustomed to take water from time immemorial from a private well. *Held* that the right claimed was a customary right in the nature of an easement and could be acquired by long user. It was not a mere profit *a prendre*.

CHAPTER XXIII

Injunction against Infringement of Patents.

Origin of Patent Law.—From the early times upto the date of the well known Statute of Monopolies passed in the reign of James I, the sovereign had the exclusive liberty of making special grants to favoured subjects and even to foreigners. Letters Patent for Inventions are the survival of these ancient Royal Grants. When a monopoly was granted, it was made known by the issue of "Open Letters," or *Litterræ Patentes*, addressed to all subjects of the realm, so that the privileges granted should not be questioned from want of knowledge. For the benefit of the monopolist the infringer was made liable and he was presumed to know the existence of Letters Patent and his ignorance of the grant was no excuse. By section 33 of the British Act of 1907 and by section 30 of the Present Act an innocent infringer is now exempted from his liability for damages. It is evident that from the first, although existing manufactures and the supply of certain products and goods, both natural and artificial, were the chief objects of the older grants of monopoly, new manufactures, and advances in arts and sciences were considered favourable subjects for protection of Royal Grants. By Statute of Monopolies (21 Jac. 1 C. 30), which was passed in 1624, monopolies were abolished and their unjust and restrictive privileges were declared "utterly void and of noneffect, and in no wise to be put in use or execution." One of the exceptions to the general extinction of monopolies was made by sections 5 and 6 of the Statute of Monopolies, in favour of patents for inventions then in force and thereafter to be granted, and this is still the basis upon which patent rights stand at the present day. By section 6 of that statute, the term of a patent was limited to fourteen years. The term of fourteen years seems to have been fixed by doubting the usual period of apprenticeship—*i.e.* seven years The privilege of Letters Patent for inventions having been thus saved from the general wreck of monopolies brought about by the statute of James I, thereafter passed through a long period of comparative obscurity, which it is needless to recapitulate (1). 'Up to the reign of Queen Anne no specification seems to have been required, but about the year, 1730 the enrolment of a specification became compulsory. As a consequence of this enforced

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(1) Fulton's Law and Practice relating to Patents and Designs pp. 7-10.

deposit of an exact description of the invention, the conditions in the grant requiring the establishment of the new industry and the instruction of others in its mysteries—in other words the commercial working of the invention within the realm—appear to have fallen into abeyance during the latter half of the eighteenth century. Apparently, the presence on the record of the exact description contained in the specification was held as a warrant that on the expiry of the patentee's monopoly whether he worked it or not, others would be able to put the invention in practice. From this it followed that the question of construction and sufficiency of the specification as a guide to the workman became then, as now, one of the tests by which it was ascertained whether this part of the consideration for the grant had been fulfilled by the patentee.....It is indisputable that, under the Statute of Monopolies patents were not granted to inventors as a reward of being ingenious, but for the purpose of introducing new manufactures into the country and to create increased employment for the working classes. It is equally indisputable that under the conditions existing before the coming into force of the present Act, many a patent granted to a forigner, so far from being an encouragement to native industry, was a positive fetter upon the wrists of those who would otherwise have found profitable employment and working in this country been made compulsory" (1). This departure from the original purpose of the Statute of Monopolies which was detrimental to the indigenous industry was strongly protested by commercial combination and the result was the passing of the compulsory License clauses of the Patents Act of 1902, which however remained a dead letter (1).

The grievances of the workmen of the United Kingdom was effectively removed by the Patents and Designs Act of 1907, section 27 of which enacts: "At any time not less than four years after the date of a patent and not less than one year after the passing of this Act, any person may apply to the comptroller for the revocation of the patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom," This section restored the original intention of the Statute of Monopolies. Before the passing of the British Patents and Designs Act of 1907, several other Acts were passed, mamely, The Patent Law Amendment Act of 1852, the Patents, Designs and Trade Marks Acts of 1883 and the Patents Acts of 1901 and of 1902. All the Acts passed between the years 1883 and 1902 were repealed by the British Patents and Designs Act of 1907 which was also revised to a great extent by the British Patents and Designs Act of 1919.

Indian Patents and Designs Act.—The first patent law in India was the Act of 1856, but as it was not sanctioned by the Home Government, there was no effective law until the Act of 1859 (XV of 1859) for granting exclusive

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(1) Foulton's Law and Practice relating to Patents and Designs pp. 10 11.

privilege to inventors. That Act was based on the English Patent Law Amendment Act of 1852 and remained in force until the 30th June 1888. The Inventions and Designs Act of 1888 (Act V of 1888) came into force on the 1st July, 1888 and was based on the English Patents, Designs and Trade Marks Act of 1888. The Act V of 1888 was again repealed and replaced by the Indian Patents and Designs Act of 1911 (II of 1911). This Act is also based on the English Patents and Designs Act of 1907 (1). "The registration of designs, which was also effected under the Act of 1888, has a shorter history as it only dates back to the Patterns and Designs Protection Act (XIII of 1872). Owing to the high fees no great advantage was taken of the provisions of the law for safe-guarding proprietorship of designs (2)." The present Act (II of 1911) was amended drastically by the Indian Patents and Designs (Amendment) Act of 1930. In the statement of Objects and Reasons the farmer of the Act states as follows:—"The existing Indian Patents and Designs Act, 1911 (II of 1911) was passed in 1911 and came into effect in 1912. Experience has indicated a number of directions in which amendments are required, and it is now proposed to revise it. The Amendment which it is desired to make are drawn from several sources A few of them are taken from the British Act of 1907 (on which the present Act is based) and were omitted from the Indian Act as they were not considered necessary in the condition then existing in India. A considerable number are based on the provisions of the British Patents and Designs Act of 1919 which represented a fairly general revision of the 1907 Act in the light of the experience gained from its working. Others are designed to remove defects which experience in India has revealed and a few drafting amendments have been added." So now the substantive law on patents and designs in British India is contained in the Indian Patents and Designs Act, of 1911 (II of 1911) as amended by the Indian Patents and Designs (Amendment) Act, 1930.

Injunction against infringement of Patents and Designs—Principles.—It is upon similar principles, to prevent irreparable mischief or to suppress multiplicity of suits and vexatious litigation, that Courts of Equity interfere in cases of patents for inventions, and in cases of copy right to secure the rights of the inventor or author and his assignees and representatives (3). It is quite plain that if no other remedy could be given in cases of patents and copyright than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights (4). Indeed, in cases of this nature it is almost impossible to know the extent of the injury done to the party without a discovery from the party guilty of the infringement of the

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(1) Codification in British India p. 237.
(2) *Ibid.*
(3) Jeremy on Eq. Jur. B. 3 Ch. 2 § 1. p. 327; *Sheriff* v. *Coates*, 1 Russ & M. 159; Story Eq. Jur. § 1260.
(4) *Harmer* v. *Plane*, 14 Ves. 132; *Hogg* v. *Kirby*, 8 Ves. 223, 224; *Lawrence* v. *Smith*, Jacob. R. 472; Story Eq. Jur. § 1261.

patent or copy right; and if it were otherwise, mere damages would give no adequate relief. For example, in the case of a copy right the sale of copies by the defendant is not only in each instance taking from the author the profit upon the individual book which he might otherwise have sold, but it may also be injuring him to an incalculable extent in regard to the value and disposition of his copy right, which no inquiry for the purpose of damages could fully ascertain (1). Another consideration of equal weight is that the plaintiff in such cases can at law have no preventive remedy against the wrongful use of his invention or trade mark, or publication of his production in future, however injurious to his title and interest (2). Now the jurisdiction of equity to restrain infringements of patents is well settled. The right granted by a patent is not to practise the invention, but to exclude others from practising it. The obvious method of protecting this right is by injunction (3).

Judicial discretion—preliminary Injunction in patent cases.—Substantially the same rules prevail in determining applications for preliminary injunctions in patent cases as in other cases, and the granting of the relief is a matter of sound judicial discretion, and where greater injury is likely to result to complainants from withholding the relief than to defendants from granting it, it may be allowed (4). And the Court may impose conditions, either for granting or refusing the relief, and may examine into the state of the litigation, the nature of the improvement and the extent of the infringement, as well as the comparative inconvenience to the parties (5). The doctrine was formerly held in England that an injunction would not be allowed until the right had been established at law, but it would seem that the jurisdiction may now be exercised on showing colour of title, coupled with an assertion of right which is not denied (6). The province of a preliminary injunction in a patent case is to preserve the rights of the patentee pending the litigation of his title. If his title has already been fully established, or is so clear as to preclude a reasonable doubt of its validity, a preliminary injunction may be granted, as in the case of a final injunction, regardless of the injury to defendant, but the case must be substantially free from doubt to warrant this course (7). And an important consideration in the granting of preliminary injunctions is that of the relative convenience and inconvenience of the parties; and if it appears that the granting of the writ will result in great injury to the defendant as compared with the benefit accruing to the plaintiff, relief may be denied in the first instance; while, upon the other hand, if the plaintiff's rights will be greatly jeopardized by the withholding of the writ, with comparatively little corresponding advantage to the defendant, the injunction may properly

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(1) *Hogg* v. *Kirty*, 8 Ves. 223, 224, 225; *Wilkins* v. *Aikins* 17 Ves. 424; Story Eq. Jur. § 1262.

(2) Spelling on Injunctions and other Extra ordinary Remedies § 804.

(3) Pom. Eq. Jur. § 1974.

(4) *Irwin* v. *Dane*, 4 Fish. 359.

(5) High on Injunction § 935.

(6) *Universities* v. *Richardson*, 6 Ves. 689; *Hicks* v. *Rani cock*, Dick. 647.

(7) High on Injunction § 937.

be granted (1). So where the granting of the writ will result in great inconvenience and injury to the defendant or to the public generally as compared with any benefit which may be confined to the plaintiff and it clearly appears that the defendant is perfectly solvent and abundantly able to respond in damages for any judgment which may be rendered against him, a preliminary injunction should be denied (2). On the contrary, where the Court, upon balancing the relative convenience or inconvenience to the parties, denies or dissolves a preliminary injunction, it may, in so doing, require of the defendant the filing of a bond conditioned for the payment of any damages which may be assessed upon the final hearing. But where the granting of the writ would be more likely to produce than to prevent irreparable mischief, neither an absolute nor a conditional injunction will be allowed (3). An interlocutory injunction against the infringement of a patent will not be allowed unless the complainant's title and defendant's infringement are either admitted or are so clear and palpable that the Court can entertain no doubt on the subject (4).

Requisite in cases to obtain injunction for infringement of patents.—In all cases coming within the jurisdiction of law or equity, the complainant must show a right in himself and a violation thereof by the defendant. To establish this right, he must prove two distinct elements, *viz.* (*i*) that he is the legal owner of a patent right, and (*ii*) that the patent is valid. The violation of the right is the infringement of the patent (5).

Definitions :—In the Indian Patents and Designs Act (II of 1911), unless there is anything repugnant in the subject or context :—

"*Copy right*" means the exclusive right to apply a design to any article in any class in which the design is registered :

"*design*" means only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to or are judged solely by the eye ; but does not include any mode or principle of construction or anything which is in substance a mere mechanical devise, and does not include any trade-mark as defined in section 478 or property mark as defined in section 479, of the Indian Penal Code :

"*invention*" means any manner of new manufacture, and includes an improvement and an alleged invention :

"*manufacture*" includes any art, process or manner of producing, preparing, or making an article, and also any article prepared or produced by manufacture :

"*patent*" means a patent granted under the provisions of this Act :

"*patentee*"—The original definition of "patentee" was as follows : "patentee" means the person for the time being entitled to the benefit of a patent. By

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(1) *Morris* v. *Lowell Manufactury Co* 3 Fish. 67 ; High on Injunction § 937.
(2) High on Injunction § 937.
(3) Ibid.
(4) Ibid § 938.
(5) Pom. Eq. Jur. § 1979.

Act VII of 1930 this definition was repealed and replaced by a new definition. Now 'patentee" means the person for the time being entered on the register of patents kept under the Act as grantee or proprietor of the patent. The revised definition of "patentee" substitutes the registered owner for the beneficial owner, and follows the definition in the United Kingdom (1).

"*Proprietor of a new or original design*,"—

(*a*) where the author of the design, for good consideration, executes the work for some other person—means the person for whom the design is so executed ; and

(*b*) where any person acquires the design or the right to apply the design to any article, either exclusively of any other person or otherwise—means in respect and to the extent in and to which the design or right has been so acquired, the person by whom the design or right is so acquired, and

(*c*) in any other case—means the author of the design ; and where the property in, or the right to apply, the design has devolved from the original proprietor upon any other person, includes that other person.

Capacity to obtain Letters Patent and application for Patent.—An application for a patent may be made by any person, whether he is a British subject or not, and whether alone or jointly with any other person. The application must be made in the prescribed form, and must be left at the Patent office in the prescribed manner. The application must contain a declaration to the effect that the applicant is in possession of an invention, whereof he, or in the case of a joint application, one at least of the applicants claims to be the true and first inventor, or the legal representative or assign of such inventor, and for which he desires to obtain a patent, and must be accompanied by a specification, and by the prescribed fee. Where the true and first inventor is not a party to the application, the application must contain a statement of his name and such particulars for his identification as may be prescribed, and the applicant must show that he is the legal representative or assign of such inventor (2).

Grant and sealing of patent.—If there is no opposition, or in case of opposition, if the determination is in favour of the grant of a patent, a patent shall, on payment of the prescribed fee, be granted subject to such conditions (if any) as the Governor General in Council thinks expedient, to the applicant, or, in the case of a joint application, to the applicants jointly, and the controller shall cause the patent to be sealed with the seal of the Patent office (3).

Date of patent.—Except as otherwise expressly provided by this Act, a patent shall be dated and sealed as of the date of the application. Provided that no Proceedings shall be taken in respect of an infringement before the advertisement of the application (4).

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(1) Notes on clauses.
(2) The Indian Patents and Designs Act s. 3.
(3) *Ibid* s. 10.
(4) The Indian Patents and Designs Act s. 11.

Effect, extent and form of patent.—A patent sealed with the seal of the Patent office shall, subject to the other provisions of the Indian Patents and Designs Act (1), confer on the patentee the exclusive privilege of making, selling and using the invention throughout British India, and of authorising others so to do. Every patent may be in the prescribed form and shall be granted for one invention only, but the specification may contain more than one claim ; and it shall be competent for any person in a suit or other proceeding to take any objection to a patent on the ground that it has been granted for more than one invention (2).

Term of Patent.—The term limited in every patent for the duration thereof shall, save as otherwise expressly provided by this Act, be sixteen years from its date. Any patent the original term of which had not expired on or before the 1st of July, 1930, shall have the effect as if the term mentioned therein was sixteen years instead of fourteen years (3), and any license existing at that date which has been granted for the term of the patent shall be treated as having been granted for the term as so extended if the licencee so desires. A patent shall, notwithstanding anything therein or in this Act, cease if the patentee fails to pay the prescribed fees within the prescribed times : Provided that where the patentee before, or within three months after the expiration of the time for payment, applies to the controller for an extension of time by any period not exceeding three months, the patent shall, on payment of such additional fee as may be prescribed, be continued or revived, as the case may be during and not beyond, the period of extension applied for. If any proceeding is taken in respect of an infringement of the patent committed after a failure to pay any fee within the prescribed time, and before any enlargement thereof the court before which the proceeding is taken, may, if it thinks fit, refuse to award damages in respect of such infringement (4).

Register of Patents.—There shall be kept at the patent office a book called the Register of Patents, wherein shall be entered the names and address of grantees of patents, notifications of assignments, and of transmissions of patents, of licenses under patents and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may be prescribed: The Register of Patents shall be *prima facie* evidence of any matters by this Act directed or authorizad to be inserted therein (5).

Revocation of patents worked outside British India.—At any time not less than four years after the date of a patent granted under the Indian Patents and Designs Act, 1911, any person may apply to the Governor-General

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(1) Act II of 1911.
(2) The Indian Patents and Designs Act s. 12.
(3) The original term of the Patent was 14 years. By the Amending Act VII of 1930, the term was extended to 16 years.
(4) The Indian Patents and Designs Act s. 14.
(5) *Ibid* s. 20.

in Council for relief under section 23 of the Act, on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside British India (1).

Petition for Revocation of patent—Section 26 of Indian Patents and Designs Act: "(I) Revocation of a patent in whole or in part may be obtained on petition to a High Court on all or any of the following grounds. namely :—

(*a*) that any invention included in the statement of claim is no utility (2) ;

(*b*) that any invention included in the statement of claim was not at the date of the application for patent, a new invention within the meaning of this Act (3) ;

(*c*) that the applicant was not the true and first inventor thereof or the assignee or legal representative of such inventor thereof ;

(*d*) that the original or any amended application or specification does not fulfil the requirements of the Act ;

(*e*) that the applicant has knowingly or fraudulently included in the application for a patent, or in the original or any amended specification, as his invention, something which was not new or whereof he was neither the inventor, nor the assign, nor the legal representative of such inventor ;

(*f*) that the original or any subsequent application relating to the invention, or the original or any amended specification, contains a wilful or fraudulent mis statement :

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(1) The Indian Patents and Designs Act s. 23.

(2) In the Patent law the term "utility" is not used in the abstract but in a very special sense. Mere usefulness is not sufficient to support a patent. It means an invention better than the preceeding knowledge of the trades as to a particular trade. As, regards, novelty and invention, it is not enough that the purpose is new or that there is novelty in the application so that the article produced is in the sense new but there must be some novelty in the mode of application. In adopting the old continuance to the new purpose there must be difficulties to be overcome requiring what is called invention or there must be some ingenuity in the mode of making the adoption. To be new in the patent sense the novelty must show invention. *Indian Vacum Brake Co.* v. *E. S. Luard*, 42 C. L. J. 543=92 Ind. Cas. 1008=53 C. 306=A. I. R. 1926 Cal. 152. In an application under this section for a patent, the most important issues are :—

(*a*) Is the petitioner the true and first inventor of the invention? (*b*) Was the patent granted to the respondent by the order of the Controller of Patents, etc., obtained by him in fraud of petitioner's right. The issues in such cases can be sent down for trial to the District Judge of the district in which the invention is made, and he is to proceed in accordance with the provisions of sub-section 3 of section 28 of the Act. Except the Advocate General or any person authorized by him, the petitioner is to give security for the payment of all costs incurred or likely to be incurred by the respondent. It is advisable if the parties so desire, to allow the patentee during the progress of the proceedings to make all the legitimate use of the invention and to appoint a trustworthy person to act as an *ad inter im* receiver : (*a*) to receive income (*b*) to keep the usual account of receipts and disbursements and (*c*) to pay from time to time such sums of money to the patentee as in the opinion of the Receiver may be reasonable and proper for the efficient working of the invention by the patentee and his servants. In such like cases it is a very strong point against the party who does not venture to go into the witness box to testify the truth of his assertion. *Takur Das* v. *Shah Din*, 74 P. W. R. 1915=148 P. L. R. 1915=29 Ind. Cas. 904.

(3) In every case the question is, has there been an exercise of inventive faculty. *Per Lord Esher M. R.* in *Lyon* v. *Goddard*, 7 R. P. C. 334.

(g) That the whole or part of the invention, or the manner in which the whole or part is to be made and used, as described in the original or any amended specification, is not thereby sufficiently described, and that this insufficiency was fraudulent or is injurious to the public."

Infringement of one of several parts.—During the sixteen years of patent right, the privilege of making, using, exercising, and vending the invention is limited to the owner of the patent and his representatives (1). Any person making or dealing with the patented article in an unauthorised manner is an infringer (2). Where a patent is for an invention consisting of several parts, the imitation of any part of the invention is an infringement of the patent (3). Any infringement of any part of a patent process is actionable, if that part is of itself new and useful, so that it might be the subject matter of a patent, and is used by the infringer to effect the object proposed, either wholly or partially by the patentee (4). In a patent for arrangement and a combination of parts so as to form an entire new machine, and not for any particular part of the machine, protection will not be given to a particular part, the advantages of which are altogether collateral to the invention for which protection is claimed by the specification and which would not in it self be patentable (5). Therefore protection being claimed by the specification of a patent for improvements in spherical gas lamps for railway stations and public places, for "the arrangement and combination of parts hereinbefore described and represented in the drawings annexed, in the manufacture of railway station and other lamps" :- *Held*, that the use by another of a sliding spherical door for spherical lamps, which was a feature in the patentee's lamps, and one of the parts described in its specification, was no infringement of his patent (6).

Infringement of a combination.—A patent for an entire combination is not infringed by a different combination, for the same object, of the same elements, though important, or of equivalents for them, if not a mere colourable evasion or imitation (7). If a patent is taken out for an invention by means of a combination, the use of a subordinate part of the combination is no infringement of the patent, unless such part is new and material (8). A patent for a combination of several improvement is not infringed by using a combination of some only of those improvements (9). When a combination of instrument is the invention patented, an infringement of the patent must be an infringement of the combination (10). But the mere manufacture and sale of

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(1) Indian Patents and Designs Act, ss. 14 and 29.

(2) Fulton's Patents and Designs p. 178.

(3) Smith v. L. & N. W. Ry. 2 El & B. L. 69 ; *Electric Telegraph* v. *Brett*, 10 C. B. 839=20 L. J. C. P. 123.

(4) *Bottle Envelope Co.* v. *Symour*, 28 L. J. C. P. 22.

(5) *Parkes* v. *Stevens*, 3 L. J. Ch.627.

(6) *Ibid.*

(7) *Custis* v. *Platt*, 35 L. J. Ch. 852.

(8) *White* v. *Fen*, 15 L. T. 505.

(9) *Clark* v. *Adie*. 46 L. J. Ch. 585.

(10) *Dudgeon* v. *Thompson*, 3 App. Cas. 34 ; see also *Spencer* v. *Jack*, 1 N. R. 114=8 Jur. N. S. 1165.

an article, part of a combination patent, is not an infringement of that patent even if the article has no use except for the purpose of infringement (1).

Distinct object.—A patent for a mechanical arrangement whereby a particular operation may be performed for a particular purpose, the mechanical contrivances so arranged not being new in themselves, but thus first combined for that particular purpose, is not infringed by the adoption of the same arrangement or combination of mechanical contrivances for a similar purpose, if the mode of operation is sufficiently distinct and different in principle from that which was described or claimed in the patent, and the object achieved is also sufficiently district or novel, and does not form an essential part of the patent (2).

Different Process with same Elements.—When a patent has been obtained for the use of a known substance, described by its specific name, and it is afterwards discovered that the use of two other and equally known substances will produce the same effect, though the evidence of scientific men may go to show that the two substances became, in the act of so using them, one substance described in the patent, their use will not constitute an infringement of the patent (3). But a patent for the use of a substance in a process is infringed by the use of a chemical equivalent, known to be so at the time of the use, if used for the purpose of taking the benefit of the patent, and of making a colourable variation therefrom (4). Where a patent is obtained for the use of particular chemical materials for arriving at a particular chemical result, it is no infringement to arrive at the same result by the use of other chemical materials which are not known to be equivalents for the materials mentioned in the specification at the time when the patent was obtained (5). Where a patent is obtained for a new process for arriving at a known result, it is no infringement to arrive at the same result by a different process. Where a patent is obtained for a new result, and one process of arriving at that result is described in the specification, it is an infringement to produce the same result by any process (6).

Colourable imitation of patented article.—The plaintiffs were patentees of a stopper for stoppering bottles containing aerated waters, which was described in their specification as being made "of hard wood, having a greater specific gravity than water, such was *lignum vitae* or other suitable material." The object gained by the patent was that, in filling the bottles in an inverted position, the stopper, which had been thrust into the bottle, would sink of its own weight into the neck, where it would be retained by the gases in the bottle and so stopper it. The defendant obtained a patent for a stopper of wood, originally of less specific gravity than water, to which he affixed a metal clip, which pulled the stopper down till the bottle was filled.

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(1) *Dunlop Pneumatic Tyre* v. *Moseley*, 73 L. J. Ch. 417=(1904) 1 Ch. 612.
(2) *Saxby* v. *Clunes*, 43 L. J. Ex. 228.
(3) *Urwin* v *Heath*, 5 H. L. Cas. 505.
(4) *Ibid.*
(5) *Badsche Amilin and Soda Fabrik* v. *Levinstin*, 52 L. J. Ch. 70=24 Ch. D. 156.
(6) *Ibid.*

The clip was then removed and used in filling other bottles in the same way. There was evidence that the defendant's stopper became by immersion of greater specific gravity than water: *Held*, that the defendant's stopper was a colourable imitation of that of the plaintiffs, and that the plaintiffs were entitled to an injunction (1). In determining whether a defendant has infringed the plaintiff's patent, the court will regard the substance of the invention, and if the defendant has infringed the substance of the invention, although he may have made material variations or used mechanical equivalents, an injunction will be granted (2).

Importation from Abrood.—The importation and sale in England of articles manufactured abroad according to the specification of an English patent is an infringement (3). Importation from abroad is an offence, even if the infringing articles are immediately re-exported (4). Where a patent has been granted in England for a new process for producing more cheaply a chemical product which was previously known, the importation and sale in England of this substance made abroad according to the patented process is an infringement of the patent (5). But an English merchant who in persuance of a contract made in England, delivers a patented article at a foreign port to an English importer, does not infringe, in as much as there is no actual making, using, exercising, or vending of the invention within the realm (6). In an English case it was held that the license to use a patent in Belgium did not imply permission to sell the manufactured article in England in violation of the complainant's English patent (7).

Suits for infringement of patents.—A patentee may institute a suit in a District Court having jurisdiction to try a suit against any person who, during the continuance of a patent acquired by him under this Act in respect of an invention, makes, sells, or uses the invention without his license, or counterfits it, or imitates it (8). Every ground on which a patent may be revoked under this Act shall be available by way of defence to a suit for infringement (9). A patentee shall not be entitled to recover any damages in respect of any infringement of a patent granted after the commencement of the Indian Patents and Designs Act of 1911 from any defendant who proves that at the date of the infringement, he was not aware, nor had reasonable means of making himself aware, of the existence of the patent, and the

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(1) *Barrett* v. *Vernon*. 35 L. T. 755.

(2) *Thorn* v. *Worthing Skating Rink Co.*, 6 Ch. D. 415 n.

(3) *Elmslie* v. *Boursierr* 39 L. J. Ch. 328.

(4) *British Motor Syndicate* v. *Taylor*, 17 R. P. C. 723.

(5) *Von Heydan* v. *Neustadt*, 50 L. J. Ch. 126=14 Ch. D. 230.

(6) *Saccharin Corporation* v. *Reitmeyer*, (1900) 2 Ch. 659.

(7) *Betts* v. *Wilmot*, L. R. 9 Ch. 239; *Societe Anonyme des Manufactures* v. *Tilshman's Patent*, L. R. 25 Ch. D. 1.

(8) The Indian Patents and Designs Act s. 29.

(9) *Ibid*; see also *Gopilal* v. *Lakhpat Rai*, 28 C. W. N. 343 (P. C.)=(1923) P. C. 103=18 L. W. 141=L. R. 4 P. C. 155.

marking of an article with the word "patent," "patented," or any word or words expressing or implying that a patent had been obtained for the article stamped, engraved, impressed one, or otherwise applied to the article stamped shall not be deemed to constitute notice of the existence of the patent unless the word or words are accompanied by the year and number of the patent: Provided that nothing in this section shall affect any proceedings for an injunction (1). In a suit for infringement of a patent, the court may, on the application of either party, make such order for an injunction, inspection, or account, and impose such terms and give such directions, respecting the same and the proceedings thereon, as to the court may seem fit (2). It is a settled principle of equity that where jurisdiction is taken for one purpose it will be retained in order to award full relief. Accordingly, equity, after granting a permanent injunction against the infringement of a patent, will retain the bill to decree an account of profits and sometimes to award damages. The distinction between profits in equity and damages must be carefully noted (3). "Profits are the gains or savings made by the wrong-doer by the invasion of the complainant's property right in his patent. They are the direct pecuniary benefits received and are capable of definite measurement (4)." "If an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits (5)" A bill in equity for a naked account of profits and damages against an infringer of a patent, cannot be sustained (6). "Such relief is ordinarily incidental to some other equity, the right to enforce which secures to the patentee his standing in Court (7)." Where an account is claimed, all persons claiming any interest, legal or equitable, in the patent, ought to be made parties to the action, so that the infringing defendants may not be called upon to account twice (8).

Parties to a suit for infringement of patents.—As to the parties in the action, the plaintiff might be the patentee or the assignee, or the mortgagor, either alone or joined with the mortgagee (9). Co owners of a patent should join; but one co-owner alone may take action (10). A licencee whether exclusive or general cannot sue (11). When an exclusive licence is a leave to do a thing, and a contract not to allow anyone else to do the thing but unless coupled with a grant, it confers no more than any other licence, any

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(1) The Indian Patents and Designs Act s. 30.

(2) *Ibid* S. 31.

(3) *Diamond Stone-Sawing Mach* v. *Brawn*, 166 Fed. 306.

(4) *Head* v. *Porter*, Ames Cas. in Eq. Jur. 644.

(5) *City of Elizabath* v. *American Nicholson*, 97 U. S. 126; *Bergman* v. *Macmellan*, 17 Ch. D. 423.

(6) Pom. Eq. Jur. § 1983.

(7) *Root* v. L. S. & M. S. Ry. Co, 105 U. S. 189.

(8) Kerr on injunction p. 307.

(9) Fulton's Patents and Designs p. 182; see also *Electric Telegraph Co.* v *Brett* 10 C. B. 838; *Van Gelder* v. *Sowerly* 44 Ch. D. 374

(10) *Sheehan* v. *Great Eastern Railway Co.*, 16 Ch. D. 59; Fulton's Patents and Designs p. 182; *Dunnilliff*, v. *Mallett* 29 L. J. C. P. 70; *Day* v. *Davis*, 22 R. P. C. 34.

(11) *Heah* v. *Harley*, 58 L. J. 793.

interest or property in the thing, and the licencee has no title to sue in his own name (1). But injunction was granted to restrain an infringement of a patent at the suit of the exclusive licensees of the patent ; their co plaintiffs the owners of the patent, having since the bill was filed, assigned all their interest in the patent (2). An exclusive agent for the sale of a patented article also is not entitled to sue (3). An assignment of the provisional protection acquired by the application for a patent does not constitute a legal assignment of the patent when granted, but merely confers an equitable right to the patent assigned. Accordingly, the assignee of a provisional protection cannot, before the patent has been actually assigned to him, sue for infringement of the patent without joining the patentee as a party to the action, either as plaintiff or defendant (4). The assignee and trustee of a bankrupt patentee or legal owner can sue (3). If the plaintiff has acquired the patent from some one else, and if any of the infringements have taken place during the former proprietorship, it would be advisable to join the former owner as co-plaintiff. Apparently an assignee might sue alone for damages for infringements committed before the date of his assignment if he succeeds to the rights and property of his predecessor in title (5). But it would be wise to join the assignor (6).

The defendant might be the person manufacturing the infringing goods or the user or seller. An importer into this country of goods patented here could be sued, even if a mere carrier (7). A corporation, and also its servants, can be sued for infringement (6). The directors of a company are personally responsible for the infringement of a patent by their workmen notwithstanding such infringement may be in contravention of orders (8). Where the principals of a firm which had infringed a patent, were out of the jurisdiction, and not amenable to the process of the Court, the Court restrained the manager, who, though out of the jurisdiction, had appeared to the bill (9). Foreigners in this country, as well as British subjects, are liable for the injury done by their infringing upon the sole and exclusive right granted by the Crown to patentees for inventions in conformity with the law and constitution of this country ; and the powers of the Court of Equity, which are founded on the insufficiency of the legal remedy, must be enforced against them as well as British subjects (10). In an action by P, a patentee for infringement against persons who had bought machines from B, it was proved that P had asked the purchasers to try his

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(1) *Ibid* ; see also *British Association* v. *Forester*, 86 L. J. Ch. 489=116 L. T. 433.

(2) *Renad* v. *Livinstein*, 11 L. T. 766.

(3) Fulton's Patents and Designs p. 182.

(4) *Bowden's Patents Syndicate* v. *Smith*, 73 L. J. Ch. 522=(1904) 2 Ch. 86; see also *Spennymore* v. *Catherall* 26, R. P. C. 822.

(5) *United Horse Neil* v. *Stewart*, 13 A. C. 412, per *Lord Macnaghten*.

(6) Fulton's Patents and Designs p. 183.

(7) *Washburn Manufacturing Co.* v. *Cunnard Co.*, 6 R. P. C. 398.

(8) *Betts* v. *De Vetre*, 37 L. J. Ch. 325 ; on appeal to H. L. *I e. Vitre* v. *Betts*, L. R. 6 H. L. 319.

(9) *Betts* v. *Neilson*, 12 L. T. 719.

(10) *Caldwell* v. *Vanvlissengen*, 9 Hare 428.

machine, saying that it was better machine than B's but gave no intimation that he considered B's machine an infringement of his patent, though he admitted that at the time he did consider it to be so:—*Held* that the purchaser did not depose that when they bought B's machines they were ignorant of P's patent, nor was there any reason to believe that they were ignorant of it, or that P supposed them to be so, P had not, on the ground of acquiescence or estoppel, lost his right to sue them for an infringement in using B's machines, it not being the duty of a patentee to warn persons that what they are doing is an infringement, and P's conduct not amounting to a representation that it was not an infringement (1). Where the act of infringement occurs in the course of work for the government, an action in equity will lie against the contractor, and an accounting will be granted, although an injunction will be refused for reasons of public policy (2). An action will not lie in equity against the government official, there being no right to either an injunction or profits, the remedy being at law for damages (3). One co-owner of a secret process or invention cannot, in the absence of contract, be restrained by another co-owner from using the knowledge which he possesses for his own benefit (4).

Abandonment of Infringement and Injunction.—"When it appears that prior to the commencement of suit defendant had wholly ceased to infringe and was not threatening and did not intend to infringe further, but had in good faith entirely and finally abandoned the manufacture and sale of the article, an injunction may be denied (5); but in such a case, it is held, that the defendant must set up in his answer that infringement is not further intended (6)."

Laches.—"Unreasonable delay and deceitful acts or silence of a patentee which induce an infringer to incur expenses or to become liable to losses for damages which he would not otherwise have suffered may sometimes justly induce a Court of Equity to stay his suit for an infringement or for an accounting before the time fixed by the analogous statute of limitation has expired. But delay unaccompanied by such deceitful acts or silence of the patentee, and by such facts and circumstances as practically amount to an equitable estoppel, will warrant no such action (7)". A special injunction, on notice, to prevent the infringement of a patent, was refused on the ground of delay, notwithstanding the Court had a strong impression in favour of the plaintiff's right. An injunction was refused and the plaintiff was put to establish his legal rights (8). Where an interlocutory injunction to restrain an infringement of a patent was moved for in a suit in which the bill was filed in July, and it appeared that the plaintiff wrote complaining of the infringement in the preceding November,

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(1) *Proctor* v. *Bennis*, 57 L. J. Ch. 11.
(2) *International Curtis Marine* v. *William Cramp etc.*, 211 Fed. 124.
(3) *Belknap* v. *Scheld*, 161 U. S. 10.
(4) *Heyl Dia* v. *Edmond's*, 81 L. T. 579.
(5) *General Electric Co.* v. *New England* 123 Fed. 310.
(6) *Cayuta Wheel & Foundry Co.* v. *Kenedy Valve*, 127 Fed. 355=Ames. Cas. in Eq. Jur. 638.
(7) *Ido* v. *Trorlicht etc., Carpet Co.*, 115 Fed. 137; Pom. Eq. Jur. § 1990.
(8) *Bridson* v. *Benecke*. 12 Beav. 1.

and knew of the defendant's proceedings in the previous August, the injunction was refused on the ground of delay (1). Where the patent was obtained in 1846, the alleged infringement of it took place in 1847, and the bill was filed for more than two years afterwards, the injunction was refused (2). The owners of a patent for a peculiar mode of manufacturing iron wheels for railway carriages having discovered that several railway companies were violating their patent, brought an action for damages against one of such companies only, but did not in any way give notice to the other companies to discontinue their infringements of the plaintiff's right. In the action the validity of the patent was disputed, and it was not decided until three years after the patent had expired, when a verdict was given for the plaintiffs, with large damages. Thereupon the plaintiffs filed a bill for an account of profits, and an injunction against another of the companies who had infringed their patent, complaining of acts done nine years before: *Held* that the delay was not excused by the tendency of the acton, but was fatal to the plaintiff's case (3). In such a case, the rule as suggested by *Wood V. C.* in *Bovil* v. *Crate* (4) should be followed. In that case the learned Vice-Chancellor said: "After getting information of case after case of infringement, the patentee might select that which he thought best in order to try the question fairly, and proceeding against that case to obtain his interlocutory injunction. He might write at the same time to all the others who were in *simili casu* and say to them, 'Are you willing to take this as notice to you that the present case is to determine yours' Otherwise I shall proceed against you by way of interlocutory injunction, and if you do not object on the ground of delay, I do not mean to file bills against all of you at once." "If the complainant has been diligent" says *Prof. Pomeroy* "insuing other infringers, or even if he has been conducting a single test case before proceeding against others, the defence of laches will not prevail. He is not obliged to sue everyone at once (5)." Whether there is laches or not is to be determined on the facts of each case and should usually be left to the final hearing. (6). The fact that the defendant's trespass has been long continued is no reason why it should not be finally enjoined (5)

Complainant's delay in applying for an injunction seldom has a greater effect upon his interest in the proceeding than to post-pone the granting of preventive relief until the final hearing, though in some cases such delay when unaccounted for may deprive him of the benefit of a decree for an

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(1) *Bovill* v. *Crate*, L. R. 2. Eq. 388; see also *Leonhardt* v. *Kaehe*, 11 R. P. C. 534; *North British Rubber* v. *Gormully Co.*, 12 R. P. C. 17; *Gillette* v. *Gamage*, 24 R. P. C. 3, 4.

(2) *Baxter* v. *Combe*, 1 Ir. Ch. R. 284.

(3) *Smith* v. L. & S. W. 1 Kay 408, see also *Reliance Rubber Co.* v. *Reliance Tyre Co.*, 42 R. P. C. 99.

(4) L. R. 1 Eq. 391, approved in *North British Rubber* v. *Gormully Co.* (1895) 12 R. P. C. 21 cited in Kerr on Injunction p. 307.

(5) Pom. Eq Jur. § 1990.

(6) *Ibid*; see also *United Telephone* v. *Equitable Telephone*, 5 R. P. C. 233.

accounting. Thus where it was shown by the defendant that he had used the patented apparatus for nearly three years before any claim was made by the plaintiff, it was held that the injunction must be withheld, untill the plaintiff established satisfactorily the point of acquiescence by the public, and explained how it was that he allowed the defendants' machine to be used so long without interference (1). Independent of the questions of abandonment and simple laches in bringing an action for infringement, a complainant may be estopped against either a particular defendant or all persons by reason either of his general conduct with reference to the property interest in the invention or on account of specific act of acquiesence imputable to him (2).

Restraining order.—Three varieties of injunction may be granted. (i) a temporary restraining order, usually accompanying an order to show cause; (ii) a preliminary injunction; (iii) the final injunction which is the object of the suit and which is usually granted by an interlocutory decree accompanied by an order of reference to compute damages (3).

Temporary Restraining order.—Under order 39, rule 3, a temporary restraining order can be granted *ex-parte* and upon showing of immediate and irreparable loss to the applicant before the matter can be heard upon notice (4). Injunctions are granted *ex parte* and before the appearance of the defendant to the bill, in urgent cases of threatened mischief, and also where notice of an intention to apply for an injunction might lead to the commission of the act before the time for hearing a motion upon notice (5). But the court if possible should always require notice, however short to be given (6). In such a case "the plaintiff must also swear at the time of making the application that he believes that the invention is new and had never been practised in the kingdom at the date of the patent (7).

Temporary Injunction—Matters to be proved—To justify a preliminary injunction it is not required that the infringement should be proved beyond a reasonable doubt (8). But "a preliminary injunction will be granted only when the Court is satisfied: (i) That the patent is valid; (ii) "That the plaintiff is the owner of the legal or equitable interest therein; and (iii) That the defendant is about to commit an act of infringement. It will be denied if reasonable doubt exist upon any one of these points, and even when they are established if other circumstances render its allowance inexpedient or inequitable. Upon an application for a preliminary injunction, an exhaustive hearing as to these essential points is not, however, usually permitted. The court will not anticipate the trial on the merits by an extended examination of the testimony then to be produced, but in cases involving obscure propositions of law, or disputed and intricate questions

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(1) Spelling on Injunctions § 833.
(2) Spelling on Injunctions etc. § 836.
(3) Pom. Eq. Jur. § 1991
(4) *Burma Oil Co.* v. *Sampson*, 64 Ind. Cas. 534=13 Bom. L. R. 227.
(5) Joyce on Injunction p. 1261.
(6) *Hari* v. *Secy. of State*, 27 B. 424, 451.
(7) Kerr on Injunction p. 323.
(8) *Doughty* v. *West*, 2 Fisher, 553.

of fact, will refuse the injunction until these matters came up for investigation in their proper order. This necessary attitude of the courts towards these applications has led to the adoption of peculiar rules of evidence by which the plaintiff is required to furnish certain special forms of proof, or in their absence to await the final hearing before invoking this preventive power (1)." In case of a simple machanism a bare inspection of the two machines is often enough to show an infringement for the purpose of preliminary injunction (2).

Grant of Temporary Injunction.—The plaint usually contains a prayer for a preliminary or temporary injunction. The prayer should be supported by affidavits. As a general rule, it is said: "The purpose of the interlocutory writ is not to conclude the question of right, but to protect against material injury during the litigation. In a patent case, to warrant the writ, not only must the infringement be without reasonable doubt, but the rights of the patentee must be clear. Failing prior adjudication in favour of the validity of the patent, there must be shown such continued public acquiescence in the exclusive right asserted as raises a presumption of validity; a presumption not arising from the letters patent, unless accompanied by public acquiescence (3)." If the patent is of some age and its novelty has not previously been challenged, and a *prima facie* case of infringement is established, the plaintiff is, generally speaking entitled to an interlocutory injunction (4). Where a defendant to a bill filed to restrain an infringement of a patent by his answer denies the novelty of the invention, the plaintiff in support of a motion for an injunction, must make a clear affidavit of his belief in the novelty of the invention (5). Where the plaintiffs were owners of a type-founding patent, and the defendant was printer, who used types alleged to be colourable imitations of the type patented by the plaintiff, on a bill for an injunction Vice-chancellor Sir W. P. Wood held that the court had jurisdiction to order the defendant to deliver a sample of type to the plaintiffs for analysis; and that laches sufficient to defeat the plaintiffs' right to an interlocutory injunction was no bar to an order on the same motion for inspection and delivery of samples (6). Where a patent had been in force for twelve years, and has been the subject of four suits against different persons, all of which terminated favourably to the patentee, and in two of which verdicts had been given in favour of the validity of the patent, the court held that in a fifth case the patentee was entitled to an injunction pending

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(1) Rob. on Patent § 1173.
(2) Speling on Injunctions etc. § 817.
(3) *Standard Elevator* v. *Game Elevator* 56 Fed. 718.
(4) *Shillito* v. *Larmath*, 2 R. P. C. 1; *Dudgeon* v. *Thompson*, L. R. 3 App. Cas. 34; Fulton's Patents and Designs p. 184; see also *Saccharin* v. *Natural Saccharin Co.*, 26 R. P. C. 654; *Bonatta* v. *Espir*, 43 R. P. C. 159.
(5) *Mayor* v. *Spence*, 1 J. & H. 87; Joyce on Injunction p. 239.
(6) *Patent Type Foundry Co.*, v, *Walter*, Joh. 727.

the trial of the legal right, although a fresh fact was brought forward tending to impeach the novelty of the invention (1). Long and exclusive enjoyment under letters patent entitled a party to an injunction until an action could be tried at law (2). And where there had been such length of exclusive enjoyment under a patent, the court granted an injunction in the first instance without previously putting the party to establish his right by an action at law, but otherwise where the patent is recent (3). The Court will interfere by interlocutory injunction in support of a patent right, where the patent is an old one, and there has been long and undisturbed enjoyment of it, or where its validity is established else where, and the court sees no reason to doubt the result, or where the conduct of the defendant has been such that as against him there is no reason to doubt the validity of the patent (4). The fact of an interdict having been granted against an infringer in Scotland is, as against him sufficient *prima facie* evidence of the validity of a patent for the United Kingdom to warrant interlocutory injunction (5). It depends on the degree of doubt which exists as to the question of validity and infringement whether the court will grant an *in terim* injunction. The degree of convenience and inconvenience by granting an injunction will always be carefully considered (6). In a suit to restrain the infringement of a patent relating to roller skates, the plaintiff moved for an injunction against the defendant until the hearing : *Held*, that the plaintiff was entitled to an injunction upon giving an

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(1) *Newall* v. *Wilson*, 2 De. G. M. & G. 282 ; see also *Heine* v. *Julius*, 21 R. P. C. 513.

(2) *Curtis* v. *Cutts*, 8 L. J. N. S. Ch. 184.

(3) *Hill* v. *Thompson*, 3 Mer. 622 ; Joyce on Injunction p. 245 ; see also *Holophane* v. *Berend*, 15 R. P. C. 19 ; *Spencer* v. *Holt*, 20 R. P. C. 144 ; *Smith* v. *Grigg Ltd.*, (1924) 1 K. B. 658 ; *Truntner* v. *Patmore*, 29 R. P. C. 60 ; *Caldwell* v. *Vanvlissengen*, 21 L. J. Ch. 97.

(4) *Dudgeon* v. *Thomas*, 30 L. T. 244 on appeal 3 App. Cas. 34.

(5) *Ibid.* In *Potter* v. *Whitney*, 3 Fisher, 77, *Lowell J.* said : "Although it is the duty of the judge, in every case of this nature, where the defendant has not been a party to any former suits, to examine the case anew, and exercise his discretion upon the questions presented yet when the questions are in fact the same as in former cases, he cannot but admit those decisions as having great weight, as much as in any other case arising for instance, in admiralty or at common law, in which the point in controversy has been passed upon and decided." In *Page* v. *Homes Burglar Telegraph Co.*, 2 Fed. Rep. 330, *Bhatchford J.* said : "It is well settled that after the validity of a patent has been established in a suit, and notwithstanding the presumption thereby raised that the patent is valid, it may always be shown in another suit on the patent against another defendant, and even in answer to an application for a preliminary injunction in such suit, that the right claimed by the claimant in the new suit was not, either as to its nature or its extent, fairly in controversy in the former suit, or that material facts were not known or considered when the former suit was tried, or that there are relevent matters which were not adjudicated in the former suit." Spelling on Injunction, and other Extra-ordinary Remedies § 810, The English practice is also the same, Vide Kerr on Injunction p. 811 citing *British Thomsox Houston Co.*, v. *B. T. Electric Lamp & Co*, 39 R. P. C. 167. And in order that a prior decision may avail the complainant, it must be shown to have involved the exact device or contrivance claimed by him in the suit where it is offered. Spelling on Injunctions etc. § 310.

(6) *Birdson* v. *Mc Alpine*, 8 Beav 229.

undertaking as to damages. In as much as the defendant's trade was only a new one, there would be less hardship in stopping it and requiring the plaintiff to give an undertaking as to damages than in compelling the plaintiff to rely upon the defendant's undertaking to keep an account of his sales and patents (1).

An *interim* injunction will not be granted to restrain the infringement of a patent several years old but never established by legal proceedings, unless there has been an actual user of the patent for a considerable time (2). The court will not, in the first instance, interfere by injunction to restrain the infringement of a patent unless there has been long and uninterrupted enjoyment under it, but will direct an action to be brought to try the legal right. Delay in filing the bill is a ground of refusing the injunction (3). In *Damport* v. *Jepson* (4), *Lord Justice Turner* said : "Where there has been long and quiet enjoyment under a patent, the validity of which has been questioned and established after considerable litigation with another defendant, the court will not refuse an interlocutory injunction to restrain infringement of it merely on the ground that the defendant, if ultimately successful, will have been more injured by its being granted than the plaintiff, if ultimately successful, will have been by its having been refused." So where there is a *prima facie* case of an infringement of a patent, the length of time for which the patent has been enjoyed by the patentee will influence the court in granting an injunction against the parties who are alleged so to have infringed his rights (5). Although it is the ordinary rule of the court not to grant an injunction, unless either the validity of a patent has been established, or the patent has been undisputed for many years, the circumstances of the case may be such as to induce the court to depart from the rule (6). But where a patent is of long standing, yet if, from the nature of the alleged invention, or the conflicting evidence as to its novelty, its validity, appears to be doubtful, or if the evidence of exclusive possession is not satisfactory, the court will not grant an injunction until the title has been established (7). So the patentee, in order to entitle himself to an *interim* injunction on the ground of previous enjoyment, must show that there has been an actual public user of his patent (8). But as regards the infringement of a recent patent, it is not a matter of course to require the plaintiff to establish his right at law, but the court will have regard to the whole case made upon the pleadings and by the evidence (9). A licensee during the continuance of the license, is estopped from disputing the licensor's patent (10). And though, in *Danger field* v. *Jones* (11),

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(1) *Plimpton* v. *Piller*, 4 Ch. D. 286.
(2) *Plimpton* v. *Malcolmson*, 44 L. J. Ch. 257.
(3) *Baxter* v. *Comb*, 1 Ir. Ch. 284 ; *Caerties* v. *Cutts*, 8 L. J. Ch. 184 ; *Harner* v. *Plane*, 14 Ves. 182.
(4) 4 D. F. & J. 440.
(5) *Davenport* v. *Richard*, 3 L. T. 503.
(6) *Renard* v. *Levinstin*, 10 L. T. 94 affirmed 10 L. T. 177.
(7) *Collard* v. *Allison* 4 Myl. & C. 487.
(8) *Plympton* v. *Malcolmson*, L. R. 20 Eq. 37, 38 ; Joyce Doctrines p. 147.
(9) *Clark* v. *Ferguson*, 1 Giff. 184 ; Joyce Doctrines p. 147.
(10) *Crossley* v. *Dixon*. 10 H. L. 293 ; Vide s. 116 of the Evidence Act.
(11) 13 L. T. N. S. 142.

upon a bill to restrain the infringement of a patent, where the defendants had taken out a license from the plaintiff to use the machines which had afterwards and prior to the hearing of the cause been revoked, Vice-chancellor Sir W. Page wood said, he did not mean to say that the taking the license bound the defendants in any way, or that it operated by way of estoppel ; yet this observation, taken with the decision above mentioned in the case of *Crossley* v. *Dixon*, and the other cases (1) pust merely imply that after the license is withdrawn there is then no longer an estoppel (2).

A defendant may often avoid being subjected to an interlocutory injunction, by under taking to keep an account pending trial (3). A patentee can sustain an action for an injunction to restrain a threatened infringement of his patent, even if no actual infrringement has taken place (4). In an action for the alleged infringement of a patent an order was made restraining the plaintiff until judgment in the action from threatening legal proceedings in respect of such infringement: *Held* that the order was in the nature of a final order, and therefore an undertaking as to damages ought not to be inserted (5). It is the rule of a court of equity not to grant perpetual injunction to restrain the infringement of a patent, unless the legal validity of the patent has been conclusively established (6). The court in a suit respecting the infringement of a patent, will grant an issue to determine whether the invention described in the specification is actually that for which the patent was granted (7). An injunction will be refused when the allegations of exclusive possession are avoided by averments and proof of a more peaceable and exclusive possession by defendants under patents purchased and used by them (8).

Irreparable Injury—Compensation in damages—Defendant's solvency.—It is not a matter of course, upon the presentation of a patent which *prima facie* established the right to the thing patented, accompanied by an allegation that the defendant is violating it, that a preliminary injunction will issue ; but it must appear likewise that if the writ of injunction does not now issue the complainants will be irreparably injured, and that no subsequent decree of the Court can sufficiently ascertain and make good the damages (9). While it is seldom a decisive question, on a motion for injunction, whether the defendant is responsible for profits and damages if they are recovered (10), yet when the defendants are fully responsible, and the plaintiff can be adequately compensated, irreparable damages must be shown to warrant an

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(1) *Bowman* v. *Taylor*, 2 A. & E. 278 ; *Baird* v. *Nilson* 2 Cl. & E. 726 ; *Lawes* v. *Purcer*, 6 E. & B. 930 ; *Hall* v. *Conder*, 2 C. B. N. S, 22 ; *Norton* v. *Brooks*, 7 H. & N. 499 ; *Grover* v. *Millard*, 8 Jur. N. S. 713.

(2) Joyce on Injunction p. 236.

(3) *Leonhardt* v. *Kalle*. 11 R. P. C. 534; *Zenith Motors* v. *H. Collier*, 28 R. P. C, 563.

(4) *Frearson* v. *Loc*, 9 Ch. D. 48.

(5) *Fenner* v. *Wilson*, 62 L. J. Ch. 984 =(1893) 2 Ch. 656.

(6) *Hills* v. *Evans*. 31 L. J. Ch. 457.

(7) *Needham* v. *Oxley*, 2 N. R. 232.

(8) *Parker* v. *Sears*, 1 Fish. Pat. Cas. 93.

(9) *Pullman* v. *Battemore*, 5 Fed. Rep. 72.

(10) *Morris* v. *Lowell*, 3 Fisher, 67.

injunction (1). These principles have no application upon the final hearing, if then the complainant's title and the infringement be clearly established. He will then be entitled to an injunction unless, upon some peculiar equitable grounds, a bond and accounting are required in lieu of injunction (2). But even in such cases the rule laid down by *A. L. Smith L. J.* in *Shelfer* v. *City of London Electric Lighting Co.* (3), should be borne in mind, namely that if the injury to the plaintiff's legal right (*i*) is small, (*ii*) is capable of being estimated in money, (*iii*) can be adequately compensated by a small money payment, and (*iv*) the case is one in which it would be oppressive to the defendants to grant an injunction, damages in lieu of injunction may be awarded. But there may be cases in which, though these four requirements exist, the defendant by his conduct has disentitled himself from asking that damages may be assessed in substitution for an injunction (4).

Abandonment of Patent.—No injunction will issue if the plaintiff has abandoned the invention, or abandoned his rights under the patent (5). But delay in bringing suit is not abandonment; nor can plaintiff be prejudiced by any acquiescence in the infringement not calculated to induce the reasonable belief that he intends to dedicate the invention to public use (6).

Complainant's legal right—patent as evidence.—In a suit for infringement of patents, every ground on which a patent may be revoked under the Indian Patents and Designs Act of 1911 shall be available by way of defence (7). So the extraordinary relief of injunction is never granted as a matter of right on filing a bill and producing a patent. The patent itself, although in a certain sense it is *prima facie* evidence of the validity of the grant, is never sufficiently strong *per se* to warrant the granting of a perpetual injunction on a mere motion (8). The title of the patentee must, in order to obtain this relief, always be strengthened by exclusive possession for some period of time, or by an adjudication in which the validity of the patent has been sustained (9). The sanction or opinion of the patent office in favour of his right is not alone sufficient, though that opinion, since the laws were passed requiring some examination into the originality and utility of inventions, possesses some weight. But the complainant must furnish some further evidence of a proprietary right; and though it need not be conclusive evidence, else additional hearing on the bill would be thus anticipated and superseded yet it must be something stronger than the mere issue however careful and public, of the patent conferring an exclusive right; as in doing that there is no opposing party, no notice, no

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(1) *New York Grape* v. *American Grape*, 10 Fed. Rep. 835.

(2) Spelling on Injunction and other Extra ordinary Remedies § 831.

(3) (1895) 1 Ch. 287=64 L. J. Ch. 216.

(4) *Shelfer* v. *City of London Electric Lighting Co.* (1895) 1 Ch. 287.

(5) *Wyeth* v. *Stone*, 1 Story, 273.

(6) Spelling on Injunction and other Extra ordinary Remedies § 835.

(7) *Vide* s. 29 of the Indian Patents and Designs Act s. 29.

(8) Kerr on Injunction pp. 320, 321.

(9) *Newall* v. *Wilson*, 2 De. G. M. & G. 282; *Heine Golly & Co.* v. *Julius Norden*, 21 R. P. C. 513; *Pneumatic Tyre* v. *Marwood*, 13 R. P. C. 347.

public use, no trial of his right with any one (1). The general rule as to the production of additional evidence may be thus stated. If the patentee, after the procurement of his patent confessing an exclusive right, proceeds to put that right into exercise or use for a considerable period without its being disturbed, that circumstance greatly strengthens the probability that the patent is valid, and renders it so likely as alone often to justify the issue of an injunction to aid it (2). After that it becomes a question of public policy, no less than private justice, whether such a grant of a right, exercised and in possession so long, ought not to be protected until avoided by a full hearing and trial (3). Such possession and enjoyment, aided by the presumptions arising from the patent itself, are usually regarded as sufficient to warrant an injunction to restrain infringement (4). The old English chancery practice in patent case where relief by injunction is demanded was thus explained by *Lord Cottenham* in *Bacon* v. *Jones* (5): "When a party applies for the aid of the Court, the application for an injunction is made either during the progress of the suit or at the hearing, and in both cases, I apprehend, great latitude and discretion are allowed to the Court in dealing with the application. When the application is for an interlocutory injunction, several courses are open. The Court may at once grant the injunction, *simpliciter*, without more,—a course which, though perfectly competent to the Court, is not very likely to be taken, where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, the more wholesome, practice in such a case, of either granting an injunction and at the same time directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the meantime keeping an account (6). Which of these several courses ought to be taken must depend entirely upon the discretion of the Court, according to the case made. When the cause comes to a hearing, the Court has also a large latitude left to it; and I am far from saying that a case may not arise in which, even at that stage, the Court will be of the opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right, and of the evidence by which it is established,—these and other

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(1) Spelling on Injunction 806; Kerr on Injunction pp. 320, 321.

(2) *Harner* v. *Plane*, 14 Ves. 132; *Hill* v. *Thompson*, 3 Meriv. 622. The reason for this rule, if it may be termed as a rule, is that where there has been long enjoyment under the patent the public had the opportunity of controlling the patent and the fact of their not having done so, successfully affords at least *prima facie* evidence that the title of the patentee is good; and the Court therefore interferes before the right is established at law. *Coldwell* v. *Vanvlissengen*, 9 Hare 415.

(3) Spelling on Injunction § 807.

(4) *Potter* v. *Muller* 2 Fisher 465, *per Leavitt J.*

(5) 4 Mylne & Craig. 433, 436.

(6) Where temporary injunction is not granted the defendant is usually required to keep account; vide *Bovill* v. *Crate*, 1 Eq. 388; *Spencer* v. *Holt*, 20 R. P. C. 142; *Zenith Motor* v. *Collier Co*, 28 R. P. C. 563; *Bonilla* v. *Esher*, 43 R. P. C. 159; Kerr p. 320.

circumstances may combine to produce such a result; although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless it is a course unquestionably competent to the court, provided a case be presented which satisfied the mind of the judge that such a course if adopted will do justice between the parties. Again the Court may at the hearing do that which is the more ordinary course; it may retain the bill, giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course, the propriety of which must also depend upon the circumstances of the case, that of at once dimissing the bill." In the above case *Lord Cottenham* described the practice of the old Chancery Court of England, but the judgment is of utmost importance as a guide in granting temporary injunction.

Pepetual Injunction.—The final injunction is the end and object of the suit. As the infringement of a patent is a constantly recurring grievance which cannot be adequately prevented but by an injunction, it is quite plain that if no other remedy could be given than an action at law for damages, the inventor would be ruined by the necessity for perpetual litigation (1). A decree for damages and profits would fall far short of adequate redress. The complainant is entitled to an injunction as well as to an accounting, and the latter is but incidental to the former (2). Upon the invasion of a patent right, the party complaining has a right to the protection of an injunction, although the other party may promise to commit no further infringement, and may offer to pay the costs of preparing the bill (3). This is no reason why an injunction should not issue and be made perpetual. The complainant in such a case is not obliged to rest his interests on the mere asseveration of the party that he will not repeat the act of infringement. Having once been a wrong-doer, the law supposes the possibility of his being so again, and will impose a proper restraint to prevent the repetition of the wrongful act. And where an injunction has been denied on the ground that the defendant before suit abandoned the infringement, and has since been making a different infringing device, a new injunction will be granted covering all the devices (4). To entitle a patentee to preventive relief it is not required that acts injurious to his interest in the invention shall have already occurred or be in progress at the time of his application. An injunction will be granted before a wrong is committed when the right is clear and the wrong is threatened, or when the wrong has once been committed and there is good reason to fear its repetition (5). To authorize an injunction, however, the complainant must make it clearly to appear that the defendant

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(1) Story's Eq. Jur. § 931.

(2) *Alling ton & Curtis* v. *Booth*, 78 Fed. 878.

(3) *Greary* v. *Norton*, 1 De G & Sm. 9. "A infringes B's patent. If the Court is satisfied that the patent is invalid and has heen infringed, B may obtain an injunction to restrain the infringement." —Vide ill. (w) to s. 54 of the Specific Relief Act.

(4) Spelling on Injunctions § 829.

(5) Spelling on Injunctions § 825; see also *Frear son* v. *Loe*, 9 Ch. D. 48; *Proctor* v. *Bayley* 42 Ch. D. 390.

intends to make, use, or sell, or authorize, or directly profit by the manufacture, use or sale of some art or instrument identical with that covered by his patent (1). But where the defendant has put in a defence denying infringement and states that if he ever had used machines infringing the patent such user had been discontinued long before the action, as the plaintiff knew, and that the defendant never threatened or intended and did not threaten or intend to use any apparatus infringing the patent: *Held* that in such a case no injunction should be granted (2). Where the owner of a patent makes an assignment pending a suit by him to restrain an infringement, and for damages, and there is no proof or claim of infringement subsequent thereto, the assignee cannot maintain a suit against the defendant, and should not therefore be joined as complainant (3) The Court will not entertain a bill for the mere purpose of giving relief in damages for the infringement of a patent, when the bill has been filed so immediately before the expiration of the patent as to render it impossible to have obtained an interlocutory injunction (4). No injunction can be granted in respect of the patent which has expired (5). But in America where the patent was in force at the time the bill was filed, and the complainants were entitled to a preliminary injunction at that time, the jurisdiction of the Court is not defeated by the expiration of the patent by lapse of time before final decree (6). "And the weight of authority "says Mr. Spelling "is to the effect that an injunction should issue after the patent has expired, when necessary to prevent the use or sale of articles made without authority for that purpose while the patent was in force. But the sale of an article made under the patent with the consent of the patentee cannot be enjoined after the patent expires. And after a patent, the infringement of which has been enjoined, expires, the injunction will usually be dissolved without reference to such articles as were manufactured while the patent was alive. The patentee may recover damages for such acts of infringement (7)."

The accepting in the ordinary way of business of an order to execute repairs amounting to making a new article is evidence of intention to continue doing so, which may justify an injunction (8). A foreign manufacturer, who manufactures abroad, and sends by post at their request to a firm in England articles which infringe an English patent, does not himself infringe the patent, and is not liable to an injunction restraining infringement in an action by the owner of the English patent (9).

In an action for infringement of a patent the plaintiff obtained judgment for an injunction, with an order for an inquiry as to damages. Pending the

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(1) *Brooks* v. *Miller*, 28 Fed. Rep. 615.
(2) *Proctor* v. *Bayley*, 59 L. J. Ch. 12 =42 Ch. D. 390.
(3) *New York Belting* v. *New Jersey Cor—Spring*, 47 F 504; Spelling on Injunctions etc. § 834.
(4) *Betts* v. *Gallais*, L. R. 10 Eq. 392.
(5) *Sacharin* v. *Quiency*, (1900) 2 Ch. 246.
(6) *Beedle* v. *Bunnet*, 7 S. Ct. 1090.
(7) Spelling on Injunctions etc. § 837.
(8) *Dunlop Pneumatic* v. *Neal*, (1899) 1 Ch. 807.
(9) *Badische* v. *Bath Chemical*, (1898) A. C. 200.

inquiry as to damages the defendants obtained an order for the revocation of the patent: *Held* that on the inquiry as to damages, the defendants were estopped from denying the validity of the patent (1). Where in an action for infringement of a patent certain claims in the specification are found to be valid, and infringement is proved, and there are no findings of invalidity or otheswise on other claims, the injunction will restrain infringement of the whole of the patent, and not merely the claims proved to be valid (2).

Costs—A patentee is entitled to full costs, at the discretion of the judge, in any suit to protect his rights under the patent, although the validity of his patent is not disputed, and has, in fact, been established in prior suits (3). The directors of a limited company, acting as its agents, infringed a patent, and were made defendants, together with the company, to a suit the bill in which prayed for an injunction and costs: *Held* that the decree must be made against the directors as well as the company, and that the directors were personally liable to pay the costs (4). Where a defendant in an action for infringing a patent denied by his pleading the fact of infringement, which issue was decided against him, but judgment was given in his favour, on the ground that a similar article to that of the plaintiff had been made and used before the date of the plaintiff's patent. *Held* that the defendant was not entitled to the cost of the issue of infringement (5).

Application for Registration of Designs.—"(1) The controller may, on the application of any person claiming to be the proprietor of any new (6) or original design not previously published in Btitish India, register the design under this Part.

(2) The application must be made in the prescribed form and must be left at the patent office in the prescribed manner, and must be accompanied by the prescribed fee.

(3) The same design may be registered in more than one class, and, in case of doubt as to the class in which a design ought to be registered, the controller may decide the question.

(4) The Controller may, if he thinks fit, refuse to register any design presented to him for registration; but any person aggrieved by any such refusal may appeal to the Governor General in Council.

(5) An application, which owing to any default or neglect on the part of

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(1) *Poulton* v. *Adjustable Cover*, (1908) 2 Ch. 430

(2) *Merganthaler Lino type* v. *Intertype*, 42 T. L. R. 682=42 R. P. C. 239.

(3) *Davenpart* v. *Ry land*, 35 L. J Ch. 204.

(4) *Betts* v. *De Vetre*, 11 Jur. (N. S.) 9.

(5) *Phillips* v. *Irel Cycle*, 62 L. T. 392.

(6) Though the shape of a band could not be said to be new and original, the application of it to a watch to be worn on the wrist might be for the purpose and use of the bracelet that the design in question might be said to be original. *Earnst Otto* v. *Controller of Patents and Designs*, 22 C. W. N. 580=45 C. 606=48 Ind. Cas. 437. There was novelty in applying what was an old thing to new use. If that was so, the design should be protected, provided, it was not merely, to use the words of the cases, analogous. *Ibid. Per Woodroffe J.* The test of the novelty is the eye of the judge. He must place the two designs side by side and see whether

the applicant, has not been completed so as to enable registration to be effected within the prescribed time, shall be deemed to be abandoned.

(6) A design, when registered, shall be registered as of the date of the application for registration (1)." But registration under s. 43 of the Indian Patents and Designs Act, 1911 is not effective unless the design or configuration, sought to be protected is new and original and not of a pre-existing common type. An "invention" has been defined to mean any manner of new manufacture and includes an improvement; but every improvement need not be a new invention. Section 38 lays down that an invention shall not be deemed to be a new invention if it was before the date of the application for a patent thereon publicly used in any part of British India or made publicly known in any part thereof, unless such public knowledge was derived by fraud and the public user was not acquiesced in for a period of more than six months (2). In *Elgin Mills* v. The *Muir Malls Co.*, (3) it was held that a combination of materials would not be entitled to protection unless it was a combination of a character which involved the exercise of any special inventive power or had some originality about it.

"Nothing in my opinion is a valid design" says *Moulton L. J.* in *Bayer's Design* (4) "but that of which full knowledge is given when you have once shown to the eye what your design is. It may be shape or configuration that is given by a specimen or by a proper drawing, and the eye can see it, and the eye can recognise whether it has been imitated. It may be a pattern to which the same applies. It may be an ornament to which the same applies. 'But in my opinion nothing beyond that, can rightly be called a design within the meaning of the Statute."

Copy right on Registration.—"(1) When a design is registered, the registered proprietor of the designs shall, subject to the provisions of this Act, have copy right in the design during five years from the date of registration.

"(2) If, within the prescribed time before the expiration of the said five years application for the extension of the period of copy right is made to the controller in the prescribed manner the controller shall, on payment of the prescribed fee, extend the period of copy right for a second period of five years from the expiration of the original period of five years.

"(3) If within the prescribed time before the expiration of such second

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the one for which novelty is claimed is new. *Ibid* per *Sanderson C. J.* "The design must be new or originial with reference to the kind of article for which it is registered....." *Per Lindley L. J in Clark's Design*, 13 R. P, C. 351. There can be no originality or novelty in a design which consists of a description of the article itself as a particular arrangement of old and well-known things, and the registration of such a design is invalid. *Repetition Wood work* v. *Briggs*, 151 L. T. 556. The principles by which the Court is guided in dealing with patent cases are not applicable to the cases of registered designs, and a design must be an exact reproduction of the registered design to come within the Act; a merely colourable alteration is sufficient to take it out of the Act. *Gramophone Co.* v. *Magazine Holder*, 104 L. T. 259=28 R. P. C. 221, per *Lord Halsbury*.

(1) Section 43 of the Patents and Designs Act of 1911.

(2) *Ram Sahai* v. *Angnoo*, 77 Ind. Cas. 517.

(3) 17 A. 490.

(4) 24 R. P. C. p. 77.

period of five years, application for the extension of the period of copy right is made to the controller in the prescribed manner, the controller may, subject to any rules under this Act, on payment of the prescribed fee, extend the period of copy right for a third period of five years from the expiration of the second period of five years (1)."

Effect of disclosure on copy right.—The disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design, and the disclosure of a design in breach of good faith by any person other than the proprietor of the design, and the acceptance of a first and confidential order for goods bearing a new or original textile design intended for registration, shall not be deemed to be a publication of the design sufficient to invalidate the copy right thereof if registration thereof is obtained subsequently to the disclosure or acceptance (2)."

Entry of assignments and transmission in registers.—"(1) Where a person becomes entitled by assignment, transmission or other operation of law to a patent or to the copyright in a registered design, he may make an application to the controller to register his title, and the controller shall, on receipt of such application and on proof of title to his satisfaction, register him as the proprietor of such patent or design, and shall cause an entry to be made in the prescribed manner in the register of the assignment, transmission or other instrument affecting the title

(2) Where any person becomes entitled as mortgagee, licensee or otherwise to any interest in a patent or registered design, he may make application to the controller to register his title, and the controller shall, on receipt of such application and on proof of title to his satisfaction, cause notice of the interest to be entered in the prescribed manner in the register of patents and designs, as the case may be, with particulars of the instrument, if any, creating such interest ;

"(3) The person registered as the proprietor of a patent or design shall, subject to the provisions of this Act, and to any rights appearing from the register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with, the patent or design, and to give effectual receipt, for any consideration for any such assignment, license, or dealing."

(4) Except in the case of an application made under section 64, a document or instrument in respect of which no entry has been made in the register in accordance with the provisions of sub-sections (1) and (2) shall not be admitted in evidence in any Court in proof of the title to a patent or to copyright in a design or to any interest therein, unless the Court, for reasons to be recorded in writing, otherwise directs

Provided that any equities in respect of the patent or design may be enforced in like manner as in respect of any other moveable property (3).

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(1) The Indian Patents and Designs and Designs Act (II of 1918). Act s. 47.

(2) Vide s. 49 of the Indian Patents Act s. 63.

(3) The Indian Patents and Designs Act s. 63.

An assignment should be entered as early as possible, otherwise his right may be jeopardised (1). The assignee has a right to sue for infringement (2). In the absence of registration a suit against a person who has no notice of assignment is not maintainable (3). By registration the assignment dates back from the date of the assignment (4).

Infringement of Design.—"(1) During the existence of copy right in any design, it shall not be lawful for any person—

(*a*) for the purpose of sale, to apply, or cause to be applied, to any article in any class of goods in which the design is registered, the design or any fraudulent or obvious imitation thereof, except with the license or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied; or

(*b*) knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale that article.

(2) If any person acts in contravention of this section, he shall be liable for every contravention—

(*a*) to pay to the registered proprietor of the design a sum not exceeding five hundred rupees recoverable as a contract debt, or,

(*b*) if the proprietor elects to bring a suit for the recovering of damages for any such contravention, and for an injunction against the repetition thereof, to pay such damages as may be awarded, and to be restrained by injunction accordingly:—

Provided that the total sum recoverable in respect of any design under clause (a) shall not exceed one thousand rupees.

(3) When the Court makes a decree in a suit under sub-section (2), it shall send a copy of the decree to the controller, who shall cause an entry thereof to be made in the Register of Designs (5)".

"Fraudulent immitation" is equivalent to conscious imitation, where, a man having the design before him, knowingly imitates, and that imitation is not sufficiently original to be protected as a fair imitation (6). A registered as a design a pattern consisting of a combination of distinct designs. B slightly altered the combination, but not so as to affect the general appearance of the pattern: *Held* this was an infringement of the copy right in the pattern (7). Ignorance of the fact that a design is copyrighted does not exempt the person copying, repeating, or multiplying the same from penalties for such infringement of copy right. The owner of the design whose right is so infringed is entitled to a penalty in respect of each reproduction (8).

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(1) *New Nixon* v. *Spilsbury*, 15 R. P. C. 567 C. A.=(1898) 2 Ch. 484.

(2) *Duncan* v. *Locharbi*, (1912) 133 L. T. Jo. 57.

(3) *Chollet* v. *Hoffman*, 7 E. & B. 686; *Hassal* v. *Wright*, 10 Eq. 509.

(4) *Hassel* v. *Wright*, *supra*.

(5) Section 53 of the Indian Patents and Designs Act 1911.

(6) *Barron* v. *Lomas*, 28 W. R 973.

(7) *M'crea* v. *Holdsworth*, L. R. 6 Ch. 418.

(8) *Green* v. *Irish Independent Co.*, (1899) 1 Ir. 386.

Interlocutory Injunction.—" An interlocutory injunction to restrain infringement may be applied for immediately upon issue or service of the writ. If the evidence of infringement is sufficient to convince the Court, and it is apparent that the plaintiff would suffer seriously from a continuance of the wrong, an interlocutory injunction will be granted, or at all events the defendant will be ordered to keep an account. If the injunction is granted, the plaintiff must give the usual undertaking as to damages. But if the title of the plaintiff is questioned, or the defendant is able to show that he has on any ground a good *prima facie* defence, or if the plaintiff has been guilty of undue delay or other laches, no interlocutory injunction will issue (1)," In an action for infringement of a registered design, the court will, as a general rule, refuse to grant an interlocutory injunction if the registration is of recent date and its validity is genuinely disputed (2).

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CHAPTER XXIV.

Injunctions against Infringement of Copyright.

History of the copyright Act of 1914.—" The question of the amendment of the Indian Copyright Act (XX of 1847) has been considered on several occasions since 1864 on the ground that the Act was incomplete and did not provide among other matters for the prohibition of copyright in photographs, translations, newspapers, telegrams, etc. Legislation however, has been postponed in view of possibility of an amendment of the English Acts on the subject of copyright. In 1908 a conference and convention, to which Great Britain was a party, was held in Berlin with the object of bringing the domestic laws of all countries concerned into harmony with one another so as to obtain international uniformity of treatment and the ratification of that convention involved certain changes in the English law. Its provisions were examined by a strong departmental Committee appointed by the Board of Trade which came to the unanimous conclusion that the Berlin convention should be accepted by Great Britain with as few reservations as possible.

"An imperial copy-right conference was subsequently convened in 1910 containing representatives of the self-governing dominions and of the India office, Colonial office, etc. It endorsed the recommedation of the Board of Trade Committee and recommended that an Act dealing with the essentials of Imperial Copy-right law should be passed by the Imperial Parliament and that this Act should be expressed to extend to all British possessions subject to

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(1) Fulton's Patents and Design p, 417 ; Kerr on Injunction 407.

(2) *Smith* v. *Grigg Ltd,* 93 L. J. K. B. 237.

the rights of self-governing dominions and possessions to modify, or add to its provisions by legislation in certain cases affecting only procedure and remedies.

"A Draft Bill was approved by the conference and eventually passed into law as the Copy-right Act, 1911 (1 & 2 Geo. V. c. 46.), which came into operation in the United Kingdom on the 1st July, 1912. The important changes in the Act are :—

(*i*) The abolition of the formality of the registration of copy-right.

(*ii*) The extension of the term of copy-right from 42 years to one of life and 50 years subject to certain conditions.

(*iii*) The extension of the scope of copy-right.

(*iv*) The substitution of one Act for several on the subject of copy-right.

"The Government of India considered that the early introduction of the Act into India was desirable both for Imperial and International as well as domestic reasons and consulted Local Governments in regard to the modifications and additions referred to in section 27 of the Act, that might be necessary to suit the special conditions. On account of non-proclamation in India of the Act of 1911 and having regard to the serious hardships and loss which might thereby be inflicted on the English authors, the Act was brought into force in India by proclamation in the Gazette of India on 31st October 1912 under section 37 (2) (d) of the Act, the question of modifications or additions being postponed for subsequent consideration on receipt of the news of the Local Governments. These are in substantial agreement with those of the Government of India who propose by virtue of powers conferred by section 21 of the Act, 1911 to pass the Draft Bill which embodies the modifications in and the additions to the Act which are considered desirable, together with certain formal and necessary alterations due to difference between English and Indian administration and procedure.

"It will be observed that the changes proposed are as few as possible in view of the desirability of securing that uniformity throughout the Empire which was advocated by the Imperial Copy right conference of 1910 (1)."

Copy right Act whether a complete code—The Indian Copy-right Act, of 1914 consolidated and amended the law and (s. 36 and Sch. II) repealed all prior Acts under which copy right existed. So the Indian Copy-right Act is a complete code. In England however, two Acts relating to copy-right are not affected by the Copy right of 1911, namely The Musical Summary Proceedings Copyright Act of 1902 and the Musical Copyright Act of 1906.

Copy right distinguished from patents.—A copy right cannot effect the purpose of a patent. The copy right of a treatise on a new medicine by the discoverer of it secures to him the exclusive right of printing and publishing the book, but not the exclusive right of making and selling the medicine ; and the copy right of a book on perspective gives him no exclusive right to the modes of drawing described, though they were never known before. The

(1) Statement of Objects and Reasons to the Indian Copy right Bill.

very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. The description of a useful art in a book, though entitled to the benefit of the copyright, lays no foundation for an exclusive claim in the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can be secured, if at all, only by letters patent. Thus a claim to the exclusive property in a peculiar system of book-keeping cannot under the law of copyright, be maintained by the author of a treatise in which that system is exhibited and explained. And the copyright of a book describing a new system of stenography does not protect the system, when considered simply as a system apart from the language by which it is explained, so as to make the illustration by another of the same system in a different book, employing totally different language, an infringement (1).

Under the New Act, copy right is a statutory right.—Since the passing of the new Copy right Act of 1914, no person shall be entitled to copy right or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of the Indian Copy right Act of 1914, which has incorporated the provisions of the British Copy right Act of 1911, or of any other statutory enactment for the time being in force; but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence (2). The new Act, therefore, abolishes common law copyright, and confers statutory copy-right upon all works as from the date when the same are made (3). "In dealing with unpublished works it is advisable to distinguish three things, which are somewhat intermingled in the older cases, namely, (*a*) the right to the material thing, such as the manuscript; (*b*) the right to publish the manuscript by making copies thereof or extracts therefrom; and (*c*) the right to make use of the ideas or information conveyed by manuscript, without copying the actual language employed in the original. The second only belongs properly to the law of copyright; the first is protected by the ordinary possessory remedies and the third by that equitable jurisdiction to restrain breaches of trust and confidence which is expressly preserved by section 31 of the Act of 1912 (4)." Before the passing of the English Copy-right Act of 1911, literary property in the unpublished work was distinct from copy-right. "In analogy to the protection of copy rights," says *Prof. Pomeroy* "a jurisdiction has become well established by modern decisions to restrain the invasion or piracy of literary property in the product of intellectual labour, which still remains in the form of manuscript, or which, if printed, has not been published, and over which, as a consequence, no statutory copyright has been obtained; and to restrain an invasion of the similar right which an

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(1) H. C. Joyce on Injunction § 870.

(2) *Vide* s. 31 of the Indian Copy right Act. Sch. 1.

(3) *Macmillan & Co. Ltd.* v. *Cooper*, 28 C. W. N. 613 P. C.=48 B. 309=40 T. L. R. 186 P. C.

(4) Copinger on Copy-right p. 22.

artist has in his pictures, and other original works of his creative art.... It will be exercised to restrain the unauthorized publication of unpublished manuscript or printed matter in violation of the rights of the person entitled thereto (1); the unauthorized publication, performance, representation on the stage, or other similar uses of dramatic compositions which have not been 'published' by the author or proprietor; the unauthorized publication, delivery, or other like use of lectures which have been delivered by the author, but not otherwise published; the unauthorized making, sale, or exhibition of copies of paintings, engravings, and other works of art, even though the originals may have been publicly exhibited; and the unauthorized publication of private letters, whether on literary topics, or on matters of private business, or family (2)."

Copyright, meaning of—"Copy right" means sole right to produce, or reproduce, the work or any substantial part thereof in any material form whatever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public: if the work is unpublished, to publish the work or any substantial part thereof, and shall include the sole right—(*a*) to produce, reproduce, perform, or publish any translation of the work; (*b*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work; (*c*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise; (*d*) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered; and to authorise any such acts as aforesaid (3).

Copy right.—Section 1, subsection 1 of the Copyright Act enacts: "Copyright shall subsist throughout the parts of His Majesty's dominions to which the Copy right Act extends for the term mentioned in the Act, in every original, literary, dramatic, musical and artistic work if—

(*a*) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and

(*b*) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid; but in no other works, except so far as the protection conferred by the Act is extended by orders in council there under relating to self governing dominions to which this Act does not extend and to foreign countries."

Publication.—For the purposes of the Indian Copyright Act, publication in relation to any work means the issue of the copies of the work to the public, and does not include the performance in public of a dramatic or musical work,

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(1) *Hogg* v. *Kirby*, 8 Ves. 215, 233; *Nicol* v. *Stockdale*, 3 Swanst 687; *Bacon* v. *Jones*, 4 Mylne & C. 433, 436; *Saunders* v. *Smith*, 3 Mylne & C. 711, 728; *Marten* v. *Wright*, 6 Sim. 297.

(2) Pomeroy's Eq. Jur. § 1353.

(3) Section 1, subsection (3) to First schedule of the Copyright Act.

the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but, for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works (1). A place of publication is a place where copies are received by the public either for price or gratuitously (2).

Copy right under the old Act.—The mere failure of an author to make the payment prescribed by s. 5 of Act XX of 1847 does not deprive him of his copy right in his book. On the other hand the proviso to section 14 of the Act definitely states the contrary (3).

Originality.—"Whatever disputed points may arise" says *Mr. Slater* "from time to time during a study of the law relating to copy right nothing is better understood or more universally recognized than the principle of 'originality,' an essential qualification, without which no one can be considered an author, or be fairly entitled to the protection of his work (4)". "A difficulty of a similar character often arises in the ascertainment of the fact whether a work is original or not Of some intel'ectual productions the originality admits of little doubt as the originality of some inventions or discoveries But in a great variety of cases the difference between the known and the unknown, between the new and the old, between the original and the copy, depends upon shades of distinction extremely minute and almost inappreciable. It is obvious that there can be no monopoly of thoughts, or of the expression of them. Language is common to all ; and in the present advanced state of literature and learning and science, most species of literary works must contain much which is old and well known mixed up with something which perhaps is new, peculiar and original (5)." No man is, however, capable of writing directly from his own thoughts and experiences ; he must necessarily consult authorities, and may inadvertently recapitulate their sentiments and ideas. It consequently becomes apparent that the word "original" may have in legal phraseology a slightly different meaning to that accorded to it in every day conversation (6). In *University of London Press* v. *University Turitorial Press* (7), *Peterson J.* said : "The word 'original' does not in this connection mean that the work must be an expression of original or inventive thought. Copy right Acts are not concerned with the originality of ideas but with the expression of thought, and in the case of literary work, within the expression of the thought in print or writing. The originality which is required relates to the expression of the thought ; But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author." In *Macmillan & Co. Ltd.*

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(1) *Ibid.*

(2) *De Farlene* v. *Hilton*, (1899) 1 Ch. 884.

(3) *Venkata Rao* v. *Padmanabha Raju*, A. I. R. 1927 Mad. 981 = 53 M. L. I. 529.

(4) Slater on Copy right and Trade Mark p. 13.

(5) Story's Eq. Jur. § 1270.

(6) Slater on Copy right and Trade Mark p. 13.

(7) (1916) 2 Ch 601.

v. *Cooper*, (1). their Lordships of the Privy Council adopted this as the correct construction of the word "original." So originality relates to the expression of thought. The work must not be copied from another work (2). It is clear that no one can monopolise the subject even of his own production ; subject like ideas are free, and as one author may treat of any subject he pleases, although the ground may have been repeatedly traversed, so also another author has an equal liberty, and both are entitled to refer to the same common sources of information. There are and can be but few, if any, things which in an abstract sense are strictly new and original throughout (3). Copy right does not exist in a work which itself infringes copy right (4). A mere copyist has no copy right in the work copied (5). Even a slight independent labour will be protected (6). In *Macmillan Co. Ltd.* v. *K. & J, Cooper* (1), the publication in respect of which appellants claimed copy right consisted of a number of detached passages selected from North's translation of Plutarch's Life of Alexander, often separated from each other by considerable bodies of print kint together by a few words so as to give these passages, when reprinted, the appearance as far as possible of a continuous narrative. Secondly, there were notes bearing on the text : It was held by the Judicial Committee, that the reprint of the passages in question was not an "abridgment" in which copy right could be claimed ; and it did not require such knowledge, judgment, literary skill or task to compile them as would entitle the compiler to claim copy right therein ; but the notes made the book more attractive, the study of it more interesting and informing, enhancing its efficiency and consequently increasing its value as an educational manual, so that the Appellants were entitled to claim copy right in these notes. In the above case *Lord Atkinson* in delivering the judgment said : "It will be observed that it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for his product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess and which differentiates the product from the raw material. This distinction is well brought out in the judgment of that profound and accomplished lawyer and great and distinguished Judge, *Mr. Justice Story*, in the case of *Frederic Emerson* v. *Chas Davies* (7), decided

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(1) 28 C. W. N. 613=48 B. 309=40 T. L. R. 186 (P. C)

(2) *Ibid.*

(3) Slater on copy right and Trade Mark p. 13.

(4) *Cary* v. *Fadan*, (1799) 5 Ves. 24.

(5) *Walter* v. *Lane*. (1900) A. C. 554 ; *Barfild* v. *Nicholson*, (1824) 2 Sm. & St. 1; *Lestre* v. *Young*, (1894) A. C. 335.

(6) Copinger p. 47 ; see also *Velly* v. *Morris* (1866) L. R. 1 Eq. 697 ; *Morris* v. *Ashbee*. (1868) L. R. 7 Eq. 34 ; *Lamb* v. *Evans*. (1893) 1 Ch. 218.

(7) 3 Story U. S. Rep. 768 (1845). Here their Lordships of the Judicial Committee of the Privy Council cites from an American case. So the prejudice against American cases by some of the judges is not based on any reason.

in the United States and reported in Story's United States Reports Vol. 3, p. 768. Some of the points decided are stated in the headnotes to be, first, that any new and original plan, arrangement or combination of material will entitle the author to copyright therein, whether the materials themselves be old or new. Secondly, that whosoever by his own skill, labour and judgment writes a new work may have a copy right therein, unless it be directly copied or evasively imitated from another's work. Thirdly, that to constitute piracy of a copyright it must be shown that the original has been either *substantially* copied or to be so imitated as to be a mere evasion of the copyright. The plaintiff in the case had compiled and published a book entitled. 'The North American Arithmetic', described as containing elementary lessons by Frederick H. Amson, the purpose and object of the publication being to teach children the elements of arithmetic. The complaint was that the defendants on a date named had without the plaintiff's consent exposed for sale and sold fifty copies of the plaintiff's said work, purporting to have been composed by the defendant Davis, and had subsequently sold 1,000 copies of the same. The main defence was that the book, copies of which were sold by the defendants, was composed by themselves, and that neither it nor any part of it was copied, adopted or taken from the plaintiff's book or any part thereof. At p. 778 of the report the learned Judge expressed himself thus:—The book of the plaintiff is, in my judgment, new and original in the sense in which those words are to be understood in cases of copy right. The question is not whether the materials which are used are entirely new and have never been used before or even that they have never been used before for the same purpose. The true question is whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. If they have not, then the plaintiff is entitled to a copy right, although he may have gathered hints for his plan and arrangement or parts of his plan and arrangement from existing and known sources. He may have borrowed much of his materials from others, but if they are combined in a different manner from what was in use before..... .....he is entitled to a copyright. It is true that he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials; but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement, or illustrations and combinations, for these are strictly his own . . . . In truth, in literature, in science and in art there are and can be few, if any, things which, in an abstract sense, are strictly new and original throughout.....This decision is, of course, not binding on this tribunal; but it is, in the opinion of the Board, sound, able, convincing and helpful. It brings out clearly the distinction between the materials upon which one claiming copyright has worked and the product of the application of his skill, judgment, labour and learning to those materials; which product, though it may be neither novel

nor ingenious, is the claimant's original work in that it is originated by him, emanates from him, and is not copied."

In the case of *Macmillan* v. *Suresh Chandra Deb* (1), the question was whether copy right can exist in a selection. In that case *Sir Arthur Wilson* said at p. 961: "In the case of a work not original in the proper sense of the term, but composed or compiled or prepared from materials open to all, the fact that one man has produced such a work does not take away from any one else the right to produce another work of the same kind, and in doing so to use all the materials open to him. But, as the law is concisely stated by *Hall V. C.* in *Hogg* v. *Scott*, (2), the true principle in all these cases is that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work; that is in fact, merely to take away the result of another man's labour or in other words, his property."

What are literary works.—The work must not only be original it must be literary (3). The examination papers set by two examiners are original literary works within the meaning of section 1 of the Copy-right Act (4). The word 'literary' has not been used to portray a quality or style or literary finish, but is used to indicate written or printed matter (5). So copy-right exists in a telegraphic code (6) or in catalouge of types (7) or in a system of short-hand (8); or in news paper telegrams. A tradesman's catalogue is a proper subject of copy-right (9).

Copy-right in abridgment.—In an abridgment the idea must be preserved and expressed in author's own language. A book in which certain passages are copied and others are omitted is not an abridgment. In order to constitute an original literary work some skill must be spent. A new or original plan, arrangement or construction of material will entitle the author to copy-right therein whether the materials themselves be old or new. It will not create a copy-right in a new edition of a work of which the copy-right has expired merely to make a few amendations to text or to add a few important notes. To create a copy-right by alterations of the text these must be extensive and substantial practically making a new book (10).

Copy right in compilation.—Copy right may exist in a compilation (11).

Copy right in reports of cases.—A reporter has no copy right in the reports of case but he has such a right in the selection of cases and in the

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(1) 17 C. 951.
(2) L. R. 18 Eq 444 (458).
(3) Vide s. 1 of the First Schedule to Copy right Act of 1914; Copinger p. 50.
(4) *University Press* v. *University press* (1916) 2 Ch 601.
(5) *Ibid.*
(6) *Anderson* v. *Lieber Co.*, (1917) 2 K. B 463.
(7) Copinger p. 50.
(8) *Ibid.*
(9) *Hotton* v. *Arthur* 1 H. & M. 603.
(10) *Macmillan Co.*, v. *Cooper*, 28 C. W. N. 613 (P. C.) = 48 B 308.
(11) *Ghafoor Baksh* v. *Jwala Prosad*, 43 A. 412 = 61 Ind. Cas. 394 = 19 A. L. J. 180.

arrangement of reporting. The principle is that everybody in entitled to resort to the common source of information but they must exercise their own labour and skill (1). In the above case *Iman J* said : "The plaintiff in this suit is the proprietor and editor of a Law-periodical known as Calcutta Weekly Notes. The first Defendant is the Proprietor, Editor and Publisher of a rival Law-periodical known as the Calcutta Case Law.....The plaintiff's case is that the report of the decisions of this court as well as of the Judicial Committee of the Privy Council published in the Calcutta Weakly Notes are the result of considerable labour and expense on his part as well as on the part of the staff employed by him, and that in these reports he has an exclusive copy right. He complains that the defendants have been systematically pirating reports from the Calcutta Weekly Notes and printing and publishing the same in the Calcutta Case Law. In the Schedule to the plaint some of the instances of piracy have been set out.....It is generally true that in the reports of judgments, the reporter has no copy right, but it cannot be said that in the selection of cases, and in the arrangements of the reporting the reporter has not the protection of the law. The defendant is entitled to report such judgments as he obtains by expenditure of his time, labour and money, but where he fails to exert his own energies, he cannot be allowed to avail himself of other people's industry. The contesting defendants, instead of restricting himself to reporting the judgments only, has gone much further. What he has done in the present case is that he has freely drawn on such portions of the Plaintiffs reports as form no part of the judgment. He has also taken from the plaintiff's reports the quotations from judgments that were appropriate to the reports. The Plaintiff's reports in many instances contain statement of facts not to be found in the judgments, but have been gathered by the reporters from the records of the cases. The defendant, no doubt, was at liberty to bestow his labour in collecting the facts for himself, but he was not entitled to avail himself of the labours of another. 'Whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works, subject to copy right, and entitled to protection, so said *Lord Langdale, M. R.* in *Lewis* v. *Fullorton* (2).....I have no doubt in this case that the contesting defendant has committed literary piracy on the plaintiff's periodical and in this view this suit has to be decreed. The result is that the Plaintiff succeeds, and the defendant No 1 will be restrained from pirating from the Calcutta Weekly Notes for the purpose of his publication." The head note or the side or marginal notes of a report is a thing upon which much skill and exercise of thought are required and as such is a subject matter of copyright (3).

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(1) *Jogesh Chandra* v. *Mohim Chandra*, 18 C. W. N. 1078 ; see also *Incorporated Council* v. *William Green*, (1912) W. N. 243.

(2) 2 Beav. 6 (8).

(3) *Sweet* v. *Benning*, 16 C. B. 491 ; *D' Almaine* v. *Bossey*. (1835) 1 Y. & C. 228.

Copy right in translation.—Copyright may exist in a translation of a work (1). The author of a book is entitled to copyright in a translation of it, as if it were an original work (2),

Title of a book.—The title of a book is not a subject matter of copyright (3). A title unless it is sufficiently lengthy to have had labour in construction as well as in choice expended upon it, will not be protected as an original literary work (4).

Libellous, immoral of obscene work.—A copyright in a libellous, immoral or obscene work will not be enforced (4).

Original Dramatic work.—In *Tate* v. *Fullbrook* (5), it was held that a dramatic work was entitled to be protected against piracy by public performance unless it was capable of being printed and published. The actual decision in *Tate* v. *Full brook* (5) to the effect that mere scenic effects are not the subject of protection has been approved under the Act of 1911 (6).

Artistic work.—The Indian Copyright Act, includes amongst other artistic works "works of painting, drawing, sculpture, and architecturat works of art, and engravings and photographs (7)." But an artist has no monopoly in the subject (8).

Term of copyright.—The term for which copyright shall subsist shall, except as otherwise expressly provided by the Act, be the life of the author and a period of fifty years after his death. Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of the Act, thirty years, from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent on the price at which he publishes the work (9). The proviso to this section does not prohibit the republication for sale of two or more such works in one volume (10). Subject to the provisions of the Act the author of a work shall be the first owner of the copy right therein (11).

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(1) *Byrne* v. *Statist Co.*, (1914) 1 K. B. 622.

(2) 13 A. L. J. 139.

(3) *Lineseed* Victualler's *New paper* v. *Bingham*, 38 Ch. D. 139; see also *Dicks* v. Yates, 18 Ch. D. 55; *Broemel* v. *Meyer*, 29 T. L. R. 148.

(4) Copinger 59; see also *Glyn* v. *Western Features Film Co.*, (1916) 1 Ch. 261.

(5) (1908) 1 K. B. 821.

(6) Copinger p. 68; see also *Tate* v. *Thomas*, (1921) 1 Ch. 803=90 L. J. Ch. 318.

(7) Section 35 (1).

(8) *De Berenger* v. *Whebhle*, 2 Stark. N. P. 548.

(9) Section 3 of the First Schedule to the Copyright Act.

(10) *Osborme* v. *J. M. Dent & Sons*, (1925) 1 Ch. 369=94 L. J. Ch. 308 (per *Romer J.*)

(11) Section 5 of the First Schedule of the Copyright Act.

Terms of copy right of joint authors.—In the case of a work of joint authorship, copy right shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in the Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, which ever period may be the shorter, and in the provisions of the Act with respect to the grant of compulsory licenses a reference to the date of the death, of the author who dies last shall be substituted for the reference to the date, of the death of the author. For the purposes of the Act, "a work of joint authorship," means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors (1). By mere suggesting an idea a person does not become a joint author (2). The copyright rests in the joint authors as tenants in common and not as joint tenants (3). One of two joint authors can restrain the other by injunction from publishing the joint work (4).

Posthumous work, copy right in—In the case of a literary, dramatic or musical work, or an engraving, in which copy right subsists at the date of the death of the author or, in the case of a work of joint authorship at or immediately before the date of the death of the author who dies last, but which has not been published, or, in the case of a dramatic or musical work, been performed in public, nor in the case of a lecture, been delivered in public, before that date, copy right shall subsist till publication, or performance or delivery in public, which ever may first happen, and for a term of fifty years there after. The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentory disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be *prima facie* proof of the copy right being with the owner of the manuscript (5).

Period and ownership of copyright in Government publication.—Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of the Act, been prepared or published by or under the direction or controt of His Majesty or any Government department, the copy right in the work shall, subject to any agreement with the author, belongs to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work (6). Now the

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(1) S. 16 of the First Schedule of the Copyright Act, 1914.

(2) *Tate* v. *Thomas*, (1921) 1 Ch. 503 ; see also *Evans* v. *Hulton*, (1924) W. N. 130.

(3) *Lauri* v. *Renad* (1892) 3 Ch. 402.

(4) *Cascinsky* v. *Routledge*, (1916) 2 K. B. 325.

(5) Section 17 of the First Schedule of the Copy right Act.

(6) Section 18 of Ibid ; see also *British Broadcasting* v. *Wireless Gazette*. (1926) 1 Ch. 433.

crown has copy right in the authorized version of the Bible and Prayer Books (1)'

Period and ownership of copy right in mechanical instruments.—Copy right shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copy right shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and where such owner is a body corporate, the body corporate shall be deemed for the purposes of his Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts (2).

Period of ownership of copy right in photographs.—The term for which copy right shall subsist in photographs shall be fifty years from the making of the original negative, from which the photograph was directly and indirectly derived, and the person who was owner of such negative at the time when such negative was made shall be deemed to be the author of the work, and where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts (3). The copy right dates from the making of the original negative and subsists for a period of fifty years from that date. Where, however, the work is ordered by another person, and is made for valuable consideration, the first ownership in the copyright belongs to the person so ordering the work in the absence of any contrary agreement (4). But the proprietary right in the negative will remain with the photographer (5).

Works of foreign authors first published in parts of His Majesty's dominions to which the copy right Act extends.—If it appears to His Majesty that a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by order in Council to direct that such of the provisions of this Act as confer copy right on work first published within the parts of His Majesty's dominions to which this Act extends, shall not apply to works published after the date specified in the order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty's, dominions, and thereupon those provisions shall not apply to such works (6).

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(1) *University of Oxford* v. *Richardson*, 6 Ves. 689 ; *Manners* v. *Blair*, 3 Blis. N. S. 391 ; *Red Letter Testament In re*, (1900) 17 T. L. R. 1.

(2) Section 19 of the First Schedule of the Copy right Act.

(3) Section 21 of the First Schedule of the Copy right Act.

(4) Vide S. 5 (1) (a) of Ibid.

(5) *Pollard* v. *Photograph Co.*, 40 Ch. D. 345 ; *Bolton* v. *London Exhibitions*, 14 T. L. R. 550.

(6) Section 23 of the First Schedule of the Copyright Act.

Duration of copyright in existing works.—Where any person is immediately before the commencement of the Act entitled to any such right in any work as is specified in the first column of the First Schedule to the Act, or to any interest in such a right, he shall, as from the date be entitled to the substituted right set forth in the second column of the schedule, or to the the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted, if this Act had been in force at the date when the work was made and the work had been one entitled to copy right thereunder (1).

Ownership of copyright of engravings etc. made to order.—Where in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in persuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright (2).

Author in employment of some other.—Where the author was in the employment of some other person under a *contract of service* or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary be the first owner of the copyright, but where the work is an article or other contribution to a news paper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical (3). A "contract of service" is not the same as a "contract for service" (4). "The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service; and similarly the greater the degree of the independence of such control, the greater the probability that services rendered are of the nature of professional services, and that the contract is not one of service (5)." So "in each case the question to be asked is, what was the man employed to do? Was he employed upon the terms that he should, within the scope of his employment, obey his master's orders or was he employed to exercise his skill, and achieve an indicated result in such manner as, in his judgment, was most likely to ensure success?" (6). There is a contract of service where the contract is such that the employer is entitled to say: "You shall do it in this way, that is to say, not only shall you do

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(1) Section 24 of the First Schedule of the Copyright Act.
(2) Section 5(a) of the First Schedule of the Copyright Act.
(3) *Ibid* Cl. (b) of the First Schedule of the copyright Act.
(4) Copinger p. 101.
(5) Per *Fletcher Moulton L. J.* in *Simons* v. *Heath Laundry Co.* (1910) 1 K. B. 543; *University of London Press* v. *University Tutorial Press*, (1916) 2 Ch. 601.
(6) *Per Buckley J.* in *Simons* v. *Heath* (1910) 1 K. B. 543 (553).

it by virtue of your agreement, but shall do it as I direct you to do" (1). An apprentice is a person bound to and who serves another for the purpose of learning something which the other is to teach him (2)

Assignment of copyright.—The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of his Majesty's dominions to which this Act extends and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by license, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent :

Provided that, where the author of a work is the first owner of copy right therein, no assignment of the copy right, and no grant of any interest therein, made by him (otherwise than) by will after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copy right in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copy right expectant on the termination of that period shall, on the death of the author notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void ; but nothing in this proviso shall be construed as applying to the assignment of the copy right in a collective work or a licence to publish a work or part of a work as part of a collective work (3).

Partial assignment,—Where, under any partial assignment of copy right, the assignee becomes entitled to any right comprised in copy right, the assignee, as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purpose of the Act as the owner of the copy right, and the provisions of the Act shall have effect accordingly (4).

Infringement of copy right.—Copy right in a work shall be deemed to be infringed by any person who without the consent of the owner of the copy right, does anything the sole right to do which is by this Act conferred on the owner of the copy right : Provided that the following acts shall not constitute an infringement of copy right :...

(*i*) any fair dealing with any work for the purposes of private study, research, criticism, review, or news paper summary ;

(*ii*) where the author of an artistic work is not the owner of the copy right therein, the use by the author of any mould, cast, sketch, plan, mode, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work :

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(1) *Sadler* v. *Henlock*, 4 E. & B. E. 472. 578 ; *Limpus* v. *London*, 1 H. & C. 526 ; *Tewrns* v. *Noakes*, 6 Q. B. D. 532.

(2) *St. Panchras* v. *Claphan*, 2 E. &

(3) Section 5.

(4) *Ibid.*

(*iii*) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic crafts manship, if permanently situate in a public place or building, or the making or publishing of paintings, drawing, engravings or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art ;

(*iv*) The publication in a collection, mainly composed of non-copy right matter *bonafide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, or short passages from published literary works not themselves published for the use of schools in which copy right subsists : Provided that not more than two of such passages from work by the same author are published by the same publisher within five years. and that the source from which such passages are taken is acknowledged (1) ;

(*v*) The publication in a news paper of a report of a lecture delivered in public, unless the report is prohibited by conspicously written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and except whilst the building is being used for public worship, in a position near the lecturer, but nothing in this paragraph shall affect the provisions in paragraph (i) as to news paper summaries :

(*vi*) The reading or recitation in public by one person of any reasonable extract from any published work.

(2) Copy right in a work shall also be deemed to be infringed by any person who—

(*a*) sells or lets for hire, or by way of trade exposes or offers for sale or hire ; or

(*b*) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copy right ; or

(*c*) by way of trade exhibits in public ; or

(*d*) imports for sale or hire into any part of His Majesty's dominions to which this Act extends,

any work which to his knowledge infringed copy right or would infringe copy right if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.

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(1) *Educational Book Dept.* v. *Dr. Robindranath Tagore,* A. I R. 1933 All. 474. In the above case, *Sulaiman C. J.* said ; "The learned advocate for the defendant contends that in as much as the defendants borrowed not more than two poems from each of the works of Dr. Tagore they come within the scope of this proviso. We are unable to accept this contention. The proviso does not say that not more than two of such passages from each work of the same author are published, but says 'not more than two passages from works by the same author." It seems to us that in as much as the defendants have in their book published four passages from the work of the same author they cannot claim the protection of this proviso. Obviously, the proviso was not intended to protect a man who brings out an unauthorised edition of a poet's poems by taking out 2 poems out of each of the many works published by him separately."

(3) Copy right in a work shall also be deemed to be infringed by any person who for his profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copy right, unless he was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of copy right (1).

Infringement of mechanical instrument.—It shall not be deemed to be an infringement of copy right in any musical work for any person to make within the parts of his Majesty's dominions to which this Act extends, records, perforated rolls or other contrivances by means of which the work may be mechanically performed if such person proves (*a*) that such contrivances have previously been made by, or with the consent or acquiescence of the owner of the copy right in the work ; and (*b*) that he has given the prescribed notice of his intention to make the contrivances and has paid in the prescribed manner to, or for the benefit of, the owner of the copy right in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned :

Provided that nothing in this provision shall authorize any alteration in, or omission from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copy right or unless snch alterations or omissions are reasonably necessary for the adoptation of the work to the contrivances in question (2).

In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions : The conditions as to the previous making by, or with the consent or acquiescence of the owner of the copy right in the work, and the restrictions as to alterations in or omissions from the work, shall not apply (3).

Infringement and plagiarism.—The term infringement is identical with that of piracy, and both differ in some respects from mere plagiarism. The plagiarist appropriates to himself the labour of another, and passes the result off as his own production in such a way as to avoid the penalties of law, which attach only on the invasion of some legal right. The literary pirate goes a step further and incurs actual liability, and that where he passes off the production as his own, or fairly acknowledges the source from which he has copied or stolen (4) ; there can, therefore, be no plagiarism without at the sametime the representation as to authorship although an infringement is equally liable whether there be any misrepresentation or not (5).

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(1) Section 2 of the First Schedule of the Copy right Act.

(2) Section 19 (1). 19 (2) of the First Schedule of the Copy right Act.

(3) Section 19 (7) of the First Schedule of the Copy right Act.

(4) *Scott* v. *Standard*, L. R. 3 Eq. 718.

(5) Slater on copyright and Trade Marks p. 30.

Infringement of literary property in three modes.—Literary property is liable to invasion in three modes. First, open piracy, as where a publisher in this country publishes an unauthorised edition of a work in which copyright exists, or where a man introduces and sells in this country a reprint made abroad. Secondly, literary larceny, as where a man, pretending to be the author of a book, illegitimately appropriates the fruits of a previous author's literary labour. Thirdly where a man is selling a work under the name and title of another man or another man's work. Against the first two species of offences the Copyright Acts afford protection; against the third, the common law (1). According to the Copyright Act, copyright means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, so it would be piracy if the infringer deliberately copy verbatim the salient features of another's work (2). So it is a well settled principle that a copyright may be infringed as well under colour of making extracts whereby the important materials in the original are taken, though properly credited, as by outright and entire appropriation (3). But the exact limitation of this rule cannot be strictly defined, since the Court must in each case consider not only the nature and the object of the selections made but their quantity as well (4). In *Falsom* v. *Marsh* (5), *Mr. Justice Story* said: "We must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has another professed and obvious object, and cannot fairly be treated as a piracy; or they many be inserted as a sort of distinct and mosaic work into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy." "There is no doubt" said *Lord Eldon* (6) "that a man cannot under the pretence of quotation, publish either the whole or part of another's work, though he may use what it is in all cases difficult to define, fair quotation". The most valuable portion of a copyright production may be taken in this way, although the matter taken constitute but a small portion of the original work in quantity (7). According to the new Copyright Act of 1914 (8), it would be infringement to reproduce any substantial part of a

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(1) Vide remarks of *James L. J.* in *Dicks* v. *Yates*, 50 L. J. (N. S.) Ch. 815, cited in Slater p. 30.

(2) *Maxwell* v. *Somerton*, 30 L. T. N. S. 11.

(3) *Scott* v. *Stanford*, 3 Eq. 718; *Weatherley* v. *International Horse*, (1910) 2 Ch. 305.

(4) *Falsom* v. *Marsh*, 2 Story U. S. 100; *Bramwell* v. *Halcomb*, 3 Myl & Cr. 738.

(5) 2 Story (U. S.) 100.

(6) *Wilkins* v. *Aitkin*, 17 Ves. 422.

(7) *Bramwell* v. *Halcombe*, 3 Myl & Cr. 738; *Tinsley* v. *Laccy*, 1 H & M. 747; *Warner* v. *Subhorn*, 39 Ch. D. 73: *Saunders* v. *Smith*, 3 My & Cr. 737.

(8) Section 1 (2).

work, the sole right to do that vests in the author or the owner of the copyright. So where quotations and citations go so far as to supersede the original work and answer as a substitute for it, a proper case is presented for equitable interference (1). But quotations reasonable in quality, number and length are fair if within reasonable limits (2). As a question of strict law, apart from exceptional cases, the privilege of fair use accorded to a subsequent writer must be such and such only, as will not cause substantial injury to the proprietor of the first publication; but cases frequently arise in which, though there is some injury yet equity will not interfere by injunction to prevent the further use, as where the amount copied is small and of little value, if there is uo proof of bad motive, or where there is a well founded doubt as to legal title, or where there has been long acquiescence in the infringement, or culpable laches and negligence in seeking redress, especially if it appear that the delay has misled the respondent (3). The moral basis on which the principle of these protective provisions rests is the Eighth commandment, "Thou shalt not steal (4)." So while it is proper to publish copious extracts from a publication for purpose of legitimate criticism, yet the office of critic will not be allowed to be abused as a pretext for making an entire reproduction. And a proprietor of a newspaper will be enjoined from publishing in his paper extensive extracts from a novel without attempting any criticism upon the same (5). But while, as has been stated, an abstraction of all the important parts of a publication, or of any material portion, will constitute an infringement for which an injunction lies, yet the legitmate publication of extracts does not constitute such piracy of literary property as to render the one taking them amenable to an action for an injunction (6).

How far honesty of intention is important.—The use which a subsequent writer may make is a fair use, and only such as will not cause substantial injury to the proprietor of the first publication (7). And to determine whether the copying from a copyrighted work amounts to a priracy or a "fair use," the court will look more to the value than to quantity of matter taken (8). The fact that the infringement was for a good purpose or with an honest intention constitutes no defence to an action for infringement (9); besides it is a fair presumption in such cases that one who knowingly abstracts that which belongs to another intends all which its publication effects. But the fact that the intention is innocent will be given consideration as having a bearing upon the question of 'fair use' where the amount taken is small, and a court of equity will give such fact due effect in determining whether or not an injunction should be granted, especially

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(1) Spelling on Injunctions § 852.
(2) *Sampson* v. *Scaver*, 140 Fed. 539; *Chatterton* v. *Cave*, 3 A. C. 483.
(3) *Lawrence* v. *Dona*, 4 Cliff. 1.
(4) *Mc millan* v. *Cooper*, 28 C. W. N. 613 (P. C.)
(5) *Dickin son* v.—cited 8 L. J. Ch. N. S. 141; see also *Bohn* v. *Bogue*, 10 Jur. 420.
(6) *Bell* v. *White head*, 3 Jur. 68.
(7) *Lawrence* v. *Dona*, 4 Cliff. (U. S.) 1.
(8) Spelling on Injunctions etc. § 853.
(9) *Read* v. *Lacy*, 1 J. & H. 527.

where to grant it would occasion great loss and *in*convenience to the defendant, and to refuse it would result in but little injury to complainants (1). It cannot be said, however that the honesty of intention on the part of an infringer constitutes in itself a legal defence (2). In all such cases the value and materiality of the part taken is looked to as well as the *quantum*, for it is obvious that the *quintessence* of a book may be reproduced in a very small substance (3).

Citation of authorities.—An author may not copy the quotations or extracts from a former work, but should go to the original sources whence such extracts are taken. So it is not considered to be improper to use a former publication as a guide to authorities which a subsequent writer on the subject examines for himself for the purpose of deducing his own conclusions therefrom (4). So it is a fundamental principle of the law of copyright that, although the sources from which an another derives his information and procures the material for his literary work are public and open to all writers in common, a subsequent writer is not, therefore, justified in availing himself of the labours of his predecessors in the same field, and making a servile and colourable imitation of his work, but must himself go to the original sources of information which are common to all (5) This doctrine is especially applicable to such works as business or city directories, the informations necessary for their preparation being open to all, yet a subsequent compiler being restrained from a servile imitation or use of the labours of his predecessor in the same field ; and the preventive jurisdiction of equity in this class of cases is freely exercised (6).

Where defendant's book consisted of statistical table taken bodily from plaintiff's work, without the exercise of that labour which plaintiff had himself used in producing these tables originally, such use will not be regarded as a fair and legitimate use of the labours of a predecessor in the same field, but will be treated as an infringement for which an injunction will lie. And in such a case, the fact that the defendant gives full and complete acknowledgment in his book of the sources from which such statistics are drawn will not avail against the granting of an injunction, since the court can only look at the result of the infringement as affecting the property right of plaintiff, and not upon the defendant's motive or intention (7). And when defendant's book has been made largely by taking the actual words as they stand in plaintiff's work, an injunction will be allowed (8).

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(1) Spelling on Injunctions etc. § 853.
(2) *Ibid.*
(3) Slater on Copyright etc. p. 35 ; see also *Campbell* v. *Scott*, 11 Sim. 31 ; *Bradbury* v. *Hotten*, L. R. 8 Ex. 1 ; *Chatterton* v. *Cave*, 3 App. Cas. 497 ; *Tinseley* v. *Lacy* 1 H. & M. 753.
(4) *Pike* v. *Nicholas*, 39 L. J. N. S, 435 ; *Jerr old* v. *Heywood*, 18 W. R. 279 ; *Morris* v. *Wright*, 22 L. T. 82.
(5) High on Injunction § 994.
(6) *Kelly* v. *Morris* L. R. 1 Eq. 697 ; *Kelly* v. *Hooper*, 1 Y. & C. C. C. 197 ; *Morris* v. *Ashbee*, L. R. 7 Eq. 34 ; *Mathewson* v. *Stockdale*, 12 Ves. 270 ; *Morris* v. *Wright*, L. R. 5 Ch. 279.
(7) *Scott* v. *Stanford*, L. R. 3 Eq. 718.
(8) *Steven* v. *Wildy*, 19 L. J. N. S. Ch. 190 ; High § 996.

Colourable imitations.—Infringing when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made in contravention of the provisions of the Act (1). Whether a work is a colourable imitation of another must necessarily be a question of fact (2). It is obvious, however, that in dealing with mere imitations where no words are actually copied, it may often be difficult to prove that a defendant made any use of the plaintiff's work (3). The question whether there has been an infringement of copyright depends on whether a colourable imitation has been made Similarity is a great point to be considered but mere similarity is not enough. A conglomeration of similarities which cannot be mere coincidence is evidence of infringement (4). A copy has been defined as that which comes so near the original as to suggest the original to the view of the spectator. It is always a question of fact and the court will examine the decree of resemblance (5).

Infringement of copyright by abridgment.—A fair abridgment of a work is not any violation of the author's property. To constitute a true and proper abridgment of a work the whole must be preserved in its sense and then the act of abridgment is an act of understanding, employed in carrying a large work into a smaller compass, and rendering it less expressive and more convenient to the reader. To be protected, an abridgment must be in the nature of a new and meritorious work, and while the substance of the original is preserved the abridgment must be in different language (6). But a mere colourable shortening of the original work will not be protected as an independent composition (7). "It is perhaps, unfortunate that the right to make an abridgment of his work is not one of the right specifically reserved to the proprietor of the Copyright by the Copyright Act, because, the decisions on the subject are somewhat inconsistent (8)." It has been frequently doubted by high judicial authority whether an abridgment can under any circumstances amount to a fair reproduction of an original work. There is very little doubt that an abridgment is in some cases nothing whatever but a direct and often successful attack on the property of another, for this form of production frequently, and if well composed always, contains the whole of the spirit of the original. It may even be made of greater value by the introduction of notes ; it is always cheaper, and most persons who purchased a copy of the abridgment would not after perusal of it go to the expense of obtaining the work on which it is founded The original author's right of property must undoubtedly suffer. On the other hand, a fair abridgment is frequently of the greatest use and assistance ; it consists of a substantial condensation of the original

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(1) Section 35 (1). of the Copyright Act, Sch. I.
(2) Copinger 133.
(3) *Ibid.*
(4) *Mohini Mohan* v. *Sita Nath*, 34 C. W. N. 540.
(5) *Mohendra* v. *Emperor*, A. I. R. 1928 Cal. 359.
(6) *Per Apsley L. C.* in *Newberry's Case* Loffit. 775 ; *Macmillan* v. *Cooper*, 28C. W. N. 613. (P. C.).
(7) Slater on Copy right etc. p. 67.
(8) Copinger p. 134.

materials, refashioned by means of intellectual labour and skill ; it contains all that is useful in the original without any of the surplusage, and is often to be preferred to it. The effect of an abridgment is undoubtedly to withdraw public interest from the original production ; for if the abridgment is good, it is often to be preferred on account of cheapness and practical utility, while if it is bad, it may and probably will tend seriously to damage the sale of the original (1). In *Dickens* v. *Lee* (2), *Knight Bruce V. C.* said : "I am not aware that one man has the right to abridge the work of another. On the other hand, I do not mean to say that there may not be an abridgment which may be lawful, which may be protected ; but to say that one man has the right to abridge and so publish in an abridged form the work of another, without more is going much beyond my notion of what the law of this country is." But still *bona-fide* abridgments are protected on the ground of practical utility. Such abridgments are also allowable in law (3).

Infringement by translation.—In some earlier cases it was held that any person has a right to translate even a work protected by copyright, for the translator has bestowed his cares and pains upon it (4). But now by the Copyright Act of 1914, that point has been set at rest. Now copyright is infringed by reproducing the whole or part under the form of a translation (5).

Infringement by performance.—Performance means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument (6). Now the author has the sole right to perform the work. So now an author can enjoin the recitation or reading aloud of any work in public (7).

Infringement by dramatisation.—Under the old law any person might dramatise a published novel, even though the author of the novel had dramatised his own work (8). But under the new Act, the owner of the copyright has the sole right in the case of a novel or other non-dramatic work, or an artistic work to convert it into a dramatic work, by way of performance in public or otherwise (9).

Criminal remedies for infringement of copyright.—If any person knowingly—

(*a*) Makes for sale or hire any infringing copy of a work in which copyright subsists ; or

(*b*) sells or lets for hire, or by way of trade exposes or offers for sale or, hire, any infringing copy of any such work ;

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(1) Slater on Copy right p. 68.
(2) 8 Jur. 184.
(3) *Gyles* v. *Wilcox*, 2 Atk. 141 ; *D' Amaine* v. *Boosey*, 1 Y. & C. 288 , *Sweet* v. *Benning*, 16 C. B. 459.
(4) *Burnett* v. *Chetwood*, 2 Mer. 441 ; *Millar* v. *Taylor* 4 Burr. 2311 ; *Macmillan* v. *Samsul*, 19 B. 557.
(5) Copinger p. 138 ; section 1(2) (a).
(6) Section 35 of the Copyright Act, Sch. I.
(7) Section 1(2) (a) of *Ibid.*
(8) *Toole* v. *Young*, 43 L. J. Q. B. 170 ; *Reade* v. *Conquest*, 11 C. B. N. S. 479.
(9) Section 1(2) (e) of the Copyright Act, Sch. I.

(*c*) distributes infringing copies of any such work, either for the purposes of trade or to such an extent as to effect prejudicially the owner of the copyright ; or

(*d*) by way of trade exhibits in public any infringing copy of any such work ; or

(*e*) imports for sale or hire into British India any infringing copy of any such work ;

he shall be punishable with fine which may extend to twenty rupees for every copy dealt with in contravention of this section, but not exceeding five hundred rupees in respect of the same transaction (1).

Possession of plates for purpose of making infringing copies.—If any person knowingly makes, or has in his possession, any plate for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he shall be punishable with fine which may extend to five hundred rupees (2).

Infringement of Copyright and Civil Remedies.—Where copyright in any work has been infringed, the owner of the copyright shall except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right. The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court (3). In any action for infringement of copy right in any work, the work shall be presumed to be a work in which copyright subsists (4) and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then—

(*a*) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work ; (b) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceeding in respect of the infringement of copyright therein (5).

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(1) Section 7 of the Indian Copy right Act.

(2) Section 8 of *Ibid.*

(3) Section 6 of the First Schedule of the Copyright Act.

(4) *Sitanath* v. *Mohinimohan*, 39 C. L. J. 134.

(5) Section 6 of the First Schedule of the Copyright Act.

Restriction on remedies in the case of architecture.—Where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition. Such of the other provisions of the Act as provide that an infringing copy of a work shall be deemed to be the property of the owner of the copyright or as impose summary penalties, shall not apply in any case to which this section applies (1). In such a case the only remedy of the plaintiff lies in an action for damages (2).

Rights of owner against persons possessing or dealing with infringing copies, etc.—All infringing copies of any work in which copy right subsists, or of any substantial part thereof and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof (3). "Infringing copies" mean copies including colourable imitation made or imported in contravention of the provisions of this Act. It is to be observed that proceedings for recovery under this section can only be taken when the whole work or a substantial part thereof is reproduced—when only a few passages were reprinted, property in the infringing work would not pass. This is in substantial accord with the decision in *Rooney* v. *Kelly* (4), where the Court observed: "It would be difficult to maintain under the 23rd section that the proprietor of the copyright in a book would acquire the property of all copies of another book which contained printed therein a few pages or passages of his book." In such a case the plaintiff would be entitled to delivery and cancellation (5). One of the co-owners can sue under this section (6). Where in a case of infringement of copyright the plaintiff asked for damages under s. 6 on the footing of the loss sustained and in the alternative under s. 7 for the delivery of the unsold copies and damages on the footing of conversion in respect of the infringing copies sold, and the Court awarded damages under s. 6 and also decreed delivery of the unsold copies, *held* that the plaintiff could not claim damages under s. 7 also (7).

Exemption of innocent infringer from liability.—Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other

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(1) Section 9 of the First Schedule of the Copyright Act.

(2) As regards amount of damages, *vide Lufout* v. *Lllemant*, cited in Oldfield 90; *Birn* v. *Keen*, (1918) 2 Ch. 281; *Fenning* v. *Wolverhampton*, (1914) 3 K. B. 1171.

(3) Section 7 of the First Schedule of the Copyright Act.

(4) (1861) 24 Ir. C. L. R. at p. 171.

(5) Oldfield p. 87.

(6) *Lauri* v. *Renad*, (1892) 3 Ch. 402; *Cescinsky* v. *Routledge*, (1916) 2 K. B. 325.

(7) *Mohini* v. *Sita*, 34 C. W. N. 540= 51 C. L J. 243; see also *Birm Bros.* v. *Keen* & *Co.*, (1918) 2 Ch. 781.

than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had not reasonable ground for suspecting that copyright subsisted in the work (1).

Parties.—The owner of the copyright is entitled to have all the remedies mentioned in ss. 6, 7, 8 and 9 of the Copyright Act. Where the rights of the plaintiffs are equitable only, he cannot sue withont joining the legal owner (2). In such a case no especial damage need be proved (3). A licensee without joining the owner cannot sue (4). One of several owners can sue a stranger for infringement of copy right (5). "The older cases in which courts of equity had enforced the rights of equitable assignees (6), were cases of *interim* injunction only (7), and unless the legal owner is a party to the proceedings either as joint plaintiff or defendant (8) a perpetual injunction will only be granted under very special circumstances (9)". A mere selling agent has no right to bring any suit (10). A partial assignment of copy right is not a mere personal contract, but confers certain rights of property capable of being protected by injunction. The part owner of a copy right has a right to protect it against another who alleges that he has purchased it from a common vendor (11). The owner of the copy right of the music in a song is entitled to sue for an infringement of that copy right without joining the author of the works of the song as plaintiff, none the less because the owner of the copy right of the work may also sue in respect of an infringement (12). The fact that the copy right in some of the illustrations in the plaintiff's catalogue is vested in other persons does not preclude him from suing to restrain an infringement of such of the illustrations as he has the copy right in (13).

Damages.—Damages in cases of literary piracy are to be estimated as follows: the defendant is to account for every copy of his book sold as it had been a copy of the plaintiffs, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies (14).

Account for profits.—According to the common law, the pirated copies are to be delivered to the owner of the copy right, only for destruction (15). But the court of equity grants another relief incidental to the relief by the grant of injunction, The defendant may be directed to account for profits, he

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(1) Section 8 of the Copyright Act Sch. I.

(2) *Performing Right Society Ltd.* v. *London Theatre* of *Varieties*, (1924) A. C. 1; *University of London Press* v. *University Tutorial Press*, (1916) 2 Ch 601; *Bowdens* v. *Herbert*, (1904) 2 Ch. 86; *Landeker* v. *Wolff*, (1907) 52 S. J. 142.

(3) *Exchange Telegrahh* v. *Gregory* (1896), 1 Q. B. 147.

(4) *Nilson* v. *Horniman*, (1909) 25 T. L. R. 685; *Nicol* v. *Stockdale*. 3 Swan. 687; *Petty* v. *Taylor* (1897) 1 Ch. 467.

(5) *Lauri* v. *Renad*, (1892) 3 Ch. 403.

(6) *Sweet* v. *Carter*. 11 Sim. 572; *Hodges* v. *Wells*, 2 Ir. Eq. 266; *Sims* v. *Maryat*, 17 Q. B. 281; *Hazlet* v. *Templeman*, 13 L. T. 593; *Grace* v. *Newman*, L. R. 19 Eq. 623.

(7) *Perjormihg Right* v. *London*, (1924) A. C. 1.

(8) *Ibid.*

(9) Copinger p. 166.

(10) *Nichol* v. *Stockdale*, 3 Sw. 687; *Petty* v. *Taylor*, (1897) 1 Ch. 465,

(11) *Macdonald* v. *Eyles*, 90 L. J. Ch. 248=37 T. L. R. 187,

(12) *Rubens* v. *Pathbrewer*, Times Dec. 20 in 1912.

(13) *Lawrence* v. *Bushwell*, 12 C. W. N. 753=356. 463.

(14) *Pick* v. *Nicholas*, 38 L. J. Ch. 529.

(15) *Hole* v. *Bradbury*, 12 Ch. D. 886; *Warne* v. *Subom*, 39 Ch. D. 73, 82.

has made by the sale of infringing copies (1). But a plaintiff cannot obtain both an account of profits and an enquiry as to damages (2). In *Colburn* v. *Simons* (3), *Wigram V. C.* said : "It is true that the court does not, by an account, accurately measure the damages sustained by the proprietor of an expensive work from the invasion of his copy right by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court, by the account, as the nearest approximation which it can make to justice, takes from the wrong-doer all the profits he has made by his piracy, and gives them to the party who has been wronged. In doing this the court may often give the injured party more, in fact, than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold, if the injury by the sale of the cheaper book had not been committed." In such a case an account should be taken on the basis of net profits (4). Where even after a notice the defendant fails to produce his account books there is a fair presumption that the account books have been deliberately suppressed by the defendants in order to conceal the actual profits raised by the sale of the books. And therefore the court is entitled to assume that the entire stock of copies of books published had been sold by the defendants and the sale proceeds appropriated by them (5)

Costs.—The costs of all parties in any proceedings in respect of the infringement of copy right are in the absolute discretion of the court (6).

Principles of granting injunction.—The principles governing the issuance of injunction against the infringement of copyright are similar to those relating to patents. A copyright gives an exclusive right which the owner is entitled to have protected by injunction. The preventive jurisdiction of equity exercised by the remedy of injunction in restraining the infringement of copyrights, rested in the necessity of preventing irreparable mischief and vexatious litigation, and of extending better protection to the rights of authors and their representatives than could be had by the process of courts of law (7). The jurisdiction was exercised for the purpose of making effectual the legal right, which could not be done by an action for damages, and equity therefore interfered to render such right effictive by enjoining the publication of the infringing work (8). Indeed a Court of Equity was manifestly the better forum for the protection of copyright, since a Court of Law could not afford as ample redress, either for the past violation of the right, or for the prevention of a threatened

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(1) *Hogg* v. *Kirby*, 8 Ves. 215 ; *Bailey* v, *Taylor*, 1 Ruse & My. 73 ; *Kelly* v *Hooper*, 1 Y. & C. C. 140 ; *Colburn* v. *Simmons*, 2 Ha. 453.

(2) *De Vetre* v. *Betts*, L. R. 6 H. L. 319 ; S. 6, subsection 1, of the First Sch. of the Copy right Act.

(3) 2 Hare 560=12 L. J. Ch. 388=62 R. R. 225.

(4) *Delfe* v. *Delamotte*, 3 K. & J. 581 ; *Educational Book Dept.* v. *Dr. Tagore*, A. I. R. 1933 All. 474.

(5) *Ibid.*

(6) Section 6, sub-section 2 of Schedule 1 of the Copyright Act ; *Educational Bosk Depot.* v. *Dr. Rabindranath*, A. I. R. 1933 All. 474.

(7) Story Eq. § 930 ; *Sanders* v. *Smith*, 3 Myl & Cr. 728 ; *Wilkins* v. *Aiken*, 17 Ves. 422.

(8) *Wilkins* v. *Aiken*, 17 Ves. 422.

or anticipated violation in future. A Court of Law could neither compel a discovery of sales, nor an accounting as to sales, nor could it prevent a multiplicity of suits, which was effected by the proceeding in equity ; while equity had undoubted jurisdiction over a bill for an injunction and an accounting for the protection of a copyright, and might restrain a future violation, as well as require an account for past infringement (1). It is not necessary that any actual damages be shown (2). Where the infringement is otherwise established, the intention is immaterial (3). An injunction will be granted if the plaintiff shows that there is a probability of damage (4). But in cases of trivial damage, injunction may not be granted (5). An immoral production, of course, is not entitled to the protection of a court of equity (6).

A plaintiff whose copy right is infringed has a right to an order of the court restraining the infringement, and is not prevented from exercising his rights by an offer of the infringer before action that he will promise not to do again and will pay such damages as may be agreed upon. If such an offer is repeated after writ issued, with the addition of an offer to submit to an order and pay costs to date, the plaintiff may be deprived of any subsequent costs (7).

Granting of Temporary Injunction.—If a clear case of infringement be shown a temporary injunction will be granted without proof of actual damage (8). Originally Courts of Chancery in England were reluctant to grant relief prior to the establishment of the legal right in a Court of Law, and would refuse to interfere unless the right was clear and undisputed (9). Afterwards, by statute (10), and still later under the Judicature Acts (11), the chancery and divisions of the High Court of Justice have concurrent and equal jurisdiction ; so that now in England as well as in this country, Courts, of equity have jurisdiction to determine all questions, both legal and equitable, affecting the validity of copyrights and alleged infringements. In British India in a case of infringement of copyright the application for temporary injunction is governed by s. 6 of the Copyright Act and not by s. 56(f) of the Specific Relief Act (12). Where the legal right of the plaintiff, namely his copyright in a particular book was admitted and only its violation by the threatened publication of an alleged similar book was not denied and it further appeared

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(1) High on Injunction § 988.

(2) *Smith* v. *Johnson*, 33 L. J. Ch. 137 ; *Whatherby* v. *International Horse*, (1910) 2 Ch. 305 ; *British Broad Casting* v. *Wireless League*, (1926) 1 Ch. 442=95 L. J. Ch. 279.

(3) Pom. Eq. Jur. § 1994.

(4) *Borthwick* v. *Evening Post*, 37 Ch. D. 449.

(5) *Whittingham* v. *Wooler*, 2 Swans. 428 ; *Bailey* v. *Taylor*, 1 Russ & My. 73 ; *Cox* v. *Land and water*, L. R. 9 Eq. 324.

(6) *Glyn* v. *Western Feature Film Co.* (1916) 1 Ch. 261.

(7) *E. W. Savory Ltd.* v. *World of* h. 566=86 L. J. Ch. 824.

(8) *Reed* v. *Halliday*, 19 F. 325 ; *Saunders* v. *Smith*, 3 My. & Cr. 728.

(9) *Lowndes* v. *Duncombe* 2 Coop. 216 ; *M' Neill* v. *Williams*, 11 Jur. 3 4 ; *Saunders* v. *Smith*. 3 Myl & Cr. 737 ; *Rundell* v. *Murray*, Jac. 311 ; *Southey* v. *Sherwood*, 2 Meriv. 435 ; *Wolcott* v. *Walker*, 7 Ves. 1 ; *Bramwell* v. *Halcombe*, 3 Myl & Cr. 737.

(10) 25 & 26 Vict. C. 42 s. 1.

(11) 36 & 37 Vict. C. 66 ; 38 & 39 Vict. C. 77 ; 39 & 40 Vict. C. 59. 40 & 41 Vict. C 9, 57.

(12) *Kartar Singh* v. *Ladha Singh*, A. I. R. 1931 Lah. 624=132 Ind. Cas. 586.

that if the injunction was not issued irreparable injury or inconvenience might result to the plaintiff. *Held* that it was a proper case in which a temporary injunction should be issued (1). In order to justify a grant of temporary injunction in an action by the plaintiff restraining the defendant from infringing his copyright, it is not necessary for the plaintiff to make out a strong case and show that there is no other remedy open to him by which he can protect himself from the consequence of the injury. Injunction in such a case is the appropriate relief. In doubtful cases where the question as to legal right is one on which the Court is not prepared to pass an opinion, or the legal right being admitted the fact of its violation is denied, the course of the Court is either to grant the injunction pending the trial of the legal right or to order the motion to stand over until the legal right has been tried. In determining which of these two alteratives it shall adopt, the Court is governed by the consideration as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction (2). The power of the Court to grant a temporary injunction is not limited by the absence of any finding on the question of jurisdiction which has been raised in the case. *Prima facie* until such a question is decided in the negative, a court has jurisdiction to do all acts and take any action that may be sanctioned by law in connection with the case (3). In England even prior to the above mentioned statutes, a preliminary injunction was granted upon condition that complainant should proceed to establish his title by action at law, the injunction to be continued or withdrawn according to the success or failure of the action to establish title (4). The ability of the defendant to respond to any damages that may be assessed on final hearing, is an element of consideration on an application for a preliminary injunction to prevent infringement and in this respect the rule governing cases arising under the patent and copyright laws, is the same as in other equitable proceedings (5). But a preliminary injunction will be refused where the right of the complainant is doubtful (6).

Doctrine of acquiescence and laches.—Upon the question of the effect of plaintiff's acquiescence in defendant's publication, and of his laches and delay in invoking equitable relief, the same general principle is applicable which governs in other branches of the law of injunction. That principle is, that a plaintiff who, with full knowledge of all the facts, acquiesces in a given course of conduct on the part of defendant, and knowingly permits the expenditure by defendant of large sums of money upon the strength of such acquiescence, or who is guilty of great laches and long delay in the assertion of his rights, may be estopped from afterwards enjoining defendant from asserting

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(1) *Ibid.*
(2) *Ibid.*
(3) *Ibid.*
(4) *Mawann* v. *Tegg*, 2 Russ. 385; *Dickens* v. *Lee*, 8 Jur. 183; *Sweet* v. *Shaw*, 3 Jur. 217; *Bacons* v. *Jones*, 4 Myl & Cr. 433; *Wilkins* v. *Aiken*, 17 Ves. 422; *Bogue* v. *Houlton*, 5 De G & Sm. 267.
(5) H. C. Joyce on Injunction § 890.
(6) *Ibid* § 891; Kerr on Injunction p. 391.

the right in controversy. And the rule may be regarded as well established that whenever defendant has been induced by plaintiff's conduct or encouragement to go on with the publication in question, or when plaintiff has for a long preriod knowingly acquiesced in such publication without remonstrance or complaint, a court of equity may properly refuse to lend its aid by injunction to restrain the alleged infringement to plaintiff's copy right (1). And generally it may be said that a court of equity in the exercise of its discretion as to interfering by injunction before the legal right is established, will not enjoin an alleged infringement of a copy right, before action at law, where complainant's conduct has been such as to induce defendants to believe that their publication would not be interfered with (2). Thus where the owner of a copy right has, for a considerable period of time, permitted persons to copy cases from his works without objection, he will not be allowed to enjoin other parties from transcribing cases from the same works, until he has first established his title at law (3). The doctrine of laches as a bar to equitable relief in cases of this nature also rests upon the principle that if the owner of the copy right or musical composition for which protection is sought suffers an infringement upon his right to go unchallenged, the court will be averse to permiting him to question another infringement. Plaintiff must, therefore, purge himself of laches before he can be allowed relief; although the burden of proving it in the first instance rests upon the defendant, who must show a clear knowledge by plaintiff of the former infringements and his acquiesence, and his acquiescence therein for a long period of time, if he seeks to fasten upon the plaintiff the consequences of such laches for the purpose of preventing him from obtaining relief against other infringements (4). Mere delay in taking proceedings after knowledge of a piracy is not in itself such acquiescence as will deprive a plaintifl of his right to an injunction at the hearing (5). The copy right of a work of an alien was sold to a British subject who published it in England in 1844. The copy right was infringed in 1849, but the state of the law then rendered it very doubtful whether the copy right was protected, and the purchaser merely protested against the infringement; but in 1851, within a reasonable time after the decision of a case in the Exchequer Chamber has established the general question of copy right in an alien, he filed his bill and moved to restrain the publication of the pirated work: *Held* that there had been no such delay as to disentitle him to an injunction (6). Injunction was refused to restrain publication of a work which had been left for twenty-three years by

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(1) *Saunders* v. *Smith*, 3 Myl & Cr. 711; *Bailey* v. *Taylor*, 3 L. J. 66; *Randell* v. *Murray*, Jac. 311; *Southey* v. *Sherwood*, 2 Meriv. 133; *Tinsley* v. *Chapman*, 3 Beav. 133; *Tinselly* v. *Lacy*, 1 H. & M. 747; *Assignees* v. *Wilkins*, 8 Ves. 224; *Chappel* v. *Sheard*, 1 Jur. N. S. 99; *Correspondent News paper* v. *Saunders*, 12 L. T. N.S. 540; High on Injunction § 1028; *King* v. *Reed*, 8 Ves. note 223.

(2) *Saunders* v. *Smith*, 3 Myl & Cr. 711; *Bramwell* v. *Halcomb*, 3 Myl & Cr. 737; *Randell* v. *Murray*, Jac. 316.

(3) *Saunders* v. *Smith*, 3 Myl & Cr. 711.

(4) *Chappel* v. *Sheard*. 1 Jur. N. S. 996. High on Injunction § 1030.

(5) *Hogg* v. *Scott*, L. R. 18 Eq. 444, *Weldon* v. *Dicks*, 48 L. J. Ch. 201; but see *Lewis* v. *Chapman*, 3 Beav. 133.

(6) *Buxton* v. *James*, 5 De G & Sm. 80

the author in the hands of a book-seller, to whom it was originally sent with an intention of its being published; that intention being afterwards relinquished, and the work having passed into the hands of the defendants, who published it without the consent or privity of the author (1). So also an injunction was refused to restrain alleged infringement of copy right, before trial at law, where the conduct of the plaintiff had been such as, in the opinion of court, was calculated to induce the defendants to believe that the course taken by them would not be objected to by the plaintiffs (2). The rule that plaintiff must come into court with clean hands applies in these cases; and it is clearly a proper application of this rule to refuse the relief where the book which plaintiff seeks to have protected by injunction is itself a piracy (3).

No acquiescence without knowledge.—It is however to be borne in mind that there can be no such acquiescence in the defendant's publication, within the meaning of the rule, as to bar relief in equity, unless plaintiff has had full knowledge of the publication which he afterwards seeks to enjoin. And the fact that plaintiff's book has been out of print for a number of years, and has become obsolete and forgotten in trade, will not prevent relief by injunction against an infringement of his rights (4). So it has been held that knowledge on the part of the plaintiff that defendant was advertising his book which contained the objectionable matter in controversy, and that he was going on with its sale, or that he was about to issue a new addition, did not constitute such acquiescence as to prevent relief in equity by injunction (5). A plaintiff cannot be prejudiced by delay while ignorant of piracy (6).

Relative Injury and Inconvenience.—In determining the propriety of granting or refusing an injunction and giving other relief, the court will consider the nature and objects of the defendant in taking the matter from the plaintiff's work, the quantity and value of the material used, and the extent to which such use may prejudice the sale or diminish the profits or supersede the objects of the producer of the original (7). Accordingly, where application was made for an injunction to restrain the circulation of a guide book containing matter infringing upon plaintiff's rights in a copy righted work, it was held that the question of damages that might be sustained by the defendant by granting the order, as compared with that to the plaintiff by denying it, and the finacial ability of the defendant to respond to any damages assessed against him, and the fact that there was no intention on the part of the defendant to appropriate the property of the plaintiff, and that it was done without the knowledge of the defendant, by one employed to compile the work were all considerations which it was proper for the court

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(1) *Southey* v. *Sherwood*, 2 Mer 435.
(2) *Saunders* v. *Smith*, 3 Myl & Cr. 711; *Assignees* v. *Wilkins*, 8 Ves. 224n.
(3) *Carry* v. *Fadden*, 5 Ves. 24; Spelling on Injunction § 873.
(4) *Weldon* v. *Dicks*, 10 Ch. D. 247.
(5) *Hogg* v. *Scott*, L. R. 18 Eq. 44; High on Injunction § 1032.
(6) *Lewis* v. *Fullarton*, 2 Beav. 6, *Chappel* v. *Sheard*, 1 Jur. N. S. 977.
(7) *Folsom* v. *Marsh*, 2 Story U. S. 100; Spelling on Injunction § 876.

to weigh in determining the question of granting or denying the application (1). And it may be stated as a general principle governing herein, that where the injury is slight, or the granting of the injunction could for any reason do injustice to defendant, it will be refused and plaintiff will be left to his legal remedy (2).

What should be considered in granting or refusing the relief.— A case of invasion of copyright being made out, whether by whole sale appropriation, or by servile imitation, or by colourable translation or abridgment, the court will not refuse an injunction because it would have the effect of stopping the sale of a work, parts of which are original or even meritorious. If the works which are original cannot be separated from those wherein the infringement is found without destroying the use and value of the original matter, the alleged appropriator must suffer the conseqence of his own wrong doing. The same rule applies here as in the case of confusion of materials. He that mixes what belongs to him with that which does not, if unable to separate the ingredients of the mixture, must bear all the resulting loss (3). But the court will not usually grant an injunction where only a small part of the publication has been copied, and the piracy is slight, unless special injury is shown (4).

In *Jarrold* v. *Houllston* (5), *Wood V. C.* said : "The next question is, to what extent a work of this description is entitled to protection.....Here it is as if the book in question had been published in parts. Had the last part alone been published, there would have been no ground for interfering at all. The second lecture contained piratical matter.....It appears to me, therefore, that I shall be doing complete justice if I restrain the defendants, from publishing the second lecture, and the fifth and following lectures, down to and including the twenty-fifth of the defendant's book." Nor will the court as a rule grant an injunction where the matter taken is of a character capable of being reproduced by a mere mental process which any person of ordinary education qualifications may perform ; such for example, as arithmetical calculations or computations of interest (6).

The author of a compilation on English grammar, etc. in the vernacular, the subject matter of which is arranged in a new way totally different from current books on the subject, can acquire a copyrigh in the book. Where a large number of pages from this book were copied verbatim, even the spelling mistake being reproduced, in another publication which also followed the same

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(1) *Hanson* v. *Jaccord Jewellery Co.* 32 Fed. Rep. 202.

(2) Spelling on Injunction etc. § 876.

(3) *Mawmen* v. *Tegg*, 2 Russ. 390, 391 ; *Jerrold* v. *Houlston*, 3 Kay & J. 708 ; *Lewis* v *Fullarton*, 2 Beav. 6.

(4) *Sweet* v. *Carter*, 11 Sim. 572 (580) ; *Campbell* v. *Scott*, 11 Sim. 31 ; *Bell* v. *White head*, 3 Jur. 68 ; *Jerrorld* v. *Haywood*, 18 W. R. 279 ; *Bohn* v. *Bogue*, 10 Jur. 420 ; *Lewis* v. *Fullarton*, 2 Beav. 6 ; *Hanfstaengl* v. *W. H. Smith* (1905) 1 Ch. 519.

(5) 3 Kay & J. 708=112 R. R. 356.

(6) *Bailey* v. *Taylor*, 1 Russ & M. 73 ; *King* v. *Reed*, 8 Ves. 223 n ; Spelling on Injunction § 875.

arrangement which was adopted by the author of the former, an injunction was granted against the whole of the latter publication (1).

Effect of contract between author and publisher.—Where an author enters into a verbal agreement with a publisher for the publication of his book at the author's expense, he being reimbursed by a royalty upon the sales, but there being no transfer of the copyright and agreement with the publisher of an exclusive nature, or restricting the author from publishing another edition, an injunction will not lie to prevent the author from publishing another edition until such publisher shall have sold all of his copies (2). But where plaintiffs purchase the copyright in a periodical published by defendant, with the right to use his name in connection therewith, or with any of their present or future publications, he agreeing to give his entire time and services in and about such publication, and not to engage in any other business without plaintiffs' consent, or to permit the use of his name for any other publication without their consent, there an injunction will lie to prevent defendant from advertising or announcing the publication of a rival work without plaintiffs' consent (3). A question may arise between an author and a publisher as to how far the former may in the preparation it authorised, but on a different subject use a portion of the material already used. It is presumed that the same principles would apply as in case of any other infringement of a copyright, especially where the publisher instead of contracting for the exclusive publication makes an outright purchase of an author's manuscript and copyright (4). But where plaintiff had purchased defendants' copyright of a work upon criminal law, written by him and the defendant at the same time, contracted not to edit or write any other work on that subject, the court refused to enjoin simply because an advertisement had appeared announcing that he was about to edit another work bearing a different title from the first, but which might include some of the same subjects (5). The defendant G wrote a book for school, use of the copyright in which he assigned to the plaintiffs, and agreed not to publish any similar work. He subsequently wrote for the defendants F. Brothers a book on the same lines, adopting the same system, repeating the same kind of lessons, intended practically for the same class of pupils, and F. Brothers published it at a like low price: *Held* (*i*) that an unfair use had been made of the materials used in the first work, and consequently the publication of the second book was an infringement of the plaintiffs' copyright; (*ii*) that the agreement (which was to be deemed to

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(1) *Ghafoor Baksh* v. *Jwala Prosad*, 43 A. 412=19 A. L. J. 180=61 Ind. Cas. 394.

(2) *Warne* v. *Routledge*, L. R. 18 Eq. 497. As to relative rights of authors and publishers under contracts between them and violation of such contracts by assignments, Vide *Stevens* v. *Benning*, 6 De G M & G. 223; *Reade* v. *Bentley*, 3 K & J. 278; *Jerrold* v. *Haywood*, 18 W. R. 279; *Pike* v. *Nichols*, 18 W. R. 321; *Taylor* v. *Pillow*, L. R. 7 Eq. 419.

(3) *Ward* v. *Beeton*, L. R. 19 Eq. 207; see also *Brook* v. *Chetly*, 2 Coop. t. 216.

(4) *Barfield* v. *Nicholson*, 2 Sim. & St 1; *Rooney* v. *Kelly*, 14 Jr. L. R. N. S. 153; *Colburn* v. *Simons*, 2 Ha. 543.

(5) *Brooke* v. *Chitty*, 2 Coop. 216.

subsist during the legal term of the copyright) was not an unreasonable restraint of trade and (*iii*) that the defendants F. Brothers should be restrained by injunction from publishing the second book (1).

Report of speech protected.—Lecture includes address, speech and sermon (2). According to section, 1, sub-section 2, copyright in case of a lecture means the right to deliver the work or any substantial part thereof in public. "Copyright, however, can only subsist in a lecture if it is a literary work, *i. e.* a work expressed in print or writing (3), and it would appear therefore, that there is no copyright in mere *extempore* speech (4)". By mere delivery a lecture is not published (5). But it is published when a reporter takes it down and it appears in the newspaper. So under the old Act it is held that where a newspaper has had its reporter taken down in short-hand speeches delivered before public audiences upon public questions which it has afterwards had written up and published in its paper, together with an account of the meetings and of the speeches, the proprietors acquire an exclusive right to the publication of such speeches against one who is proceeding to publish them by copying *verbatim* from plaintiff's newspaper, and an injunction will therefore lie to restrain such infringement (6). On this case *Copinger* remarks: "It must be clearly understood that the House of Lords did not decide that the reporter obtained the copyright in *Lord Rosebury's* speeches, but only in the reports of those speeches (7)".

Law reports protected by Injunction.—The question whether there may be such literary property in the work of a reporter who prepares and publishes the reports of judicial decisions of the Courts as to entitle him to a copyright therein, and to the protection of equity by enjoining an infringement upon his work, seems to be settled in the affirmative in England; and there are repeated instances of relief by injunction in such cases in that country (8). Thus where plaintiff and defendant were proprietors of two rival legal publications or journals, each of which contained, among other things, reports of cases at law and in equity reported by members of the bar under verbal agreements with the proprietors, the plaintiff's journal being copyrighted, they were allowed an injunction to restrain defendant from printing or selling any copies of his journal containing their reports (9). A reporter has no copyright in the reports of cases but he has such a right in

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(1) *Educational Co.* v. *Fallon*, (1919) 1 Ir. 62=53 I. L. T. 41.

(2) Section 35 (1). of the First Schedule of the Copyright Act.

(3) *University of London Press* v. *University Tutorial Press*, (1916) 2 Ch. 601.

(4) Copinger p. 41.

(5) Section, 1 (3) of the First Schedule of the Copyright Act.

(6) *Walter* v. *Lane*, (1900) A. C. 539.

(7) Copinger p. 45. "The question arises as to whether the Copyright Act, 1911 has altered this decision. It is submitted that it has not." Ibid.

(8) *Sweet* v. *Shaw*, 1 Jur. 917; *Sweet* v. *Mugham*, 11 Sim. 51; *Butterworth* v. *Robinson*, 5 Ves. 709.

(9) *Sweet* v. *Maugham*, 11 Sim. 51.

the selection of cases and in the arrangement of reporting. The principle is that everybody is entitled to resort to the common source of information but they must exercise their own labour and skill (1).

How far compilation protected; abridgment of law reports.—A publication consisting partly of original matter and partly of compilations and selections from former works may be subject of copyright, and as such entitled to protection in equity. And where a large proportion of defendant's work has been made up from such a publication, with no other labour than that of copying and arranging the matter in such form as suited the compiler, it will be enjoined as an infringement (2). So upon a bill to enjoin the publication of an abridgment of law reports, the bill alleging defendant's work to be merely a colourable abridgment, omitting some parts of the cases or the chronological order and arrangement of the work being artificially changed to an alphabetical arrangement, under heads and titles, so as to give it an appearance of a new work, an injunction may be allowed (3).

Unpublished literary work.—Before the passing of the English Cpoy right Act of 1911, there was no statutory copyright in an unpublished work. But a common-law copyright in such works was constantly admitted (4). So in analogy to the protection of copyrights, a jurisdiction was exercised to restrain the invasion or piracy of literary property in the product of intellectual labour, which was still in the form of manuscript, or which if printed was not published, and over which, as a consequence no statutory copyright could be obtained, and to restrain the invasion of a similar right which an artist had in his pictures or other original works of his creative art. It was exercised to restrain the unauthorized publication of unpublished manuscript or printed matter in violation of the rights of the person entitled thereto (5). In *Pollard Photographic Co.* (6), there was an extreme application of the doctrine. *Mrs. Pollard*, the plaintiff was photographed by defendant, and she paid for likenesses taken from the negative. Defendant made other likenesses of plaintiff from the negative, and exhibited and sold one in the form of a christmas card. Plaintiff was granted an injunction. *North J.* in that case in granting injunction said: "The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed

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(1) *Jogesh* v. *Mohim*, 11 C. W. N. 1078.

(2) *Lewis* v. *Fullarton*, 2 Beav. 6; see also *Macmillan* v. *Cooper*, 28 C. W. N. 613 (P. C.).

(3) *Butterworth* v. *Robinson*, 5 Ves. 709; High on Injunction § 1010.

(4) *Prince Albert* v. *Strange*, 1 M & G 25; *Caird* v. *Since*, 12 A. C. 326; *Exchange Telegraph* v. *Gregory*, (1896) 1 Q. B. 147; *Exchange Telegraphs* v. *Central News*, (1897) 2 Ch 48; *Mansell* v. *Valley Printing*, (1908) 2 Ch. 441; *Philip* v. *Pennel*, (1907) 2 Ch. 577; *Copinger* p. 4; *Vasudeo* v. *Anup* 44 B. 720=57 Ind. Cas. 592.

(5) *Duke of Queensburry* v. *Shepbrare*, 2 Eden. 329; *Pope* v. *Curl*, 2 Atk. 342; *Southey* v. *Sherwood*, 2 Mr. 435; *Prince Albert* v. *Strange*, 1 M & G. 25; Pom. Eq. Jur. § 1997.

(6) 40 Ch. D. 345.

in his hands merely for the purpose of supplying the customer; and further I hold that the bargain between the customer and photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only (1)". On the same principle unauthorized publication of private letters, whether on literary topics, or on matters of private business, friendship or family were also restrained (2). The right of action was in the writer or his personal representatives, and not in the owner of the manuscript (3). But unpublished letters could be used for the purpose of writing a biography, or for any other purpose, except for publication (4). But the whole law on the subject has changed since the passing of the English Copyright Act of 1911, which has been incorporated in the Indian Copyright Act of 1914. By section 31 of the Act, no person shall now be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of the Act. As regards the first ownership of the copyright of an unpublished work, the Act draws no distinction between published and unpublished work. But sub-section (2), of section 17, provides that where an author's unpublished manuscript is acquired "under a testamentary disposition made by the author" the ownership of the manuscript is *prima facie* proof of ownership of copy right. That is to say, if the author bequeaths his manuscripts to A, and all the residue of his property to B, he is to be deemed, in the absence of contrary intention, to have included the copyright in his bequest to A(5). So now by the new Copyright Act of 1914, the copyright in the unpublished work is also a statutory right (6).

The author of certain Tamil songs sold the right to publish and sell them to plaintiff. Afterwards the author sold 47 songs to M, 40 of which were the same as those sold to plaintiff. M published those 40 songs and sold them to the public. It appeared that in respect of the sale to plaintiff the author undertook to correct and revise the songs, but he has failed to do so. In a suit by plaintiff for an injunction, held that the sale to plaintiff was complete and its completeness was not affected by the mere fact of the author undertaking to revise some of the songs, or re-write some of them; that plaintiff had acquired an exclusive right to publish or refrain from publishing the songs, and any one publishing them without his consent infringed his legal right, and that, consequently he was entitled to restrain M from infringhis rights therein (7). Where letters written by the plaintiff to his solicitor were improperly handed over by such solicitor's clerk to one P, the court

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(1) See also *Mansell* v. *Valley Printing Co*, (1908) 1 Ch. 567 affirmed (1908) 2 Ch. 441.

(2) *Pope* v. *Curl*, 2 Atk. 342; *Gee* v. *Pritchard*, 2 Swanst. 402.

(3) *Macmillan Co* v. *Dent* (1906) 1 Ch. 101 affirmed (1907) 1 Ch 107.

(4) *Philip* v. *Pennel*, (1907) 2 Ch. 577.

(5) Copinger p. 23; *Willis* v. *Curtois*, 1 Beav. 189.

(6) Vide s. 1 of the Schedule of the Indian Copyright Act.

(7) *M Ramiah* v. *Chidam bora*, 59 Ind. Cas. 229=39 M. L. J. 341.

ordered the original letters to be handed back to the plaintiff and granted an injunction restraining the use of copies of them (1).

Unpublished literary work—whether similarity affords any test—In *Florence A Decks* v. *H. G. Wells* (2) the action was brought against the *Macmillan Company of Canada*, which is the company to which the plaintiff entrusted her manuscript ; it is brought against *Mr. H. G. Wells*, who is said to have used the manuscript of the plaintiff improperly as the foundation of his book, The Out-line of History, and it is brought against *Macmillan Company, Incorporated, of New York, Messrs. George Newnes, Limited*, and *Messrs. Cassell & Co., Limited*, for having published the work or *Mr. Wells* which had been so composed. In delivering the Judgment *Lord Atkin* said : "Now whether or not the book was used, handed over to *Mr. Wells*, and whether it was improperly used by him are pure questions of fact ; upon those questions of fact both courts, have come to a conclusion against the plaintiff ;.....The position is that *Miss Decks* in August 1918 entrusted her manuscript entitled "The Web" to the *Macmillan Company of Canada*. The manuscript was of a work which involved the whole history of the world from its beginning to the present day, with the special object of enphasizing the important part that woman had played in the social development of the world. The book was entrusted to the *Macmillan Company in Canada* on 8th August 1918. It was left with them by *Miss Decks* for two purposes. One purpose was to ascertain whether there would be any objection to the use by her of certain extracts from Green's 'Short History of the English people,' the copyright of which was owned by *Messrs. Macmillan in London*. Together with a request that they should afford her information on that point, they were generally asked to advise her as to the prospects of the work as a publication. Apparently *Messers. Macmillan in London* control the *Macmillan Company of Canada and the Macmillan Incorporated Company of New York*.....It seems that the manuscript was not returned in fact to *Miss Decks* uptil April 1919.....During that priod between August 1918 and April 1919 *Mr. Wells* appears to have completed the manuscript of his book, "The Outline of History,' which book also is written as a history of the world form the beginning, dealing as an ultimate object, with a history from a different point of view from that which had been undertaken by *Miss Decks*. Therefore so far as the coincidence of time is concerned, if the manuscript had left Canada and had reached London it is of course, possible that *Mr. Wells* might have had an opportunity of seeing the work and using it ; and of course, direct evidence has to be given in respect of this matter. The evidence of *Mr. Saul* (who occupied the position of editor of *Messrs. Macmillan Company's* works and was the person before whom manuscripts would naturally come) was that, so far as he was concerned, to his knowledge

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(1) *Lord Ashburton* v. *Pape*, (1913) 2 Ch. 469=82 L. J. Ch. 527.

(2) A. I. R. 1933 P. C. 26=64 M. L. J. 193=142 Ind. Cas. 815=1933 A. L. J. 393.

he had not parted with the manuscript ; and it is difficult to see who could have dealt with the manuscript except *Mr. Saul* himself. . . . . .The evidence of *Mr. Wells* is quite clear and definite, that he had never seen the manuscript he did not know of *Miss Deck*, he had not taken any part of the information that she had put in her manuscript from that manuscript or from *Miss Decks* herself ; and there is no direct evidence on behalf of *Miss Decks* that the manuscript ever did in fact leave Canada.

"But apart from the direct evidence, *Misz Decks* relies upon the intrinsic evidence to be derived from a comparison of the two works ; and she says that when you compare the one work with the other, you will find that there is such an accumulation of similarities, of like omissions, of plan, of phrases, of mistakes, that the inference is irresisitble that *Mr. Wells* did in in fact have her work before him before he composed his work. Now their Lordships are not prepared to say that in the case of two literary works intrinsic evidence of that kind may not be sufficient to establish a case of copying, even if the direct evidence is all the other way and appears to be evidence that can be accepted ; but that such evidence must be of the most cogent force before it can be accepted as against the oath of respectable and responsible people whose evidence otherwise would be believed by the court. . . . The suggested similarities can be explained by the nature of the work, which has common elements, and by the fact that both writers must have had recource to authorities which were common to both."

Maps and charts, etc.—Where the natural objects from which a work is produced are equally open to all, as in the case of a map or chart, the copyright is violated only when a servile imtation is made. In all such cases, absolute originality being of necessity excluded, the compiler may property make use of preceding work upon the same subjects, by bestowing upon the materials thus taken such mental labour, and subjecting them to such revision as to produce an original result, the alterations being not merely colourable, and the compiler not denying the use made of preceding works (1). Maps are literary works under the new Copyrigt Act (2). But the Court will interpose to restrain the piracy of a court calendar, the individual work being regarded as a proper subject of copyright, although the general subject as in the case of a chart or map is open to all (3). So relief will be granted against the reproduction by defendant with a few minor changes of a set of copyrighted maps prepared by plaintiff showing improvements upon property and the surrounding property as affecting fire risks (4).

Copy of painting ; living pictures, photographs. etc.—Where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration

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(1) High on Injunction § 1005.
(2) Copinger p. 78.
(3) *Longman* v. *Winchester*, 16 Ves. 269.
(4) *Sanborn* v. *Dakin*, 39 Fed. 266 ; High on Injunction § 1005.

in pursuance of that order, then in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copy right (1). But if an artist or photographer solicits the making of a picture or photograph, without making any charge for doing so, the copy right *prima facie* belongs to the artist (2). The unauthorized copying of a painting by taking photographs and selling them constitutes such a violation of the common law right of the owner as to warrant relief by injunction. And in such a case, the fact that the owner has previously consented to and permitted the publication in a magazin of an engraving from the painting does not constitute such a publication as to prevent relief in equity. Nor does the exhibition of the painting at a public gallery or for the purpose of obtaining subscribers amount to such publica ion as will bar the right to relief by injunction (3). But the publication of sketches of living pictures which represent the scenes of copy righted paintings owned by plaintiff constitutes no infrgement of the copyright and will therefore not be enjoined (4). Nor does the production of the living pictures themselves constitute an infrigement and relief in such cases will likewise be denied (5). And the exhibition of a diorama copied on a large scale from plaintiff's print or engraving has been held not to be sufficient ground to warrant an injunction until plaintiff's right could be established (6). Where, however, plaintiff has made drawings and etchings and has printed impressions of them for his own private use and pleasure, not intending them for publications, and defendants surreptitiously obtain them and publish a catalogue for sale an injunction will be allowed against such publication. And in such a case the right to relief rests unon the double ground of an exclusive property in plaintiff with no right or interest in defendants, and upon the ground of breach of trust or confidence in obtaining possession of the etchings ; and the injunction is proper, under such circumstances, without a trial at law (7). And upon similar grounds, a photographer, who has taken photographs for a customer in the usual course of business, retaining the negative in his possession, may be restrained from selling or exhibiting for sale, without the customer's consent, copies of such photographs (8).

In deciding whether there is an infringement of copyright in pictures, the question is whether the offending pictures are copies of substantial portions of the copyrighted pictures. The figures may have been reduced in the offending pictures and slight modifications may have been introduced or the clothes and colours may have been different but it is sufficient if the main figures have been identical (9). Notwithstanding the fact that the statutory copyright in photo-

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(1) *Bon cas* v. *Cook*, (1903) 2 K. B. 227.
(2) Copinger p. 99.
(3) High on Injunction § 1000; *Turner* v. *Robinson*, 10 Ir. Ch. 121.
(4) *Hanfstaengl* v. *Baines*, (1895) A. C. 20=64 L. J. N. S. Ch. 81 ; *Hanfstaengl* v. *Empire Palace*, 63 L. J. N. S. Ch. 681.
(5) *Hanfstaengl* v. *Empire Palace*, 63 L. J. N. S. Ch. 417 ; High § 1000.
(6) *Marien* v. *Wright*, 6 Sim. 297.
(7) *Prince Albert* v. *Strange*, 1 Mac & G. 25=2 De G. & Sm. 652.
(8) *Pollard* v. *Photograph Co.* 40 Ch. D. 345.
(9) *Mohendra Chandra* v. *Emperor*. A. I. R, 1928 Cal. 359.

graphs may not have been registered, the court will grant an injunction to restrain the reproduction without licence from the owners, of any such photographs by any other person (1).

Industrial societies' rules.—General rules for industrial societies under the Industrial etc. Societies Act, 1876, had been copyrighted by an official of the plaintiff society, which was subsequently registered. The copy right in the rules was afterwards assigned to the society. The defendant society had published rules which were practically identical with those used by the plaintiff society : *Held* that the plaintiffs were entitled to a declaration that the defendants had infringed the copyright in the latter rules ; *Held* further that as an injunction restraining the use of the rules would immediately end the corporate existence of the defendant society, it should not be used (2).

Telegraphic Code.—The plaintiff prepared and published a telegraphic cypher code, each word consisting of five letters and differing from every other word in at least two out of five letters. In preparing the code the compiler had applied two principle, first that all the words, though meaningless in themselves, should be pronounceable ; secondly, that it should be selected so as to make error in transmission by the Mosse code as little likely as possible (3).

Infringement of copy right indirectly.—In an action by plaintiffs for an injunction and damages on the ground that the defendant's directory constituted an infringement of the plaintiff's copy right in their directory, it was found that, a substantial portion of the defendant's directory was taken, that the inaccuracies in both works were identical, that there was an identity not merely of information but of language and that where the defendants did make enquiry that enquiry was limited to a mere correction and verification of the materials collected by the plaintiffs. *Held* that the defendant's work involved an infringement of plaintiff's copy right. In a case such as this, the plaintiffs are at liberty to claim general damages and also compensation for conversion based on the sales by the defendants. Where the damages are not accurately calculable they are damages at large (4). A rival publisher is not less liable to an injunction for piracies because he makes inquiries on his own behalf to ascertain the correctness of what he copies (5). Injunction was granted and continued against the defendant, restraining the sale of a sheet almanack, containing matter pirated from a distinct part of a directory published by the plaintiff (6).

Member of Board of studies preparing selections.—A member of the Board of Studies of the Allahabad University, prepared at the request of the convener a list of graduated selection from Standard Persian Authors for the use of candidates for certain examinations of the university. In preparing these

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(1) *Bowden* v. *Amalgamated Pictorials*, (1911) 1 Ch. 386, see also *Barker Motion* v. *E. Hulton*, 28 T. L. R. 496= 56 Sol. Jo. 633.

(2) *Co-operation Union* v. *Kilmore*, 47 I. L. T. 7.

(3) *Anderson* v. *Lieer Code*, (1917) 2 K. B. 469=86 L. J. K. B. 1220.

(4) *Khosla Bros.* v. *Thacker's Directory Ltd*, 67 Ind. Cas. 983.

(5) *Morris* v. *Ashbee*, L. R. 7 Eq. 34.

(6) *Kelly* v. *Haoper*, 1 Y & Coll. C. C. 197.

lists he spent considerable labour, learning and skill. The Board of Studies after due consideration adopted with slight modification the selection shown in the list as the subject for these examinations in Persian and published the lists for the information of the public generally and of the candidates concerned specially. Subsequently to this, B, a firm of publishers, compiled books from the original authors according to these lists : *Held* that A had no copy right in the list, as by laying the result of his labours before the Board of Studies he placed the lists unreservedly at the disposal of the University authorities (1).

Newspaper—alleged custom of trade to copy.—The plaintiff, the proprietors of the "Times," a news paper duly registered under the copyright Act, 1842, published on the morning of the 13th April (among other matter) three articles which had been composed by foreign correspondents and paid for by the plaintiffs on the terms that the copyright therein should belong to the plaintiff. The defendants, the proprietor and publisher of the *St. Jame's Gazette*, published in their paper, about half past twelve on the same day, a verbatim copy of these three articles, except certain alterations. *Held* that the plaintiffs had a legal right to sue to restrain the infringement of their copyright; and that the defendants could not escape on the ground that they had copied only a small part of the plaintiff's newspaper, or justify what they had on the ground of an alleged universal practice of journalists to copy such articles from each other, without asking the permission of the proprietor of the paper copied from (2).

Ancient religious works annotated.—In 1884, the plaintiff published a new and improved edition of an old religious *Sanskrit* work, called *Ortraja* on religious observances. In this edition, the old materials had been completely re-cast and re-arranged and valuable foot notes also had been added with the assistance of Sanskrit Pundits. The copyright of this work was registered by the plaintiff in 1885. The defendants in 1886 brought out an edition of the same work and registered it. The edition contained the same alterations, omissions and additions, and the same foot notes as were contained in the plaintiff's edition, except some material changes. The plaintiff alleging that his copyright has been infringed, prayed that an injunction may be issued to the defendants restraining them from selling the unsold copies of their books and for damages. *Held* granting an injunction, that the defendants had not gone to original sources to get their material, but had simply appropriated the labour and industry of a previous compiler (plaintiff) with an existing copyright (3).

Selection of Poems.—There is copyright in a selection of poems. The true principle applicable to cases of this kind is, that one person is not at liberty to use or avail himself of the labour, which another has been

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(1) *Muhammad Abdul Jalil* v. *Ram Doyal*, 14 A. L. J. 724=38 A. 484=34 Ind Cas 357.

(2) *Walter* v. *Steinkopff*, (1892) 3 Ch. B. 358.

(3) *Ganga Vishna*: v. *Moresshar*, 13 49 ; see also *Max well* v. *Somerton*, 30 L. T. 11.

at for the purpose of producing his work, that is in fact, merely to take away the result of another man's labour, or in other words his property A suit for injunction to restrain a piracy of copy right by the sale of a book published more than a year before suit is not barred by section 26, Cl. 45, 5 & 6 Victoria or by art. 40, Sch. II of the Limitation Act (1).

CHAPTER XXV.

Injunction against infringement of Trade marks, trade names, etc.

Trade mark.—A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade mark (2). In the common law sense of the word, a trade mark is a distinctive mark or device affixed to or accompanying an article intended for sale for the purpose of indicating that it is manufactured, selected or sold by a particular person or firm (3). A trade mark, although partaking to some extent of the nature of a monopoly, differs essentially from copyright. Copyright refers to and is intended to protect the substance of a production, whether of a literary or artistic nature, while a trademark merely protects the identification of an article, and of itself in no way affects the production or sale of a similar article by a third person (4). Any one who has adopted a particular mode of designating his particular manufacture has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to confound the identity, and lead purchasers to believe that it is the manufacture to which that trademark was originally applied (5). The consideration of a true trademark is primarily centered in an actual mark or device, necessarily annexed to some description of goods or to the envelope or receptacle containing them (6).

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(1) *Macmillan* v. *Suresh Chandra*. 17 C. 951.

(2) The Indian Merchandise Marks Act, 1889 s. 3; *Anukul* v. *Empress*, 27 C. 776=4 C. W. N. 423.

(3) Byrne's Law Dictionary.

(4) *Dicks* v. *Yates*, 50 L. J. N. S. Ch. 809; Slater on Trade Marks. p. 231.

(5) *Farina* v. *Silverlock*, 6 Deg. M. & G. 218; Slater on Trade Mark p. 231.

(6) Slater on Trade Mark p. 231: "A trade mark is a symbol which is applied or attached to goods offered for sale in the market, so as to distinguish them from similar goods, and to identify them with a particular trade or with his successors as the owners of a particular business, as being made worked upon, imported, selected, certified or sold by him or them, or which has been properly registered under the Acts as the trade mark of a particular trader." Kerley on Trade Mark p. 24. According to section 3 of Act of 1905, a mark includes a device, brand, heading label, ticket, name, signature word, letter, numeral or any combination thereof," and "a trade mark shall mean a mark used or proposed to be used upon or in connection with goods for the purpose indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with or offering for sale."

"The word 'trade mark'" said *Lord Westbury* (1), "is the designition of these marks or symbols, as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property." In order that the name of an article may in any case be the trade mark of the manufacturer, it is essential that the name should indicate, not the article only, but also that the article is manufactured by the person claiming it as a trade mark, as distinguished from other persons also manufacturing or entitled to manufacture it (2)."

The function of a trade-mark is to indicate to the public the origin, manufacture or ownership of articles to which it is applied, and thereby secure to its owner all benefit resulting from his identification by the public with the article bearing it. Where a trade-mark is infringed, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is on this ground that a court of equity protects trade mark (3). The basis of the right is a property right in the manufacturer or vendor to have his trade protected (4). Although there is also a right in the public to be protected from fraud, this in it-self would not give a remedy to an individual. Infringement of a trade mark is a branch of unfair competition in trade (5). "No man can have any right to present his goods as the

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(1) *The Leather Cloth Co.* v. *The American Leather Cloth Co.*, 4 De. G. J. & S. 137 (142). In *Richards* v. *Butcher*, (1891), 2 Ch. 522 at p. 532, *Kay J.* said: "User as a trade mark, means, not what the person who uses has in his own mind about it, not what he has registered in a foreign country, but what the public would understand when the trade mark, or so-called trade mark, is impressed upon the goods, to be the trade mark. That is the trade mark proper; and user as a trade mark means, and must necessarily mean, the impressing of those words either upon the goods or upon some wrapper or case containing the goods, in such a way that the public would necessarily understand those words to be, and alone to be, the trade mark of the person who uses them."

(2) *The Magnolia Metal Co's Trade Marks*, (1897) 2 Ch. 371 at p. 390.

(3) *Deninson Mfg. Co.*, v. *Thomas Mfg. Co.*, 94 Fed. 651, 656; Pom. Eq. Jur. § 1998.

(4) *Leather Cloth Co.*, v. *American Leather Cloth Co.*, 4 De. G. J. & S. 137, 141 affirmed 11 H. L. Cas. 523.

(5) Pom. Eq. Jur. 1998. A trade mark is a particular word, sign symbol or device which is used by a person for the purpose of indicating that the article to which it is attached is manufactured or sold by him or by his authority, and which by exclusive use become recognized as the distinguishing mark of the owner's goods. In order to establish title to a trade mark and to justify relief by injunction, the owner must show an appropriation and use of the word, mark, symbol or device under such circumstances as to publicity and length of the use as to manifest an intention to adopt it as a trade mark; and a mere casual use, interrupted and for a brief period, will not support the claim of exclusive ownership. High on Injunction § 1063; *Licensed Victuallers N. Co.*, v. *Bingham*, 58 L. J. N. S. Ch. 36. On the other land, long use need not be shown as a condition to obtaining injunctive relief, nor is it necessary that the article should be widely known or that it should have attained a great reputation, provided the use of the trade mark and the intention to adopt it are clear. *Hall* v. *Barrows*, 32 L. J. Ch. 548. Nor is it necessary that the article should have acquired a general notoriety in the market, by the use of the particular mark adopted, but the right may be established whenever the goods are brought into the market *M' Andrew* v. *Barrett*, 33 L. J. Ch. 56.

goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another (1)."

It is open to a person in British India to acquire an exclusive user in British India of a trade mark even though it had been previously used by a manufacturer in Scotland, consequently in a suit by a person in British India for infringement of his trade mark, the question of its prior user in Scotland is irrelevant (2). Where goods have acquired, by a particular fancy description, combination or device a reputation in the market, it is immaterial that the customers do not know who the maker is (3). "The name of an article" says *Lord Hatherley* (4) "if it has acquired a name, should not, by any honest manufacturer, be put upon his goods if a previous manufacturer has, by applying it to his goods, acquired the sole use of the name. I mean the use in this sense, that his goods have acquired by that description a name in the market, so that whenever that designation is used he is understood to be the maker. Where people know who the maker is at all—or if people have been pleased with an article, it should be recognised at once by the designation of the article, although the customers may not know the name of the manufacturer." Similarly also *Lord Halsbury* in *Birmingham Vinegar Brewery Company* v. *Powell* (5). said: "It may be true that the customer does not know or care who the manufacturer is, but it is a particular manufacture that he desires. He wants Yorkshire Relish to which he has been accustomed, and which it is not denied has been made exclusively by the plaintiff for a great number of years. This thing which is put into the hands of the intended customer is not Yorkshire Relish in that sense. It is not the original manufacture. It is not made by the person who invented it. Under these circumstances it is a fraud upon the person who purchases to give him the one thing in place of the other."

Proper and Quasi trade mark.—When a trader specially selects and appropriates to himself, for the purpose of distinguishing his goods, any device it is his trade-mark proper and no one else is allowed to use it. But if without any such selection and appropriation, the trader's goods happen to bear some mark which has come to be associated by the public with the trader's name so that all goods with the mark are supposed to come from him, then also the law will not allow any one else to use it. Both the above marks are usually called trade-marks and the distinction between them is not one of principle but it is one which is convenient, when examining the evidence by which it is sought to prove the infringement. It is only an extension of the general law of trade-marks that the right to the exclusive use of a trade mark may be

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(1) *Per Turner L. J.* in *Burgess* v. *Burgess*, 3 D. M. & G. 204; see also *Birmingham* v. *Powell*, (1897) A. C. 710.

(2) *C. R. Cowie & Co.*, v. *Patel Bros.*, 2 Rang. 278=82 Ind. Cas. 723=1924 Rang. 333.

(3) *Madhabji* v. *Central India Spinning*, 34 Ind. Cas. 533.

(4) *Wortherspoon* v. *Currie*, 5 H. L. 508 (514)=42 L. J. Ch. 130 cited in *Madhabji* v. *Central India Spinning*, 34 Ind. Cas. 533.

(5) (1897) A. C. 710 (713)=66 L. J. Ch. 763.

claimed as well by a trader who only imports goods as by one who manufactures goods (1). To constitute the ornaments employed, trade-marks, they must have been adopted as symbols devised to distinguish a particular class of goods as goods of that class manufactured or selected by a particular manufacturer or merchant (2).

The purpose and philosophy of trade marks.—The peculiar and proper purpose and function of a trade mark is to point out the origin or ownership of the article to which it is affixed, and to give notice who was the producer of it. Therefore a generic name or a name merely descriptive of an article of trade of its qualities, ingredients or characteristics, cannot be employed as a trade mark and the exclusive use of it would be protected by a injunction (3). So it is well settled that no one can acquire such a right to adopt and use as a trade mark a generic name, or a name merely descriptive of an article of trade, or of its qualities, ingredients, or characteristics, when not used in combination with some device or design, as will entitle him to have the same protected by injunction. The general rule may be thus stated : in order to procure an injunction, first an intent on the part of the defendant in using the imitation must be shown to injure the originator by disposing of the defendants' wares as his ; if consisting of words, the trade mark must indicate ownership and origin, not merely quality, kind, texture. composition, utility, intended use or class of customers. Names having a definite and established meaning not indicating ownership, origin, or something equivalent, cannot be exclusively appropriated (4). Thus, it was held that the 'word '*Satinine*' is a descriptive word, having reference to the character and quality of goods, such as starch, ghee, perfumery, etc., to which it is applied, and that it is not an invented word, and therefore cannot be registered as a trade mark under the English Patents, Designs and Trade Marks Act (5). But the rule that a generic word cannot be so appropriated as to entitle one to protection in its use only applies when it designates the article in connection with which it is used. A generic or descriptive word having no necessary connection or reference to the ingredients or quantities of the wares upon which it is stamped, printed, or labelled or to which it is other wise attached, may as well form the whole or part of a trade mark as any other class of words. Thus the word 'cream' used in connection with the word 'baking powder,' being shown to have been long used by a particular manufacturer and stamped upon his packages, was accorded protection as a mark (6).

Requisites of a valid trade mark.—Every one has a right to use any kind of trade mark he likes so long as he does not infringe the right of others already acquired. Hence where a plaintiff does not make out a case that the

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(1) *Ralli* v. *Fleming*, 3 C. 417=2 C. L. J. 93.
(2) *Lavergue* v. *Hooper*, 8 M. 149.
(3) H. C. Joyce on Injunction § 747.
(4) Spelling on Injunctions etc. § 893.
(5) *In re Meyerstein's Trade Mark*, 43 Ch. D. 604.
(6) Spelling on Injunction and other Extraordinary Remedies § 893.

right to the use of a certain trade mark is the 'exclusive right of property' which he has acquired to the exclusion of every one else, a relief to declare that the plaintiff has got the right to use that trade mark cannot be granted (1). "A trade mark" says *Prof. Pomeroy* "must not be descriptive, generic, or, geographical, for any one has a right to describe his product or place of origin truthfully. Nor can a colour or numeral unaccompanied by anything further, nor a mere former shape, be valid trade mark. No one by using his own name as a mark can prevent another of the same name or one closely similar from using his name on his goods or in partnership or corporation. Where during the life of a patent the name of the article has been used to designate it, upon the expiration of the patent the name becoming public property, and the obtaining of the trade mark for the same during the life of the patent will not protect it there after. A trade mark gives the owner no monopoly of the goods. Unless they are protected by patent or copy right, any one is at liberty to copy them. An owner may apply more than one trade mark to the same article. The test is whether the public is confused, or whether he uses the mark unfairly. A trade mark will not expire by lapse of time It is good until abandoned. A mark may belong to different persons in different countries (2), and be good in one country and invalid in another. The right to protection grows out of the use of the mark, and not from its mere adoption ; the owner cannot, in a market which he has never entered, enjoin the use of a mark which designates the latter's product (3).

Trade name. – A trade name is a name which by user and reputation has acquired the property of indicating that a certain trade or occupation is carried on by a particular person. The name may be that of a person, place or thing, or it may be what is called a fancy name (that is a name having no sense as applied to the particular trade), or a word invented for the occasion, and having no sense at all. It may be applied to goods, to a magazine, or any other subject of trade. A trade name gives the persons entitled to use it the right of preventing any other person from using it so as to induce purchasers to believe that his goods are the goods sold or manufactured by the original maker, and thus to injure the latter. Thus, where a firm had obtained a reputation for a particular kind of goods distinguished by the word '*Glen field*,' which was the name of the place where the goods had originally been manufactured a person who sold the same kind of goods under the name '*Glenfield*' was restrained by injunction from so doing, although he had a small factory at the place called *Glenfield*, because it was apparent on the evidence that he used the word to induce the public to believe that in buying his goods they were buying the goods of the plaintiff, the original manufacturer (4). A trade name differs from a trade mark merely in that it is designated and adopted for the purpose of appealing

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(1) *Ganeshi Lal* v. *Anwar Khan*, A. I. R. 1933 All, 495.
(2) *Rey* v. *Loocuturier*, (1908) 2 Ch. 715, (1910) App. Cas. 262.
(3) Pom. Eq. Jr. § 1998.
(4) Byrne's Law Dictionary,

to the ear rather than to the eye, as in the case of a trade mark. Where, thorefore, the similarity in sound between the names in question is so close as to be likely to deceive an ordinary purchaser, relief will be granted notwithstanding the fact that there is no resemblance between the packages and labels to which the names are applied (1). Where one adopts a trade name so similar to that of another that confusion is sure to result and the public will thereby be deceived, an injunction will issue at the suit of the party who first adopted the name (2). Analogous to the protection extended to one's name as forming part of, or in connection with the name of article the whole of, a trade mark, is that extended to restrain the unauthorized use of another's name to induce persons to purchase the goods and wares of the user under the belief that they are the product or property of the person whose name is used (3). In the case cited an injunction was granted to restrain a relative of the senior member of the firm of *Day & Martin*, after the senior member's death, from using the name of the original firm on packages of merchandise to the prejudice of the firm's successors in business. In deciding for complainants, *Lord Langdale M. R.* said: "The accusation which is made against this defendant is this: that he is selling goods under forms and symbols of such a nature and character as will induce the public to believe that he is selling the goods which are manufactured at the manufactury which belonged to the testator in this cause. It has been very properly said that the principle in these cases is this: that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colour, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that, in my opinion, the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others. It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments, as to mislead the public. And secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. To have a copy of the thing would

(1) High on Injunction § 1063, see also *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518, *Burgess* v. *Burgess*. 3 De G. M, & G. 896.

(2) *Walter* v. *Ashton*, (1902) 2 Ch. 282.

(3) *Croft* v. *Day*, 7 Beav. 84.

not do; for though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary in the first instance to mislead the public, and in the next place to secure a benefit to the party practising the deception by proving his own individuality'. There are many distinctions, even more than have been stated, between these two labels. It is truly said that if any one takes upon himself to study those two labels he will find several marks of distinction. On the other hand, the colours are of the same nature, the labels are exactly the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or the bottles in which the blacking is put. It appears, therefore, to one that there is quite sufficient to mislead the ordinary run of persons, and that the object of the defendant is to persuade the public that this new establishment is, in some way or other, connected with the old firm or manufacturer, and at the same time to get purchasers to go to 90½ Holborn Hill, and not to 97 High Holborn. I think what has been done here is quite calculated to effect that purpose; the defendant must be restrained."

The principle underlying the use of trade names is that a person shall not trade under a name so closely resembling that of the plaintiff as to be mistaken for it by the public. In other words a person shall not carry on his business in such a way as to represent that his business is that of another person The question to be determined in cases of this description is whether there is such a similarity between the two names as that the one is in the ordinary course of human affairs likely to be confounded with the other. It is not necessary to prove that the defendants in taking the name complained of by the plaintiffs had any fraudulent intent. It is enough if the plaintiffs prove that the act of the defendants in assuming the name complained of does an injury to the plaintiff's rights. There is no question in such a case of property or monopoly in the name There is no property in the word but at the same time it is fraud on a person who has established a trade and carries it on under a given name that some other person assume the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name (1). The defendant began to sell a certain patent medicine in such a way that the ordinary customer might easily think it was another similar one of the plaintiff. In an action for injunction restraining the defendant from so doing, *held* the test to apply in such a case would be the points of similarity and not the points of dissimilarity. The fact that the plaintiff's medicine was not an efficacious one, was no reason for refusing him the legal protection he claimed (2).

(1) *The National Bank of India* v. *National Bank of Indore*, 70 Ind. Cas. 47=1923 B. 119=24 Bom. L. R. 1181.

(2) *Cheterpal* v. *Jagannath*, 44 A. 608=L. R. 3 A 344=20 A. L. J. 537=67 Ind. Cas. 353.

When an injunction absolute is claimed restraining defendants from using a trade name which plaintiffs had been using for a long time previously, one of the tests to apply is to see if confusion is likely to be created in the mind of the public by the use of the name by the defendants (1). So a Court ought not to restrain a man from carrying on business in his own name simply because there are other people who are doing the same and who will be injured by what he is doing. It must appear that the person who is carrying on the business in his own name is doing it in such a way as to pass off his goods as the goods of somebody else. Where a defendant was carrying on business in his own name which also happened to be the name of the plaintiff the defendant could not be restrained (2).

A company is entitled to obtain an injunction to restrain a new company from carrying the same kind of business as the old company under the name identical with or similar to the plaintiff's company as to be calculated to deceive the persons dealing with the plaintiff (3).

Assignability of trade mark and trade name.—"Now a trade mark is a mode of warranting the origin of the goods to which it is attached, or their trade association, and it is of the essence of trade mark that its representation should be true. In this, I think, is to be found the true test and measure of the assignability. This is borne out by what was said by *Lord Kingsdown* in *The Leather Cloth Company Ltd.* v. *The American Leather Co. Ltd.* (4), in meeting the argument advanced by counsel for the appellants who urged that the doctrines laid down in the judgment then under appeal, if pushed to their legitimate consequences, could prevent any assignment. *Lord Kingsdown* dealt with the argument as follows:—'It was said that if this principle be pressed to its fullest extent, it will prevent the use of the name of a firm by any but the original partners, and will of course, prevent, on a transfer of the business, the right to use the name by any other persons. But the answer to this is, that by usage of the trade name of the firm is understood not to be confined to those who first adopted it, but extend to and include persons who had afterwards been introduced as partners, or persons to whom the original partners have transferred their business The name of the firm continues to be used in many cases long after all the original traders have died, or ceased to have any interest in the concern, as in the great banking houses of *Child* & *Coutts*, and many other mercantile houses. If a manufacturing house uses the name of the firm, and stamps the name of its firm, upon its goods, though the name of the firm no longer represents the same persons as at first, it is no fraud upon the public for the reasons I have already alluded to. For the same reason, the use of the old trade-mark of the firm by the new partners or their successors, if the term 'trade mark' be understood

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(1) *W. H. Dorman & Co.* v. *Henry Medows Ltd.*, (1922) 2 Ch. 332.

(2) *Uberoi* v. *Kirpal Singh*, 56 Ind. Cas. 709.

(3) *Gurkha* v. *Mahomed*, 51 Ind. Cas. 905.

(4) 11 H. L. C. 523=35 L. J. Ch. 53=11 Jur. N. S. 513.

in what I have already said in its proper sense, is no fraud upon the public; it is only a statement that the goods are the goods of the firm whose trade-mark they bear.' *Lord Cranworth* lays down the law in similar terms.

"In *Hall* v. *Barrows* (1), *Lord Westbury* said: 'If a name impressed on a vendible commodity passes current in the market as a statement or assurance that a commodity has been manufactured by a particular individual, it may be that the Court would not sell the right to use that name without addition: but if it sold the business or manufacture carried on by the owner of the name, it might give the purchaser the right to represent himself as the successor in business of the first maker and in that way entitled to use the name (2)' ". So again in *Singer Manufacturing Company* v. *Wilson* (3), it was said by *Mellish L. J.*: "The Court of Equity having taken that step, trade-marks began to be considered as property, and no doubt, there is in certain sense a property in a trade-mark and equally in a trade name, because a trade name may be used, and is commonly used, as a trade-mark properly so called, that is, a trademark upon the goods themselves. Then both a trade-mark and a trade name were allowed to be sold as part of the good will of the business. When a new partner came into a mercantile firm, amongst other rights which he purchased by coming into that firm was the right to use the trade-name or trade-marks belonging to that firm. Even when an entire business was sold to a new purchaser the right to use the trade-name and trade-marks passed with it and in that sense they become property." It is to be noticed that *Lord Justice Mellish* limits the passing of a trade mark to the case where the entire business, of which it is a part, is sold (4).

Similarly *Lord Blackburn* in *Singer Manufacturing Co.* v. *Loog* (5), says: "Both trade-marks and trade-names are in a sense property and the right to them passes with the good will of the business to the successors of the firm that originally established them though the name of that firm be changed so that they are no longer stricly correct." Then in *Pinto* v. *Badman* (6), *Fry L. J.* lays down as to the transfer of a trade-mark that, "it may be assigned if it is indicative of its origin when the origin is assigned with. It cannot be assigned when it is divorced from its place of origin or when in the hands of the transferee it would indicate something different to what it indicated in the hands of the transferor." He also said in *Edwards* v. *Dennis* (7): "No trade-mark can be assigned except in connection with the good-will of the business and must be co-extensive with the goods or classes of goods in respect of which the trade mark is registered" (8). So also in British India a trade-mark

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(1) 4 De. G. & S. 150=33 L. J. Ch. 204.

(2) *British American Tobacco* v. *Maboob Bux*, 7 Ind. Cas. 270=38 C. 110.

(3) L. R. 3 Ch. D. 376.

(4) *British American tobacco* v. *Mahboob Bux*, 38 C. 110=7 Ind. Cas. 270.

(5) L. R. 8 A. C. 15 at p. 33.

(6) 8 R. P. C. 181=7 T. L. R. 317.

(7) L. R. 30 Ch. 454 (479).

(8) It is trite law that an assignment of trade-mark without business, confers no effective right. An action for breach of trade-mark does not lie at the instance of the manufacturer who supplies articles when another firm carries on the actual business with the articles supplied. The manufacturer may be interested in the

cannot be transfered in gross : that is, no trade mark can be assigned except in connection with the good will of the business in which it had been used, or, in other words, an assignment of good will must accompany or follow the transfer of a trade mark. Consequently where a person merely takes an assignment of the trade-mark without an assignment of the good will, he acquires no title to the trade mark (1). But the transfer of the good will and trade mark need not be contemporaneous (2) or even that there should be any legal conveyance of the latter, if the assignee is equitably entitled to it (3). Although a trade mark is not so personal as to be inalienable, yet a trade mark cannot be assigned or descend in gross (4). Where the trade marks along with the business of the jute baler were sold by the executors and heirs of the proprietor, the legal requirement for the valid transfer of trade mark, was satisfied (5). When the plaintiffs, the transferees of the trade marks and business of a jute baler, gave a license to the Defendants, the right to use and to authorise others to use exclusively the trade-marks and to hold the good-will of the business of original jute-baler and the marks without any interference by the proprietors for a particular period on the payment of certain royalty and the defendants sought afterwards to repudiate their obligation under the agreement alleging that the plaintiff's title to trade-mark was illegal and invalid : *Held* that under s. 117 of the Indian Evidence Act a licensee cannot be permitted to deny that the licenser had at the time when the license commenced authority to grant such license (6).

A partnership trade mark is an asset of the firm saleable on a dissolution like any other assets, and upon such a dissolution either partners may continue to use the trade mark unless he has transferred or in some manner divested himself of the right to do so. And the owner of a trade-mark bearing his own name which is affixed to articles manufactured at a particular establishment, may, in selling the latter, confer upon the purchaser exclusive authority to use the trade-mark (7).

Good-Will—meaning of.—"The good-will" said *Lord Macnaghten* "is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business It is the attractive force which brings in custom. It is the one thing which

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success of the firm which *de facto* carries on the business, but this cannot put him in the shoes of the latter in indicating the latter's right against wrongdoers. *J. Ulman & Co.* v. *Cesar Leuba*, 13 C. W. N. 82=4 Ind. Cas. 310.

(1) *British American Toboccoo* v. *Mahboob Bux* 7 Ind. Cas. 279=38 C 110 ; *Harness Tm.* (1900) 17 R. P. C. 40 ; *Valentine Extract Co. Ltd. Tms.* (1901) 18 R. P. C. 175 ; G. S. *Hannah* v. *Jagannath*, 19 C. W. N. 1.

(2) *Welcomes Tm*, 32 Ch. D. 213 ; *Hammond* v. *Malcolm Brunker & Co.*, 9 R. P. C. 301.

(3) *Mcmillan* v. *Ehrmann Bros Ltd.*, (1904) 21 R. P. C. 357.

(4) *G. S. Hannah* v. *Jagannath*, 19 C. W. N. 1 ; *Ullman* v. *Cesar*, 13 C. W. N. 82.

(5) *Ibid*

(6) *G. S. Hannah* v. *Jagannath*, 19 C. W. N. 1.

(7) H. C. Joyce on Injunction § 788 ; see also *Vadilal* v. *Burditt*, 7 Bom. L. R. 272=30 B. 61.

distinguishes an old established business from a new business at its first start. The good will of a business must emanate from a particular centre or source. However widely extended or differed its influence may be, good will is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Good will is composed of a variety of elements. It differs in its composition in different trades and in different business in the same trade. One element may preponderate here and another element there.....For my part, I think that there is one attribute common to all cases of good will, it is the attribute of locality. For good will has no independent existence. It cannot subsists by itself. It must be attached to a business. Destroy the business and the good will perishes with it, though elements remain which may perhaps be gathered up and be revived again. No doubt where the reputation of the business is very widely spread, or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localise good will (1)" Ordinarily an hotel connotes the business carried on by a person though sometimes the term is used with regard to premises but it is only owing to their association with the original business carried on by them. Where a person purchased the materials and gardens in which an hotel had been run : held that the vendee did not purchase the good will of the business or the right to use the name in which the hotel business had been carried on and that the vendor could continue the business under the original name at some other place (2). Where two partners carry on business in partnership in some shops under the personal name of one of the partners, and at the dissolution of the partnership, one partner buys one shop and its good will and the other partner buys the other shops and good will thereof, nothing being said about the trade name of the firm, the partner in whose name the shops were conducted before the dissolution, can restrain the other partner from carrying on the business in the old name provided by so doing the latter exposes his former partner to any risk of liability. Whether there will be any such risk is a matter to be decided having regard to the circumstances of each case (

Distinctive marks.—In a suit for infringement of trade rk it it incumbent upon the plaintiff in the first instance to prove that the s sold under his label and getup are goods which had a reputation in the arket as being his goods manufactured or sold by him, of which the label and getup are distinctive and well known in the paritcular market (4). For the protection of public it is necessary that a trade-mark should be something beyond a mere

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(1) *Commissioners of Inland Revenue* v *Muller & Co*, (1901) A. C. 217 ; see also *Madhabji* v. *Central India Spinning*. 41 B. 49=34 Ind. Cas. 529 ; *G. S. Hannah* v. *Jaganvath*, 19 C. W. N. 1.

(2) *Nizam Din* v. *Sher Bahadur*, A. I. R. 1931 Lah. 651=133 Ind. Cas. 891=32 P. L. R. 650.

(3) *Moravji* v. *Madavji*, 5 Bom. L. R. 545 ; see also *Macharji* v. *Framji* 2 Bom. L. R. 1026.

(4) *Mahideen Baya* v. *Rigund Perfume*, 10 Rang. 133=A. I. R. 1932 Rang. 114.

adjective describing the quality of the material. If a foreign word or a word in dead language not known to the people in general is used that word itself, because it is not understood, may very reasonably become a trade mark (1). In the above case the parties are two rival druggist shops at Delhi. The plaintiff's allegations were that the defendants were selling their preparation known as *Sharbat Ruh Afza*, to which they have acquired a valid trade mark by long user. The defendant denied that the plaintiff was the first manufacturer of the *sharbat* or had any property in the name which it contended was merely descriptive and was not therefore the subject of a trade mark. In delivering the judgment the court observed : "The plaintiff sued the defendant for perpetual injunction restraining the defendant from selling a preparation under a name of *Sharbat Ruh Afza* and also claiming Rs. 500 as damages on the ground of infringement of trade mark. The suit was dismissed by the learned Subordinate Judge, Second class, but on appeal the learned District Judge accepted the appeal and granted the plaintiff the injunction sought together with damages which he assessed at Rs. 100. A second appeal has now been preferred. The present case is one of the out and out adoptions by one firm of a name used by another firm for a preparation or medicine which is alleged to be the specialty of the plaintiff firm. The cases cited in large number fall into two categories. In the first category may be placed those cases in which one party imitated a specific brand or trade mark or method of packing associated with the goods of the plaintiff firm with a view of passing off those goods on the public, or at least the more unintelligent portion of the public, as those of his rivals. In the second category fall those cases where a new firm attempts to adopt a name so similar to that of an existing firm of repute that the public is likely to be deceived. In these cases the

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(1) *Unani Dawakhana* v. *Hamdrad*, A. I. R. 1930 Lah. 999, *Ragett* v. *Findlater*, 17 Eq. 29. "The same considerations of policy which prior to the regulation of trade marks by statute induced the English courts to protect them and to recognize in a manufacturer or selector a right under certain limitations to the distinguishing mark or title under which he offered his goods to the public and to mulct in damages any other person who intentionally infringed a trade mark so adopted, have induced the courts in this country to accept as consonant with equity and justice the general rule which obtains in commercial countries respecting trade marks. Of course the Courts in British India would only recognise the particular provisions of the statute law of other countries in so far as may be necessary for the determination of rights which have been acquired under such provisions, unless indeed by the law of England or British India they are directed to do so. The object of the law in recognizing a right to trade mark is to protect the public from fraud, to secure to a purchaser reasonable certainty that he is purchasing an article which has a certain reputation in the market, and to secure to manufacturer or selector the reward of his skill and care, the benefit of the custom which he deserves, and which is intended for him, and although where a stranger infringes a trade mark unintentionally, he is not liable to damages, he will be restrained from the further use of it. *Millington* v. *Fox*, 3 My & Cr. 338. The remedies which are conceded for the protection of trade-marks adopted in the home market are also extended to trade-marks which have been originally adopted in foreign markets, and it is in material that goods bearing such marks are not sold in the home market. *Collins Company* v. *Walker*, 7 W. R. 222, *Collins Co.* v. *Brawn*, 3 K & J. 423 ; *Collins Company* v. *Cower*, 2 K. & J. 428." *Lavergne* v. *Hooper*, 8 M. 149.

intention is clearly to divert custom from the old established firm to the up start firm by the similarity in name. Cases falling in either of these categories are clearly of little value in discussing the law applicable to the present case.

"Of the Indian cases that have been cited *Jogi Reddi* v. *Chinnabbi* (1) is an appeal before their Lordships of the Judicial Committee from the decision of the Allahabad High Court reported as *Swadeshi Mills Co. Ltd. Bombay* v. *Juggi Lal Kamalapal Cotton Spinning & Weaving Mills Co.* (2). This related to a brand in the form of a lotus flower. *Harbert Whit worth* v. *Jamna Das Nemchand* (3) related to the use in the Aden market of labels bearing the figures of a *Somali* man and a *Somali* woman on a peculiar line of peace goods.

"*Jwala Prasad* v. *Munna Lal* (4) was a case of the use of similar brands in the shape of a flower on tins used for ghee. *Abdul Salam* v. *Hami dulla* (5) dealt with a mark on rolls of thread resembling a pair of scissors. *Madhabsi Dharmsey Manufacturing Co.*, v. *Central India Spinning & Weaving Co.* (6), dealt with the use of a specific number on piece goods. In *Chatterpal Sharma* v. *Jagannath Das* (7) the plaintiff called his preparation *Sudha Sindhu*, whereas the defendant called his preparation as *Piyus Sindhu*. The defendant had imitated the form of packing adopted by the plaintiff and had plagiarised the text of his advertisement. An injunction was granted against him.

"All the above cases fall in the first category mentioned above. The remaining Indian cases fall in the second category i. e., the imitation of a well known name. This may be seen from the very names of the cases: See *Oriental Government Security Life Assurance Co. Ltd* v. *Oriental Assurance Co. Ltd.* (8) and *National Bank of India* v. *National Bank of Indore* (9). None of these cases have any direct application to the present case. The same may be said of a large number of the English cases cited. In *R. Johnston & Co.* v. *Archibald Orr Ewing Co.* (10), *Lord Watson* asked: 'How can observations of Judges upon other and quite different facts bear upon the present case, in which the only question is what is the result of the evidence:' *Lord Blackburn* also remarked: 'The question to be determined is a question of fact.'

"Again in *Reddaway* v. *Banham* (11) at p. 220, *Lord Macnaghten* remarked: 'Cases of this sort must depend upon their particular circumstances. The facts of one case are little or no guide to the determination of another.'

"I therefore do not propose to discuss the cases cited in detail, but shall merely refer to the principal cases and those which are apposite to the present case.

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(1) A I. R. 1929 P. C. 11=114 Ind. Cas. 30=56 I. A. 1=51 A. 182 (P. C,)
(2) A. I. R. (1927) A 81=99 Ind. Cas. 353=49 A. 92.
(3) A. I. R. 1928 Bom. 227=52 B. 228.
(4) 37 C. 204=5 Ind. Cas. 1000.
(5) 97 P. R. 1913=15 Ind. Cas. 116.
(6) 41 B. 49=34 Ind. Cas. 529.
(7) A. I. R. 1922 All. 178=67 Ind. Cas. 353=44 A 608.
(8) 40 C. 570=21 Ind. Cas. 258.
(9) 70 Ind. Cas. 47=A. I. R. 1923 Bom. 119.
(10) 7 App. Cas. 219=51 L. J. Ch. 797.
(11) (1896) A. C. 199.

"The two principal English cases on which reliance is placed by the parties are *Raggett* v. *Findlater* (1), 'the Nourishing stout' case, relied on by the appellant, and *Reddaway* v. *Banham* (2) the 'Cammel Hair Belting case' relied on by the respondent. *Ragget* v. *Findlater* (1) was a case between two rival vendors of stout who both described their stout, got approved by them from other firms, as nourishing, *Vice Chancellor Sir R. Malins*, after pointing out that he must take the whole label as being the trade mark, continued: 'It is only justice to these defendants to say that if, as the plaintiff contends, it was their object fraudulently to imitate his trade marks; I have never seen a case in which there was so singular a failure in imitation, or in which I should have more readily come to the conclusion that it could not have been their intention to imitate or deceive.' He then proceeded to discuss the plaintiff's claim to the right to exclusive use of the word 'nourishing' and remarked: 'It is the word nourishing which is in common use and thoroughly understood by all Her Majesty's subjects 'Nourishing Stout.' The learned Judge then remarked: 'Upon principal it appears to me there must be something to go beyond a mere English adjective describing the quality of the material. If you use a foreign word, or a word in a dead language not known to people in general, that word itself, because it is not understood, may very reasonably become a trade mark.' He then reviewed and approved of certain cases in which the right to use the particular word had been affirmed. Among these were *Wotherspoon* v. *Currie* (3), 'the Glenfield Starch' case, *Ford* v. *Foster* (4), the 'Eureka Shirts' case and *Braham* v. *Bustard* (5), the 'Excelsior Soap' case. In discussing the last named case he cited certain remarks made by *Vice-Chancellor Wood*, and remarked, 'I think the whole of that proceeded on the basis that if the word had been an English word describing quality, the word merely describing quality would not be the subject of a trade-mark. My opinion is that for the protection of the public it is necessary a trade-mark should be something beyond a mere English word denoting quality.' The conclusion arrived at was: 'The word *nourishing* therefore of itself will not do.....If he (plaintiff) has only rested his case on the word *nourishing*, I am clearly of opinion that is no trade-mark, and on that ground I think his case wholly fails.' "

"*Reddaway* v. *Banham* (6), dealt with what was known as 'Camel Hair Belting' used for driving machinery. The plaintiff had been making his belting for a number of years and described it as camel hair. He succeeded in obtaining an injunction against the defendant who manufactured similar belting shown to be also made actually from camel hair on the ground that in the trade, camel hair belting had come to be recognized as belting manufactured by the plaintiff." In the above case *Lord Halsbury, L. C.* said: "It

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(1) (1874) 17 Eq. 24.
(2) (1896) A, C. 199.
(3) 5 H. L. 508.
(4) 7 Ch. 611=41 L. J. Ch. 682.
(5) 1 H. & M. 447=9 L. T. 199.
(6) (1896) A. C. 199.

would be impossible, for instance to say that a trader could not describe his goods truly by enumerating the particulars of what they consisted, unless such description was calculated to deceive and make his goods, pass as goods of another. What in each case or in each trade will produce the effect intended to be prohibited is a matter which must depend upon the circumstances of each trade, and the peculiarities of each trade. It would be very rash *a priori* to say how far a thing might or might not be described, without being familiar with the technology of the trade."

Lord Herschell remarked: "The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A when he was really getting the goods of B.' 'Again he said: "What right, it was asked, can an individual have to restrain another from using a common English word because he has chosen to employ it as his trade-mark? I answer he has no such right but he has a right to insist that it shall not be used without explanation or qualification if such a use would be an instrument of fraud (1) ".

The meaning to be attached to 'distinctive' was discussed in *Perry Davi's and son* v. *Harbard*, the Pain Killer case (2). In that case *Lord Halsbury* said: "I think it has been held (and certainly think so myself) that the word 'distinctive' means distinguishing a particular person's goods from somebody else's goods, not a quality attributable to the particular article, but distinctive in that respect that it means that it is a manufacture of his as distinguished from somebody else's. The manufacture may not be new, but that is the sort of distinction contemplated by the statute."

A trade-mark may be a mere quality mark, indicating the reputation of the goods irrespective of the reputation of the seller. Obviously every trader being entitled, if not bound, to state truthfully the quality of the goods he sells, no one trader can restrain any other from exercising that right by a mark truthfully indicating quality. For neither of the two grounds for protection exists in such a case. His reputation is not injured and no deception is practised on the public. To give an exclusive right there must be something further. The mark must amount to a representation that the quality is wholly or in part due to and guaranteed by some person or persons concerned in, or connected with, the origin or history of the goods. In such cases the public are invited to rely on the reputation of the persons denoted, and no other person can without their authority, make such representation. And it is a

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(1) See also *Havana cigar* v. *Oddenino*, (1876) 1 Ch. D. 176; *In re Crossfield's sons*, (1910) 1 Ch. 130=79 L. J. Ch. 211.

(2) (1890) 15 A. C. 316.

question of evidence in each case whether there is false representation or not (1).

Name originally descriptive has acquired secondary meaning.— In a suit to restrain the defendants from selling their goods under a particular name the plaintiffs claimed that they had acquired a right to the exclusive use of the name with regard to the goods manufactured in their business. The name was merely descriptive of the kinds of goods and the place of its manufacture. *Held* that the plaintiff must prove that the name had acquired a secondary meaning and had come to mean goods manufactured by themselves and not by other manufacturers before the question whether the defendants had infringed the plaintiff s right could be considered (2). In delivering the judgment in the above case *Beadey C. J.* said: "In *S. Chivere & Sons* v. *S. Chivere & Co. Ltd.* (3), *Farwell J.* as he then was, stated that there were two questions which had to be answered, *viz.* whether the plaintiff had established that '*Chiver's Jellies*' or '*Chiver's* Table Jellies' had acquired a secondary meaning and had come to mean jellies made by the plaintiffs and whether the defendants had so described their jellies as to be likely to mislead the purchaser into believing that the jellies were the jellies of the plaintiffs.....On the authority of this case, it is necessary for the appellants to prove that the *Madras Curry Powder* which is merely descriptive of the kind of powder and the place of its manufacture has acquired a secondary meaning and has come to mean curry powder manufactured by themselves and not by other manufacturers," In *Havana Cigar* v. *Oddenino* (4), *Warrington L. J.* says at p. 195: "As to the authorities I have little to say, for as I have already stated, they are not directly in point. In *Reddaway* v. *Banham* (5) and in *Cellular Clothing Co.* v. *Maxton and Murray* (6), the question was whether a name originally descriptive had obtained a secondary meaning as denoting exclusively the plaintiff's goods. This question does not arise in the present case." In *Wother spoon* v. *Currie* (7) at p. 521 *Lord Westbury* says: "I take it to be clear from the evidence that long antecedently to the operation of the respondent, the word 'Glenfield' had acquired a secondary signification or meaning in connection with a particular manufacture, in short, it had become the trade denomination of the starch made by the appellants (8)." In the *Cellular Clothing Co. Ltd.* v. *Maxton and Murray* (9), *Lord Shand* in the course of his judgment speaking of the *Radda way's* case (5) says as follows: "Of that case I shall only say, that it no doubt shows it is possible where a descriptive name has been used to prove that so general, I should rather say

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(1) *Vadilal* v. *Burdett*, 7 Bom. L. R. 272=30 B. 61.

(2) *Venkata Chalam* v. *Raja Gopal*, 55 M. 966=1932 M. W. N. 835=A. I. R. 1932 Mad. 705=63 M. L. J. 568.

(3) 17 R. P. C. 420.

(4) (1924) 1 Ch. D. 179=93 L. J. Ch. 81.

(5) (1896) A. C. 199.

(6) (1899) A. C. 326.

(7) 5 H. L. 508.

(8) See also *Powell* v. *Birmingham Vinegar*, (1896) 2 Ch. 54; *North Cheshire* v. *Manchester*, (1899) A. C. 83; *Massam* v. *Thorley's Cattle*, 14 Ch. D. 748.

(9) (1899) A. C. 326.

universal, has been the case of it as to give it a secondary meaning and so to confer on the person who has so used it a right to its exclusive user or, at all events to such a use that others employing it must qualify their use by some distinguishlng characteristic. But I confess that I always thought, and I still think, that it should be made almost impossible for anyone to obtain the exclusive right to the use of a word or term which is in ordinary use in our language and which is descriptive only, and indeed, were it not for the decision in *Radda way's Case* (1), I should say this should be made altogether impossible (2)"

Where the name, under which article is sold, though not fanciful term has acquired in the market a secondary signification as being the article manufactured by a particular person, it is not competent for anyone else to pass off under that name, an article though of the same description, in such a way and under such circumstances as is likely to mislead the purchasing public into a belief that they are purchasing the article manufactured by that particular person ; and an injunction may be issued restraining from making use of that name. It is immaterial to prove that any special damage was caused to that person or that any purchaser was deceived. The burden of proving that particular words have acquired a secondary signification lies on the person alleging it (3). Even in a case where an article can be denoted by a descriptive name, if the inventor describes the article by a fancy or invented name, he has a right in respect of that name and other persons cannot appropriate that name (4).

Geographical names.—There is in general no exclusive right, to the use of a geographical name when it is descriptive of the place of origin (5). It may however acquire a secondary meaning, which will be protected either absolutely or to the extent of compelling the second user to differentiate his product (6). If the word is fanciful, so that no one would suppose that it was used descriptively, an exclusive right may be obtained (7). If the use by the complainant deceives the public as to origin, however, the principle of unclean hands may by applied (8). If the complainant uses a mark which is

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(1) *Redda way* v. *Banham*, (1896) A. C. 199.

(2) *Venkata Chalam* v. *Rajagopal*, 55 M. 966=63 M. L. J 568=A I. R. 1932 Mad. 705.

(3) *John Smidt* v. *Redd way*, 9 C. W. N. 281=32 C. 401.

(4) *Upendra nath Brahmachari* v. *Union Drug Ltd.*, 43 C. L. J. 405=95 Ind. Cas. 667=A. I. R. 1926 Cal. 837.

(5) Kerley on Trade Mark p. 31.

(6) *Mc Andrew* v. *Barret*, 4 De G. J & S. 380 ; *Seixo* v. *Provezende*, (1865) L. R. 1 Ch 192 ; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508 ; *Montgomery* v. *Thomson*, (1891) A. C. 217.

(7) *Magnolia Metal Co's* (1897) 2 Ch. 371.

(8) *Heaton's Tm*, 27 Ch. D. 570. "The principles announced in the preceding sections which deny relief by injunction against the use of words which are generic or geographical or purely descriptive are applicable only to cases where the plaintiff is seeking to establish a technical trade mark in the word or name inquestion and the consequent right to the use of such word or name to the exclusion of all others ; and they have no application where the plaintiff predicates his right to relief, not upon the basis of a trade mark in the particular

descriptive, and the defendant uses it falsely, he may be restrained (1). As illustrating the rule, it is held that where defendants use not only the name of the place of plaintiff's business, but also words indicating that they are proprietors of that business, the use of such words being calculated to deceive the public and purchasers and to enable defendants to sell their goods as those of plaintiffs an injunction may be allowed (2). So where the plaintiff's article has become well known in the trade as the product of a particular place and is designated by that name, and when plaintiffs have the exclusive right of importing the article from the place of its origin under that name, it is held that they have a trade mark in the name, and may enjoin the defendant from selling a spurious article under the same name (3). Where plaintiff's goods have long been popularly known by the name of the place of their manufacture, which name is afterwards changed, and defendant then adopts the old name with the evident design of representing his goods as those of plaintiff, an injunction will lie to restrain such use of the name (4).

Foundation of the law relating to trade marks.—"The foundation upon which the law relating to trade marks and trade names rests is that the deception of the public by the offer for sale of goods as possessing some connection with a particular trade, which they do not in fact possess, is a wrong in respect of which the trader has a cause of action against any person who is the author of, or is responsible for, the deception (5)." "No man," said *James L. J.* (6)," is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or means, whereby without making a direct false representation himself to a purchaser who purchases from him, he enables such a purchaser to tell a lie or to make a false representation to some body else who is the ultimate

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words or phrases nor upon the assertion of the exclusive right to their use, but upon the fraudulent conduct of the defendant who is employing such names for the evident purpose of obtaining the benefits of the good-will of the plaintiff's business. And it may be stated as a general rule of even more frequent application than referred to that where a descriptive word or geographical name has, from long usage, acquired a secondary signification as referring to the particular goods sold or manufactured by the plaintiff, and where the defendant is making use of such words, names and phrases with the evident design of inducing the belief that the goods sold by him are in reality those of the plaintiff, or in such a manner as to mislead purchasers into believing that they are buying plaintiff's goods, thereby fraudulently appropriating to himself the advantage of the good-will and reputation of plaintiff's business, relief by injunction will be granted against such a use of words or names in question notwithstanding the fact that they may be geographical, or purely descriptive and as such, not capable of exclusive appropriation and ownership as trade marks. And the rules as regards geographical names applies with especial force where, as additional evidence of defendant's fraudulent design of appropriating the good-will of plaintiff's business, it appears that he is not manufacturing his goods or doing business in the town or place in question and where the use of the name has therefore not even the merit of truth to sustain it." High on Injunction § 1065 (*a*).

(1) Pom. Eq. Jur. 2010.

(2) *Braham* v. *Beachim*, 7 Ch. D. 848.

(3) *Radde* v. *Norman*, L. R. 14 Eq. 348.

(4) *Seigest* v. *Findlar*, 7 Ch. D. 801; High on Injunction § 1065 (*b*).

(5) Kerley's "The Law of Trade Marks" p. 1.

(6) *Singer Manufacturing Co.* v. *Loog*, 18 Ch. D. 395 (412).

customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade mark or trade designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of copyright, or in the nature of patent, in the use of any name. Whatever name is used to designate goods, any body may use the name to designate goods, always subject to this, that he must not, as I said, make, directly or through the medium of another person, a false representation that his goods are the goods of another person (1)". "But" says *Dr. Bige low* "the owner of a valid statutory trade mark has property in the same, with right of protection accordingly; his right accordingly does not turn upon the practice of fraud, or anything in the nature of fraud (2)." Referring to the Patents, Designs and Trade Marks Act of 1883 (3), he continued: "The law relating to trade marks has been changing its point of view, if not its grounds, in recent times, and becoming, as has been observed, assimilated to the law of property (4). The old mode of suing for deceit is accordingly falling into disuse. But the law has not advanced and is not likely to advance to the point of assimilating the law of trade marks so far with the law of property (as *e. g.* the law of patents) that, for the purpose of recovering damages in a case in which there is no property right in the plaintiff's mark, the oldauthorities, which make such a case an action for deceit, are no longer law. Now however the subject for consideration is the kind of trade mark in which one has a property right perfect in itself. The law of trade marks as a right of property, as distinguished from the common law right to recover damages for fraud though no trade mark as a right in itself existed, is a matter of statute. Accordingly, to find out what constitutes a trade mark proper as in itself a property right, the statutes and the numerous decisions thereon must be examined. In regard to the question whether the right has been violated, this is generally a question of resemblance, the same in effect as if the mark were only a quasi or common law trade mark (5)."

In theory a technical trade-mark, like a patent right, is a species of property, and when it is invaded, or appropriated, the owner thereof is entitled not only to protection from further trespass, but to the recovery of the profits issuing therefrom, as incident to and a part of his property right. In suits for unfair competition, on the other hand, the complaint is not of an appropriation of a property right, but of a tort committed by the defendant in that his conduct has been unlawful by reason of the consequential injury to the plaintiff (6).

A trade mark gives the owner no monopoly of the goods. Unless they are protected by patent or copyright, any one is at liberty to copy them. An owner may apply more than one trade mark to the same article. The test is whether the public is confused, or whether he uses the mark unfairly. A

(1) Kerley's Trade Mark.
(2) Bigelow's Law of Torts p. 75.
(3) 46 & 47 Vict. C. 57.
(4) Vide 46 & 47 Vict. C. 57 s. 62 etc.; see also Trade Marks Acts 1905 to 1919 ss. 17, 22.
(5) Bigelow's Law of Torts pp. 254, 255.
(6) *P. E. Sharpless Co.* v. *Lawrence*, 213 Fed. 423; Pom. Eq. Jur. § 1998.

trade-mark will not expire by lapse of time. It is good until abandoned. A mark may belong to different persons in different countries (1), and be good in one country and invalid in another. The right to protection grows out of the use of the mark and not from its mere adoption; the owner cannot in a market which he has never entered, enjoin the use of a mark which designates the latter's product (2).

In *Redda way* v. *Banham* (3), *Lord Herschell* laid down the rule as follows: "The principle which is applicable to that class of cases was in my judgment well laid down by *Lord Kings down* in *Leather Cloth Co.*, v. *American Leather Cloth Co.*, (4). It had been previously enunciated in much the same way by *Lord Langdale* in the case of *Croft* v. *Day* (5). *Lord Kingsdown's* own words were as follows: 'The fundamental rule is that one man has no right to put up his goods for sale as the goods of a rival trader and he cannot therefore [in the language of *Lord Langdale* in the case of *Perry* v. *Truefitt* (6)] be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.' It is in my opinion this fundamental rule which governs all cases, whatever be the particular mode adopted by man for putting off his goods as those of a rival trader, whether it is done by the use of a mark which has become his trade-mark or in any other way. The word 'property' has been sometimes applied to what has been termed a trade-mark at common law. *I doubt myself whether it is accurate to speak of there being property in such a trade-mark*, though no doubt some of the rights which are incident to property may attach to it. Where the trade-marke is a word or device never in use before, and meaningless except as indicating by whom the goods in conneexion with which it is used were made there could be no conceivable legitimate use of it by another person. His only object in employing it in connection with goods of his manufacture must be to deceive. In circumstances such as these the mere proof that the trade mark of one manufacturer has been thus appropriated by another would be enough to bring the case within the rule as laid down by *Lord Kings down*, and to entitle the person aggrieved to an injunction to restrain its use. In the case of a trade-mark thus identified with a particular manufactory the rights of the person whose trade-mark it was would not, it may be, differ substantially from those which would exist if it were strictly speaking his property."

"It is clear" said *Sir John Romilly* in *Hall* v. *Barrows* (7), "from a variety of decided cases, that a manufacturer, who has originally stamped his goods

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(1) *Richter* v. *Reynolds*, 59 Fed. 577; *Rey* v. *Lecouturier*, (1908) 2 Ch. 715, (1910) App. Cas. 262.

(2) Pom. Eq. Jur. § 1998.

(3) (1896) A. C. 199=65 L. J. B. 381; see also *Moolji* v. *Ramjan* A. I. R. 1930 Cal. 678.

(4) 11 H. L. C. 523.

(5) 7 Beav. 84.

(6) 6 Beav. 66.

(7) 9 Jur. N. S. 483=32 L. J. Ch. 548.

with a particular brand, has a property in his mark at law, and can sustain an action for damages for the use of it by another. It is also clear that Courts of Equity will restrain the use of it by another person. It has sometimes been supported that a manufacturer can only acquire such a property in a trade-mark, as will enable him to maintain an injunction against the piracy of it by others, by means of a long-continued use of it, or at least such a use of it as is sufficient to give it a reputation in the market where such goods are sold. But I entertain great doubt as to the correctness of this view of the case. The interference of a Court of Equity cannot, it appears to me, depend on the length of time the manufacturer has used the mark. If the brand or mark be an old one formerly used, but since discontinued, the former proprietor of the mark undoubtedly cannot retain such property in it, or prevent others from using it. But provided it has been originally adopted by a manufacturer, and has been continually, and is still used by him, to denote his own goods when brought into the market and offered for sale, then I apprehend, although the mark may not have been adopted a week, and may not have acquired any reputation in the market, his neighbours cannot use that mark; were it otherwise, and were the question to depend entirely on the time the mark had been used, or the reputation it had acquired, a very difficult, if not insoluble enquiry would have been opend in every case, *viz.* whether the mark had acquired in the market a distinctive character denoting the goods of the person who first used it. The adoption of it by another is proof that he considers it likely to become beneficial. If the manufacturer, who first used it, were not protected from the earliest moment, it is obvious that *malicious* and pertinacious rivals might prevent him from ever acquiring any distinctive mark or brand to denote his goods in the market, by adopting his mark, however varied, immediately after its adoption or change by the person who originally used it. This evil would not be avoided by putting his name in full, for, if the name of the manufacturer were a common one, it would be difficult for him to point out to the public what goods were or were not manufactured by him (1)". In *Taylor* v. *Virasami* (2), *Kernan J.* said:. "The general principles on which the Court gives relief in cases of trade-mark are to be found in *Perry* v. *Truefitt* (3), *Croft* v. *Day* (4), and *Leather Cloth Company* v. *American Leather Cloth Company* (5). These principles are applied to different classes of cases—first to those of imitation of the entire trade-marks, about which no question could exist; secondly, to imitation so merely resembling the entire original as to be colourable though not fraudulently so [*Mellington* v. *Fox* (6), of which *Croft* v. *Day* (4), is an example], thirdly, to a class of cases where the extra-original was not very

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(1) *Ewing & Co.* v. *Grant*, 2 Hyde 185.
(2) 6 M. 108, 110, 111.
(3) 6 Beav. 66.
(4) 7 Beav. 84.
(5) 11 H. L. 538.
(6) 3 M & C 338.

closely copied, as discussed in *Leather Cloth Company* v. *American Leather Cloth Company* (1).

"In this case the question is not whether the entire trade mark of the plaintiff was colourably imitated. If such were the question, the case would require much discussion and consideration, which the facts of this case, and the law flowing out of the principle above mentioned, do not require.

"It seems to me that the case is governnd by the subordinate principle enunciated by *Lord Cranworth* in *Seixo* v. *Provenzende* (2), referred to by the plaintiff's Counsel viz :—'I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer (an importer I hold to be the same) have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the right of that rival as the actual copy of his device (3)."

English law.—In England, trade marks of this kind were required to be registered under the Trade Marks Registration Act of 1875, now repealed and replaced by the Trade Marks Acts 1905 to 1919 ; and the effect of the Act of 1875 and the Acts replacing it, is that no one can enforce his right to a trade mark which is registrable but not registered (4). The marks admitted to registration as trade marks under the first Registration Act were required (5) to consist of one or more of the following essential particulars : a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner, or a written signature or copy of a written signature of an individual or firm ; or a distinctive device, mark, heading, label or ticket ; and to these essential particulars there might be added any letters, words or figures, or combination of letters, words or figures ; and it was further provided that any special and distinctive word or words, or combination of figures or letters, used as a trade mark before the passing of the Act might be registered as such under the Act (6). The Registtration Act of 1883, conferred power to register a mark of which the essential particular should be a fancy word or fancy words not in common use (7). Section 3 of the Trade Mark Act of 1905, defines a "trade mark as a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the preprietor of such marks by virtue of manufacture, selection, certification, dealing with or offering for sale." A registrable trade mark must consist of one or more of the following things : (*i*) The names of a company, individual or firm represented in a special or particular manner ; (*ii*) the signature of the applicant for

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(1) 11 H. L. 538.
(2) L. R. 1 Ch. App. 196.
(3) See also *Ralli* v. *Fleming* 3 C. 417 ; *Dr. Ewing* v. *Johnston*, 13 Ch. D. 434 affirmed L. R. 7 App. Cas. 219 ; *Ford* v. *Foote*, 7 Ch. App. 611 ; *Edel stone* v. *Edel stone*, 1 De G. J. & S. 185 ; *Kingham* v. *Bolton*, 15 Ir. Ch. Rep. 75 ; *Braham* v. *Bastard*. 1 H. & M. 447 ; *Worther spoon* v. *Currie*, L. R. 5 H. L. 508.
(4) Byrne's law Dictionary.
(5) Vide S. 10.
(6) Kerley on Trade Marks p. 7.
(7) *Ibid.*

registration or of some predecessor in his business ; (*iii*) an invented word or invented words ; (*iv*) a word or words having no direct reference to the character or quality of the goods and not being in its ordinary signification a geographical name or sur name ; (*v*) any other distinctive mark (1).

Section 42 of the English Act enacts : "No person shall be entitled to institute any proceeding to prevent or to recover damages for the infringement of an unregistered trade mark unless such trade mark was in use before the thirteenth of August one thousand eight hundred and seventy-five, and has been refused registration under this Act. The Registrar may, on request, grant a certificate that such registration has been refused." But nothing in the Act contained shall be deemed to affect the rights of action against any person for passing off goods as those of another person or the remedies in respect thereof (2). So even now registered trade marks, notwithstanding the prohibitory sections of the Act above referred to, are in many cases protected by the courts in the "passing off' actions. For it is well settled that, if the use by the defendant upon his goods of an unregistered trade mark belonging to the plaintiff is calculated to pass off or cause to be passed off the defendant's goods as the goods of the plaintiff, an injunction may be granted to restrain such use (3) and this whether the use be deliberately fraudulent and intended by the defendant to be deceptive or not (4). "No man," said *Cotton L. J.* (5) "must pass off his goods as the goods of another."

The Law of trade Mark in British India.—The Law as regards trade marks, in England, since 1875, is a statutory one. In British India, criminal action can be taken for infringement of trade and property marks under the Merchandise Marks Act of 1889 (6). Here in this country there is no machinery for the registration of trade mark as in England. It is the adoptation and use of a trade mark which gives title to it. As soon as a trade mark is so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of the firm. The actual length of time, it has been employed is not an important ingredient provided it has been used long enough to render it probable that a reputation in the market had been acquired. The acquisition of exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character (7). But a dealer or a manufacturer of a particular article, who adopts a name for that article, whether the name be a purely fancy name, or a descriptive name, cannot restrain another dealer from using the same name,

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(1) Section 9 of the Trade Marks Acts 1905,—1919.
(2) Vide S. 45 of *Ibid.*
(3) *Montgomery* v. *Thompson*, 41 Ch. D. 35 : (1891) A. C. 217.
(4) *Reddaway & Co.* v. *Bentham, Hemp Spinning Co.*, (1892) 2 Q. B. 639 ; Kerley on Trade Marks p. 12.
(5) *Turton* v. *Turton*, 42 Ch. D. 128.
(6) IV of 1889.
(7) *Badische Aniline* v. *Tejpali* 5 Bom. L. R. 1025.

simply on the ground that the article so named has acquired a reputation, even though it may be that the public have grown accustomed to buy the article in question only relying on the name and without examining the quality of the article. For a man to be entitled to restrain another from using a particular name with reference to a commodity, he must be in a position to show that the public have grown to associate that particular name with himself as manufacturer of or dealer in the article (1).

In *British American Tobacoo Co.* v. *Mahbub Bua* (2) *Jenkins C. J.* said: "In India there is no system of registration nor is there any provision for a statutory title to a trade mark so that the rights of the parties must be determined in accordance with the principles of the English common Law (3). Now a trade mark is a mode of warranting the origin of goods to which it is attached, or their trade association, and it is of the essence of a trade mark that its representation should be true."

One man has no right to pass off his goods for sale as the goods of a rival trader and he cannot therefore be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods he is selling are the manufacture of another person. But a person who takes up a name associated with the goods of another cannot by applying it to his goods and building up a reputation in his own way, seek to restrain the person with whose goods the name was previously associated and who has not abandoned it from continuing to use the same, for in a case of that sort it is impossible to say that the defendant passes his goods off as those of plaintiffs (4).

"Every one may use any mark or combination of marks or symbols that he likes unless some other person has by user acquired a reputation which couples his name with the mark or combination of marks and symbols (5)." "As soon, therefore as a trade mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the exclusive property of that firm, and no one else has a right to copy it or even to appropriate any portion of it, if, by such appropriation, unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom

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(1) *Mahomed Esup* v. *Raja ratnam*, 33 M. 402=5 Ind. Cas 712.

(2) 38 C. 210=7 Ind. Cas. 279; followed in *G. S. Hannah* v. *Jagannath*, 19 C. W. N. 1.

(3) *Hafizulla* v. *Sekh Papa*, A. I. R. 1933 Nag 344; *Jaula Prosad* v. *Munilal*. 37 C. 207=5 Ind. Cas. 1000; *Hannah* v. *Jagannath & Co.*, 42 C. 262=19 C. W. N. 1=27 Ind. Cas. 483; *A. J. Von* v. *Jivandas*, 50B. 402, *Mohmmad Raja* v. *Emperor* A. I. R. 1930 Oudh. 360=7 O. W. N. 598. Although there is no Trade Mark Act in India a declaration of the description of a trade mark serves the useful purpose of being evidence of genuineness of the mark which is the subject matter of it. *Mooljji* v. *Ramjan*, A. I. R. 1930 Cal. 678 by *Page J.* The ordinary principles of jurisprudene with regard to trade marks and those forbidding the passing of goods apply to India. *Per Lord Phillimore* in *The Imperial Tobacco Co.* v. *Albert Bonan and Bonan*, 51 C. 892=51 I. A. 269=29 C. W. N. 81 (P. C.)=26 Bom. L, R. 683.

(4) *Hussain Meah* v. *Abdul Rahim*, 131 Ind. Cas. 829=A. I. R. 1931 Mad. 326=33 L. W. 554.

(5) *Per Benson J.* in *Nooroodin* v. *Charles Sowden*, 15 M. L. J. 45.

the trade mark belongs (1)" It is not necessary to prove that any one has, in fact, been decieved. It is enought if "the defendant's trade mark bears such a resemblance to that of the plaintiff's as to be calculated to mislead incautious purchasers (2)." Where a trade mark in question is a distinctive mark which the firm has been using for a number of years, the firm using it acquires property in that mark as indicating that all goods which bear it have been manufactured by the firm (3).

What constitutes infringement of trade-mark.—Infringement is the use by the defendant for trading purposes upon or in connection with goods of the kind for which the plaintiff's right to exclusive use exists (*i.e.*, goods in respect of which the mark is registered) not being the goods of the plaintiff, of a mark identical with the plaintiff's mark or comprising some of its essential features, or colourably resembling it, so as to be calculated to cause goods to be taken by ordinary purchasers for the goods of the plaintiff It has long been settled that the question of the relative excellence of the plaintiff's and the defendant's goods is not relevant to the right of the pfaintiff to maintain an action either for infringement or for passing off (4). The intent of the defendant is immaterial (5) and actual deception is unnecessary. Competition is an essential element. The mark must be used by the two persons on the same class of goods, for the same mark may belong to two persons when used for distinct articles. The extent of the competition is not important, and it is no defence that the defendant's business is small, so that plaintiff is not injured (6). For the purpose of establishing a case of infringement it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use But if the resemblance is such as not only to show an intention to deceive but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs a case of infringement is made out (7). Therefore the standard of comparison is not that of the experts. But it is that of the lay public, of the unwary purchasers (8).

It is true that a person is entitled to take from any where even from a competitor's wrapper, a combination of colours and form of lettering which would improve the artistic form of wrapper. But the colour combination

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(1) *Somerville* v. *Schembri*, 12 A. C. 453=56 L. J. P. 61

(2) *Leaeher Cloth* v. *American Leather Cloth*, 4 De G. J. & S. 137, per *Lord Kingsdown*; *Abdul Karim* v. *Abdul Karim*, A. I. R. 1931 Mad. 461=1931 M. W. N. 311.

(3) *Mohammad Raja* v. *Emperor*, A. I. R. 1930 Oudh. 360; see also *Banarashi Das* v. *Emperor*, A. I. R. 1928 Lah. 186.

(4) Kerley's Trade Mark p. 446. citing *Blofield* v. *Payne*, 4 B. & Ad. 410; *Edelsten* v. *Edelsten*, 1 De. G. J. & S. 185; *Singer Manufacturing* v. *Loog*, 8 App. Cas. 15 (20)

(5) *Lawrence Mafg* v. *Tennesse Mfg.* 138 U. S. 537.

(6) Pom. Eq. Jur. § 2000.

(7) *Wother spoon* v. *Averie*, 5 H. L. 508.

(8) *Nagendra* v. *Emperor*, A. I. R. 1930 Cal. 274=34 C. W. N. 339; *Aswini* v. *Emperor*, A. I. R. 1930 Cal. 728=34 C. W. N. 524; *Swedish Match* v. *A Clamjee*, 4 R. 381; *Sted Brcs.* v. *Ahmed*, 4 R. 401.

and the lettering must be used for an honest purpose and must not be made an instrument whereby persons seeing the colouring and the lettering are led to believe that the imitator's batteries are of the competitors (1). In *Clandine Ash, Sons & Co.*, v. *Invicta Manufacturing Co.*, (2). *Lord Loreburn* said: "As regards the charge of passing off, put it as you will, it must be established that the defendant's goods were calculated to misleed purchasers into the belief that they were the plaintiff's goods. It is said in this case that the defendants intended to deceive not that the goods were calculated even innocently to deceive, but that there was a fraudulent intention on the part of the defendants. That is a material fact which would be weighed duly and to which no doubt great weight would be attached by any court if it were established, because the court would be astute when they discovered any intention to deceive, in coming to the conclusion that a dishonest defendant had been unsuccessful in his fraudulent design. When you once establish the intent to deceive, it is only a short step to proving that the intent has been successful, but still it is a step, even though it be a short step."

A trader even with some claim to the mark or name cannot adopt a trade mark which causes his goods to bear the same name in the market as those of his rival (3). It must be proved that the defendant marked his goods in such a manner as is reasonably calculated to cause it to be believed that the goods so marked were the manufacture or merchandise of some other person and such goods are not the manufacture or merchandise of such person (4). It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage or because his local character is such that the article acquires a value by its testimony to its genuineness, and if therefore goods though of the same make, are passed off by the competitors as being imported by them, he will have a right of action (5).

Where a trade mark is alleged to have been infringed and the help of the court is invoked to prevent the continuance of the infringement the court will not strain its jurisdiction to protect fools and idiots. On the other hand it will not require such minuteness of imitation as to deceive persons of unusual sagacity and information. The proper test is whether the get up of the defendant's goods is likely to deceive a purchaser who is acquainted with the plaintiff's get up, but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed, and the court must also have regard to the class of purchasers by whom the goods would normally be bought. Some similarity

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(1) *Chwan Swee Bee* v. *National Carbon Co.*, A. I R. 1930 Rang. 326.

(2) 29 R. P. C. 465, cited in *Ibid.*

(3) *Fakir Mahomed* v. *Emperor*, A. I. R. 1929 Rang. 322.

(4) *Ibid.*

(5) *The Imperial Tobacco Company* v. *Albert Bonnan and Bonnan Co.* 20 L. W. 495=80 Ind Cas. 1013=51 C. 892=(1924) M. W. N. 602=35 M. L. T. (P. C.) 156=51 I. A. 269=29 C. W. N. 81=26 Bom. L. R. 683.

in parts of the get up, is not sufficient to justify an injunction. The test is whether an ordinary purchaser purchasing with ordinary caution is likely to be misled, that is to say whether there is a reasonable probability of deception (1).

The question in every case of infringement of trade mark is not whether the mark complained of has deceived, but whether it is calculated to deceive (2). To entitle the owner of a trade mark to redress, although fraud is necessary, it does not necessarily consist in an intention to deceive on the part of the defendants, but in an actual deception or in the creation of a probability of deception independently of any fradulent intention (3). The plaintiff alleged that he had acquired by registration and also by use the ownership of the trade mark 'Scissors' and that he had used it for many years upon packets of thread which he sold in the open maket, the device being a picture of an ordinary pair of scissors ; that the defendant is using a device including a picture of a pair of what he calls trimmers but which, to the ordinary eye of man, uneducated in pictures and possessed of no abnormal powers of observation, is a pair of scissors. The plaintiff prayed for an injunction against the defendant and for compensation. *Held* that the plaintiff was entitled to the injunction asked for (4). In deciding whether there has been an infringement of plaintiff's trade mark, the Court has to see whether the device used by the defendant is such a colourable imitation of the plaintiff's mark as would be calculated to deceive the ultimate purchaser (5).

Damages for infringement of trade mark.—According to common law a plaintiff by proof of mere infringement is entitled to nominal damage (6), so a plaintiff need not allege any special damage (7). Even in cases of innocent infringement a nominal damage should be awarded (8). There is no cut and dried rule which can be laid down by a Court of law for the estimation of damages in a case of infringement of trade mark. But instead of making a speculative assumption of sales by defendant by trusting to their own goods without misleading trade mark, the safer basis would be to calculate on the falling off in plaintiff's trade which came in after the pirated mark was introduced in the market (9).

Remedies in cases of breach of trade mark.—In *Mahomed Abdul Kader* v. *Finley Fleming & Co.* (10) *Chari J.* said : "It is for the person whose trade mark is infringed to complain of the infringement. Such a person has

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(1) *Byramjee Cowasjee* v. *Vera Somabhai*, 36 Ind. Cas. 965 ; see also *Mc Dowell* v. *Standard Oil* 1927 A. C. 632.

(2) *Nemi chand* v. *Wallace*, 4 C. L. J. 269=10 C. W. N. 107, on appeal 11 C. W. 537=34 C. 495.

(3) *E. D. Sassoon* v. *D. L. Mills*, 1 Bom. L. R. 291.

(4) *Karam Elahi* v. *Abdul Aziz*, 127 P. L. R. 1909=4 Ind. Cas. 863 ; see also *E. D. Sasson* v. *D. L. Mills*, 1 Bom. L. R. 291.

(5) *Abdul* v. *Hamid*, 166 P. W. R. 1912.

(6) *Blofield* v. *Payne*, 4 B & Ad. 410 ; *Daniel* v. *White house*, 15 R. P. C. 134.

(7) *Rodgers* v. *Nowill*, 5 C. B. 109 ; *Beddaway* v. *Bentham*, (1892) 2 Q. B. 639.

(8) Kerley on Trade Marks p. 514.

(9) *Juggilal* v. *Swadeshi Mills*, 33 C. W. N. 242=56 I. A. 1=51 A. 182 (P. C.)

(10) A. I. R. 1929 Rang. 256=111 Ind. Cas. 136=6 Rang. 291.

two remedies open to him. He can file a complaint in a Criminal Court, or he can get an injunction from a Civil Court. He can choose the former remedy as being the more expeditious. Whatever his reasons may be, the choice is entirely his, and it is not for the person who is alleged to have infringed on his rights to dictate to the owner or proprietor what remedy he shall seek (1)." If the plaintiff succeeds in an civil action for infringement of trade-mark, he may obtain an order for—(*i*) an injunction restraining further infringement of his rights ; (*ii*) the delivery up for destruction, or for erasure of the marks, of any goods already marked with the spurious mark and in possession or under the control of the defendant ; (*iii*) the damage in respect of the part infringement, or, in lieu of damage, an account of the profits made by the defendant by the sale of the spuriously marked goods, or for some one or more of those (2).

"It is well-known" said *Cotton L. J.* (3) "that, both in trade mark cases and patent cases, the plaintiff is entitled, if he succeeds in getting an injunction, to take either of two forms of relief ; he may either say : 'I claim from you damage I have sustained from your wrongful act ;' or I claim from you the profit which you have made by your wrongful act." It is wrong to base the estimate of damages suffered by the plaintiff upon the amount of profits that the defendant makes. The proper way to approach the question as to how much damages the plaintiff has suffered by reason of the infringement of the mark, is to ascertain what profits the plaintiff would have made if the offending articles had not been put upon the market, and the best evidence in support of such claim is evidence of any loss of trade that the plaintiff has suffered during the period in which the defendant was importing the offending goods (4). In a case of infringement of trade-mark, a Court may grant both an injunction and damages to the plaintiff. The injunction should be wide enough to cover all possible chances of approach to ultimate buyers and damages should be awarded on the result of an enquiry as to profits made by the defendant by the unlawful use of plaintiff's number (5). The questions for determination, therefore, in a case of an alleged infringement of a trade mark are (*i*) whether the defendant has pirated the dominant device of the plaintiff and (*ii*) whether the defendant's conduct is such as to deceive ultimate purchasers. Proof of actual deception is not necessary (6).

Infringement of trade mark—Preliminary Injunction.—The complainant should be diligent in applying for a preliminary injunction. The doctrine of laches is strictly applied in such cases. The usual rule also applies that if there is any doubt either of complainant's tittle or defendant's infringement, the relief will be denied. The complainant must show that he is the

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(1) *Ganeshi Lal* v. *Anwar Khan*, A. I. R. 1933 All. 494.

(2) Kerley on Trade Marks p. 502.

(3) *Lever* v. *Goodwin*, 36 Ch. D. 1.

(4) *Sallay* v. *Neogi*, 10 Rang. 85=137 Ind. Cas. 202=A. I. R. 1932 Rag. 56 ; See also *Jaggi Lal* v. *Swadeshi Mills*, A. I. R. 1929 P. C. 11=114 Ind. Cas. 30=56 I. A. 1=51 A. 182 (P. C.)

(5) *Madhabji* v. *Central India Spining*, 34 Ind. Cas. 529=18 Bom. L. R. 206 ; but see the previous cases.

(6) *Ibid.*

owner and entitled to exclusive use. The solvency of the defendant is a circumstance which the Court will consider, or the fact that plaintiff has established trade and that the defendant's use is recent, so that an injunction will cause no serious inconvenience (1). The giving of a bond may be required as a condition for granting or withholding the relief (2). The essence of an application for an interlocutory injunction is that it should be made with promptness. Improper delay although it does not amount to acquiescence may deprive a plaintiff of his right to such a remedy. Injunction can be refused on account of delay in a case of infringement of trade mark (3). Where in a suit to restrain defendants from using the words "Camel hair" to certain belting sold by them, on the ground that such use was a false representation that belting was of the plaintiff's manufacture, the plaintiff applied for an *in terim* injunction to the same effect, held that the plaintiff should make out a strong *prima facie* case to establish that the words exclusively related to articles of their manufacture and that purchasers had been deceived into the belief that they were getting goods of plaintiff's manufacture. The proper course in such a case is to ask to have the cause expedited, and not to seek to have the questions, which can only be effectively determined at a hearing, prejudged on an application supported by affidavits (4).

Injunction in cases of breach of Trade-mark, Trade-names etc.— "Some what akin to the protection of patent and copyrights is that which Courts of equity give by means of the injunction, to the peculiar species of right arising from the adoption and use of 'trade marks.' Although some judicial opinions and some recent statutes (5), speak of property in trade marks, or call the right to their exclusive use a kind of property, yet in strictness the remedy does not depend upon any true property acquired in these symbols and names, but upon the broad principle that a Court of Equity will not permit fraud to be practised upon the public nor upon private individuals (6)". So the broadest ground of equitable jurisdiction in such cases is the protection of property interest and the prevention of fraud, the Court giving effect to the principle that no one is permitted to appropriate the pecuniary benefits of another's reputation. A complainant has a valuable interest in the good-will of his trade or business, and having adopted a particular label, sign or trade-mark, indicating to his customers that the articles bearing it are made or sold by him or by his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to deprive him of his trade or customers by using his labels, signs, or trade-mark, without his knowledge (7). So an injunction will be granted to prevent the use of names, marks, letters, or other *indicia* of a

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(1) *Read* v. *Richardson* 45 L. T. N. S. 54.

(2) Pom. Eq. Rem. § 577 (*d*).

(3) *Yoshimi* v. *Firm of Dwarka Das*, 26 S L. R. 335=139 Ind. Cas. 490.

(4) *F. Reddaway* v. *Schroder*, 8 C. W. N. 151.

(5) Vide Stat. 46 & 47 Vict. C. 57; and the British Trade Marks Acts 1905-1919.

(6) Pom. Eq. Jur. § 1354.

(7) Spelling on Injunction, and Other Extra-ordinary Remedies § 891.

tradesman, by which to pass off goods to purchasers as the manufacture of that tradesman, when they are not so (1). In the first mentioned case, *Lord Langdale* said: "I think that the principle on which both the Courts of Law and Equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters or *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or has not a property in the name or the mark, I have no doubt that another person has no right to use that name or mark for the purpose of deception, and in order to attract to him that course of trade or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using the particular name or mark. The case of *Millington* v. *Fax* (2), seems to have gone this length, that the deception need not be intentional, and that a man, though not intending any injury to another, shall not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person. I am not aware that any previous case carried the principle to that extent (3)". The ground of the remedy was stated in *Farina* v. *Silverlock* (4): "This right cannot properly be described as a copyright; it is in fact a right which can be said to exist only, an can be tested only, by its violation; it is the right which any person designating his wares or commodities by a particular trade-mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade-mark, in order to mislead the public, and so incidentally to injure the person who is the owner of the trade-mark." It is well settled by modern decisions, that when a trade mark, has been duly acquired by a manufacturer or dealer, an injunction will be granted at his suit to restrain other persons from using it upon their goods, or from using such limitations of it as will tend to mislead and deceive the public (5).

(1) *Perry* v. *Truefit*, 6 Beav. 66; Story's Eq. Jur. § 1282; *Gout* v. *Aleploglu*, 6 Beav. 69 (note).

(2) 3 M. & Cr. 338.

(3) See also *Howard* v. *Henriques*, 3 Sandf. 725; *Sykes* v. *Sykes*, 3 Barn & C. 541; *Cartier* v. *Carlile*, 31 Beav. 292; *Edelston* v. *Edelston*, 1 De. G. & S. 185; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; *Lee* v. *Haley*, L. R. 5 Ch. 155; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Seixo* v. *Provizende*, L. R. 1 Ch. 192; *Hirst* v. *Denham*, 14 Eq. 542.

(4) 6 De. G. M. & G. 214, 217; Pom. Eq. Jur. § 1354.

(5) *Burgess* v. *Burgess*, 3 De. G. M. & G. 896; *Rogers* v. *Nowill*, 3 De. G. M. & G. 614; *Farire* v. *Silverlock*, 6 De. G. M. & G. 214; *Edelston* v. *Edelston*, 1 De. G. J. & S. 185; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523; 4 De. G. J. & S. 137; *Flavel* v. *Harrison*, 10 Hare, 467; *Holloway* v. *Holloway*, 13 Beav. 209; *Cocks* v. *Chandler*, L. R. 11 Eq. 446; *Marshall* v. *Ross*, L. R. 18 Eq. 651; *Leather Cloth* v. *Lorsont*, L. R. 9 Eq. 345; *Reddi* v. *Norman*, L. R. 14 Eq. 348; *Hirst* v. *Denham*, L. R. 14 Eq. 542; *Seixo* v. *Provezende* L. R.

In *Redaway* v. *Banham* (1), the plaintiffs having proved that the expression "camel hair belting" was identified with the goods of their manufacture and of no other persons, the defendants were restrained from selling their products under the same name even though the words were merely an accurate description of the articles sold. In *Birmingham Vinegar Brewery Co.*, v. *Powell* (2) the defendants were likewise restrained from using the words "Yorkshire Relish" as description of or in connection with source, without clearly distinguishing it from the plaintiffs.

A fraudulent misrepresentation by the defendants is no longer an essential ingredient for the issue of an injunction (3). The parties who were dealing in condensed milk used labels having device of a cow. They were alike in several respects, though there were minor points of difference also. The plaintiff having sued for an injunction in respect of the trade mark, held that an injunction should be issued (4).

Where the evidence is quite satisfactory to show that plaintiff's cloth was associated with the name of *lotus* and that any *lotus* device would lead to cloth being able to be palmed off as their cloth which was the cloth of another manufacturer, injunction shonld be granted ; and the mere fact that if looked properly the defendant's trade mark was not *lotus* but a rose would make no difference if the whole get up of the one was like the whole get up of the other (5). No trader has a right to use a trade mark so nearly resembling that of another trader as to be calculated to mislead the incautious or illiterate purchasers. The use of such trade mark may be restrained by an injunction although no purchaser has actually been misled (6).

In India where there is no statute for registering trade-marks a right to a trade-mark is acquired by user. No general rule can be laid down as to what is or is not colourable imitation. All that can be done is to ascertain

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1 Ch. 192 ; *Lee* v. *Halley*, L. R. 5 Ch. 155 ; *Wotherspons* v. *Currie*, L. R. 5 H. L. 508 ; *Perry* v. *Truefitt*, 6 Beav. 66 ; *Collins Co.* v. *Brown*, 3 Kay. & J. 423 ; *Collins Co.* v. *Cowen*, 3 Kay. & J. 428 ; *Singer Mfg. Co.* v. *Loog*, L. R. 18 Ch. D. 395 ; *Hendriks* v. *Montague* L. R. 17 Ch. D. 638 ; *Orr Ewing* v. *Johnston*, L. R. 13 Ch. D. 512 ; *Bulnois* v. *Peake*, L. R. 13 Ch. D. 513 note ; *Day* v. *Brownrigg*, L. R. 10 Ch. D. 294 ; *Merch. Bank Co.* v. *Merch. Bank*, L. R. 9 Ch. D. 560 ; *Seigert* v. *Find later*, L. R. 7 Ch. 801 ; *Linoleum Mfg.* v. *Nairn*, L. R. 7 Ch. D. 834 ; *Braham* v. *Beachim*, L. R. 7 Ch. D. 848 ; *Moet* v. *Pickering*, L, R. 6 Ch. D. 770 ; *Cheavin* v. *Walker*, L. R. 5 Ch. D. 850 ; *Hirsch* v. *Jones*, L. R. 3 Ch. D. 584 ; *Singer Mfg.* v. *Wilson*, L. R. 2 Ch. D. 434 ; *East Court* v. *East Court etc.*, L. R. 10 Ch 276 ; *Cope* v. *Evans*, L. R. 18 Eq. 138 ; *Upmann* v. *Ulkan*, L. R. 7 Ch. 130 ; *Ford* v. *Foster*, L. R. 7 Ch. 611 ; *Hall* v. *Barrows* 4 De. G. J. & S. 150 ; *James* v. *James*, L. R. 13 Eq. 421 ; *Raggett* v. *Find later*, L. R. 17 Eq. 29.

(1) (1896) A. C. 199=65 L. J. Q. B. 381.

(2) (1899) A. C. 710.

(3) *Danish Dairies* v. *Firm of Murlidhar*, A. I. R. 1932 Sind. 84=26 S. L. R. 51 ; *Milling ton* v. *Fox*, 45 R. R. 271 ; *Singer Manufacturing Co.* v. *Wilson*, 3 A. 376 ; *Cellulor Clothing* v. *Maxton*, (1899) A. C. 326.

(4) *Danish Dairies* v. *Firm of Murlidhar*, 26 S. L. R. 51=A. I. R. 1932 Sind. 84.

(5) *Juggi Lal* v. *Swadeshi Mills*, 56 I. A. 1=51 A. 182=33 C. W. N. 242= A. I. R. 1929 P. C. 11.

(6) *Herbert Whitworth* v. *Jamna das* 52 B. 228=30 Bom. L. R. 514=110 Ind. Cas. 312=A. I. R. 1928 Bom. 227.

in every case as it occurs whether there is such a resemblance as to deceive a purchaser using ordinary caution. Where the defendants adopted a closely resembling mark of the plaintiff and adopted the name of the goods by which the plaintiff's good were generally known in the market, *held* that there was a infringement of the plaintiff's right and the court would protect it by an injunction restraining the defendants from adopting the name and mark and by awarding damages to the plaintiffs on the basis of profits which the defendants could not have made but for the use of the trade mark (1).

In an action for an injunction restraining the defendant from advertising offering for sale, selling or otherwise dealing in articles contained in packets or other receptacles which were a colourable imitation of those owned and used by plaintiff, the whole question turns upon this as to whether or not the court will believe that there is any probability of deception and instances of actual deception need not be proved if the court is otherwise satisfied of the probability of deception (2). In the above case *Ghosh J.* said: "A fraudulent intention is not necessary; as has been said, 'the law does not take notice of a fraudulent intention in a man's mind, if he does nothing to carry out the fraud'. It is, therefore, contended that the whole question turns upon this as to whether or not the court will believe that there is any probability of deception and that instances of actual deception need not be proved if the court is otherwise satisfied of the probability of deception. As has been said in numerous cases, the appeal is to the eye of the Judge and the judge must, in the end, act upon his own view on a comparison of the marks or designs after paying due attention to the evidence adduced before him: See in this connection *Payton & Co. Ltd.*, v. *Spelling Lampard & Co., Ltd.* (3), *Schweppes Ltd.*, v. *Gibbons* (4), *In re Farrows application* (5), where it is said that the question is to be decided partly by the Judge's eye sight and partly by the view of the evidence; *Bourne* v. *Swan Edgar Ltd.* (6), *Alaska Packer's Association* v. *Crookes* (7). It has sometimes been said that the result of the cases is that unless it is left to the eye sight of the judge to judge for himself, there is practically no evidence open to the plaintiff in an action of this nature. In my opinion the true view is that while the judge must not surrender his own independent judgment to any witness whatsoever, he must, at the same time, in order to arrive at a proper conclusion, not disregard the evidence adduced in the particular case before him.

"One of the points raised bearing on the question of the probability of deception is the similarity in the two names *i.e.*, Pedro and Padri. In the case of tne *North Cheshire and Manchester Brewery Co.*, v. *Manchester*

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(1) *The Swadeshi Mills* v. *Juggi Lal*, 22 A. L. J. 975 on appeal to P. C. 56 I. A. 1=51 A. 182=27 A. L. J. 1=33 C. W. N. 242.

(2) *Imperial Tobaco Co. Ltd.* v. *Atlantic Tobaco Co*, 40 C. L. J. 230=1925 Cal. 220=84 Ind. Cas. 1014.

(3) 17 R. P. C. 628=(1901) A. C. 308=70 L. J. Ch. 644.

(4) (1905) 22 R. P. C. 113.

(5) 63 L. T. 233.

(6) (1903) 1 Ch. 211=72 L. J. Ch. 168.

(7) (1901) 18 R. P. C. 129 (135, 138).

Brewery Co., (1), *Lord Halsbury L. C.* observed as follows : 'Is this name so nearly resembling the name of another firm as to be likely to deceive ? That is a question upon which evidence of course might be given, as to whether or not there were another brewery either in the one place or in the other, or whether there was several breweries nearly resembling it in name ; what the state of the trade was, and whether there was any trade name : All these are matters which are proper to be dealt with upon evidence ; but upon the one question which your Lordships have to decide, whether the one name is so nearly resembling another as to be calculated to deceive, I am of opinion that no witness would be entitled to say that, and for this reason : that that is the very question which your Lorships have to try.'

"Bearing these principles in mind the question which I have got to answer on the evidence before me in this application is whether there is probability of deception, in other words, whether the degree of resemblance between the two names and between the two designs of get up is such as is likely to deceive. In considering this matter I must pay attention at the same time to the question as to who are the persons whom the resembance is likely to deceive They are the persons who are likely to become purchasers of the goods put up in the packets before me ; *i.e.*, the ultimate purchasers in the Indian market, many of whom are unacquainted with the English language and most of whom are illiterate. In the second place, in finding out the amount of resemblance between the two packets, not only must one look at the distinguishing features, *i.e.*, dissimilarities, but one must look at the wholes and come to a decision. I do not agree that each resemblance is to be taken by itself and a conclusion is to be based thereon. A great deal of stress has been laid upon what is described as the leading feature, namely, the resemblance between the two names. In my view, not only must this leading feature, as it is called, be taken into consideration, but I must look at the two get-ups as wholes and while not disregarding the parts which are common to the trade, I must try to find out whether the plaintiff company are able to make out that the defendant's goods are like the plaintiff company's by reason of something peculiar to the plaintiff company and by reason of defendants having adopted some mark or device or label or something of that kind, which distinguishes the plaintiff company's goods from other goods which have like those goods, the features common to the trade."

In the cigar market the term *Corona* is used to imply cigars manufactured by a particular company ; later on it also came to denote cigars of a particular size and shape. A hotel keeper when asked by one of his customers for a *Corona Cigar* supplied one of the *Carona* size and shape but of some other brand. In a passing off action for restraining him from doing so, the defendants contended that the word being ambiguous in its meaning, it was not for them to clear up the ambiguity. *Held*, as the evidence showed that the customers

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(1) (1899) A. C. 83=68 L. J. Ch. 74.

when they used the word intended to signify the brand and not the size or shape and an injunction should issue (1). The plaintiffs obtained from the manufacturers of a certain brand of cigarettes the trade mark and good will to sell them in India. The defendants purchased from some foreign purchasers, a big stock of the same brand and were in a position to under sell the plaintiffs. *Held* in the absence of contract, misrepresentation or infringement of any rights, a suit was not maintainable at the instance of the plaintiff.s So long as the defendants did nothing to mislead customers or to infringe any covenants, they were not liable (2).

A grant of injunction is justified, even where no actual deception has been proved, if it be shown that steps have been taken by the defendant, which would likely defraud purchasers (3).

Analogous to the protection extended to one's name as forming part of, or in connection with the name of an article the whole of a trade-mark is that extended to restrain the unauthorized use of another's name to induce person to purchase the goods and wares of the user under the belief that they are the product or property of the person whose name is used (4). A trade mark in India is a species of property in respect of which an injunction may issue, and although there is no special law regarding trade mark as in England, plaintiff has his remedy under the Specific Relief Act (5). To entitle a person to an injunction, restraining the defendant from using any name or number as a trade mark, he must possesses the right to exclusive user of that name and number. Such a right, however, will not always entitle the owner to prevent others from using it under all circumstances. It is only when the use of that name or number deceives or is reasonably likely to deceive the public, that it can be interfered with or prevented, and it is not sufficient to show that the number has acquired such a reputation that the people buy the goods by that number without examination of quality (6).

In an application for an injunction to restrain the use of a trade-mark, it is not enough to say in defence that there was no fraudulent intention. That is no reason why an injunction should not be granted (7). The general principle applicable to passing off cases is that 'nobody has the right to present his goods as the goods of somebody else'. In an action for an injunction to restrain the trade mark, or mark if the defendant's goods on the face of them and having

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(1) *Havana ciger* v. *Oddenino*, (1924) 1 Ch. 179.

(2) *Imperial Tobaco Co.* v. *Bannan*, (1924) A. C. 765 ; on appeal from *Imperial Tobaco Co.* v. *Bannan*, 50 C. 762.

(3) *Madhabji* v. *Central India Spining*, 18 Bom. L. R. 206=41 B. 49=34 Ind. Cas. 529.

(4) *Croft* v. *Day*, 7 Beav. 84 ; *James* v. *James* L. R. 13 Eq. 421 ; Spelling on Injunctions and other Extraordinary Remedies § 898.

(5) *Muhammad Ishaq* v. *Alip Khan*, 98 P. L. R. 1902 ; see also *Noorooden* v. *Charles*, 15 M. L. J. 45 (F. B)

(6) *Barlow* v. *Gobind Ram*, 24C. 364= 1 C. W. N. 281 ; see also *Ewing* v. *Grant*, 2 Hyde 185 ; *Balfour* v. *Kil burn*, 1 Hyde 270 ; *John Smidt* v. *Redda way*, 32 C. 401=9 C. W. N. 281 ; *Munna Lal* v. *Jawala Prosad*, 35 C. 311.

(7) *Graham & Co.* v. *Kerr Dods & Co*, 3 B. L. R. App. 4 (*a*).

regard to the surrounding circumstances are calculated to deceive, evidence to prove the intention to deceive is inadmisible as being unnecessary the 'rule being that a man must be taken to have intended the reasonable and natural consequences of his own acts.' When the defendant adopted a trade mark identical with that of the plaintiff, which trade mark was calculated to deceive and there was evidence to show that some persons were actually deceived : *Held*, the plaintiff was entitled to succeed without a necessity for him to prove an intention to deceive and to obtain an injunction (1).

In cases where the plaintiff charges the defendants with palming off their own goods on the unwary public the foundation of the suit is misrepresentation to the public or deception of the public. There is no monopoly or exclusive right to the use of any words, letters, animals or devices such as exist in copy right or patents. There is no monopoly in names etc, which merely indicate the quality or description of goods. Although no protection can be granted, if the devices signify merely quality or description, yet such protection will be granted to the plaintiffs if they establish that the particular device indicates not merely the quality or description, but the plaintiff's manufacture. Words and devices which indicate quality and description, may at the same time also indicate the plaintiffs' manufacture. If once the plaintiff establish that the particular device, be it words or letters or animals—whatever that device may be—if the plaintiff once establish that the device indicates the plaintiff's manufacture, so that any one seeing that device before the article would be justified in concluding that he is purchasing goods of the plaintiff's manufacture, then the court will protect the plaintiff

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(1) *Munna Lal* v. *Jwala Prosad*, 35 C. 311. To entitle the owner of a trade mark to redress, although fraud is necessary the fraud does not necessarily consist in an intention to deceive on the part of the defendants, but in an actual deception or in the creation of a probability of deception independently of any fraudulent intention. It is not necessary for relief in equity that proof should be given of person having been actually deceived and having bought goods with the defen ant's mark, under the belief that they were of the manufacture of the plaintiffs provided that the Court is satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. What one has to look at, in cases of colourable imitation of trade marks, is not whether a critical and astute purchaser, seeing the two labels side by side would be able to detect the difference, but whether the distinction and characteristic symbol is the same in both cases so that one is likely to be taken for the other. *E. D. Sassoon* v. *D. L. Miles*, 1 Bom. L. R. 291 ; see also. *Nemi chand* v. *C. W. Wallace*, 11 C. W. N. 537=34 C. 495 on appeal from 4 C. L. J. 268=10 C. W. N. 107. A counterfeit trade mark may be defined as a trade mark which is either designed and used with the intention of deceiving or which by reason of its resemblance to another pre-existing and already established trade mark is calculated to deceive apart from any dis-honest intention. *Nemichand* v. *Wallace*, 4 C. L. J. 268=10 C. W. N. 107 ; see also *Abdul Salam* v. *Hamid Mullah*, 166 P. W. R. 1912.

"In *Milling ton* v. *Fox*, 3 Myl & Cr. p.33, it is distinctly laid down that it is not necessary to show fraud." *Hugh* v. *Eward* 1 Hyde 270 ; see also *Burgess* v. *Burgess*, 22 L. J. Ch. 675 ; *Croft* v. *Day*, 7 Beav. 84 ; *Hollway* v. *Hollway*, 13 Beav. 299. "In *Cartier* v. *Carlie*, 8 Jur. N. S. 184. *Sir John Romily* holds that if it be found that the mark complained of is a colourable imitation of the plaintiff's mark it is quite immaterial whether the defendant intended to imitate it, or whether he knew that it belonged to any particular individual. The ground upon which a person is restrained from using another's trade mark is that he is gaining an advantage by the use of a particular trade-mark which is the private property of another". *Ewing & Co.* v. *Grant, Smith & Co*, 2 Hyde 185.

against not only the use of the particuiar device, but against any imitation of that device, which imitation is likely to cause deception to the public (1). Injunction was granted to restrain a bazar dealer from using trade mark similar to those of a Glasgow firm trading in India (2). Where the legal right of plaintiff is not clear the injunction will not be granted *in limine* (3).

Use of defendant's own name.—The objection which in general may attach to an injunction restraining a man from using his own name does not extend in the same degree to the use of that name as the descriptive part of the trade designation of an article. There is in principle no distinction between a case in which the name of the user of which the complaint is made, is the name of the person carrying on the business and the case in which it is not (4).

Grant of Injunction, etc.—Laches.—Laches is usually fatal to a preliminary injunctive motion, but will not bar final injunction unless it amounts to abandonment or estoppel. Accounting may be refused on account of laches (5). There can be no laches without knowledge of the infringement (6). In a case where the plaintiffs refrained from taking proceedings on hearing that the defendants had received a small quantity of the infringing goods, but waited until they had got a larger consignment, *Mallins V. C.* ordered the injunction to be directed to stop the sale of future consignments only (7). Acquiescence which is not sufficient to bar the plaintiff's right, may cause the court to refuse the relief by injunction and the plaintiff may get only the damages (7). The action for infrigement may wholly fail, because the defendant has used the plaintiff's mark so long that there is no longer any deception (8). So in a fit case acquiescence or delay may deprive the plaintiff of his right of relief (9). "The *interim* injunction will not be granted if the plaintiff has delayed interfering until the defendant has built up a large trade in which he has notoriously used the mark, or if the plaintiff has delayed for a considerable time after he knew of the matters complained of, unless the delay is explained (10). And in a case in which the acts complained of has been going on for five years, and the plaintiffs failed to satisfy the court that they did not know of them, an interlocutory injunction was refused (11). Where the defendants' conduct was held to be a fraud on the public, an *interim* injunction was granted notwithstanding the fact

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(1) *Badische Aniline* v. *Farbon Farbricken*, 6 Bom. L. R. 407.

(2) *Ewing* v. *Chooni Lal*, Cor. 150.

(3) *Foot* v. *Lee*, 13 Ir. Eq. 484.

(4) *Abdul Karim* v. *Abdul Karim*, A, I. R. 1931 Mad. 461 ; see also *Valantine Meat Juice* v. *Valuntine Extract Co.*, 83 L. T. 259 ; *Reddaway* v. *Banham*, (1896) A. C. 199.

(5) Pom, Eq. Jur § 2002.

(6) *The Angloswiss* v. *The Swiss* (1871) W. N. 163.

(7) *Sayers* v. *Collyer*, 28 Ch. D. 133 ; see also *Chappel* v. *Sheard*, 2 K. & J. 117 ; *Royal Warrant* v. *Slade*, 25 R. P. C. 245 ; Kerley on Trade Marks p. 506,

(8) *Marquis of Londonderry* v. *Russel*, 2 T. L. R. 843.

(9) *East Court* v. *East Court*, 10 Ch. D. 101 ; *National Starch* v. *Mun's Co.*, (1894) A. C. 275 ; *Yost Type Writer* v. *Type Writer Exchange*, 19 R. P. C 422.

(10) *North British Rubber Co.* v. *Germully Co.* 12 R. P. C. 17.

(11) *Yost Type Writer* v. *Type Write Exchange*, (1902) 19 R. P. C. 422.

that the plaintiff had been aware of acts by the defendants some what similar to those complained of for four years (1)" (2).

To use the words of *Cozens Hardy M. R.* in *Sherwell* v. *Combined Incandescent Mantles Sydicate Ltd.* (3), the essence of an application for interlocutory injunction is that it should be made with promptness. Improper delay, although it does not amount to acquiescence, has often been held to deprive a plaintiff of his right to an interlocutory injunction (4). Acquiescence is only a form of estoppel, and it is of the essence of acquiescence that the party acquiescing should be aware of and by words or conduct should represent that he assents to what is a violation of his rights, and that the person to whom such representation is made should be ignorant of the other party's rights, and should have been deluded by the representation into thinking that his wrongful action was assented to by the other party (5). In a suit by the plaintiff for infringement of a property mark delay in bringing such an action is no ground for assuming plaintiff's acquiescence to such infringement and does not disentitle the plaintiff to the grant of an injunction prohibiting the defendant from making use of such marks (6).

In *Issacson* v. *Thompson* (7), the right to interlocutory injunction was lost by delay, in filing the bill, of 9 or 10 months since the discovery of the user. In *G. C. Vacados* v. *D. C. Mcleod* (8), the plaintiff's suit was dismissed on the ground that he came to know of the alleged infringement in 1909 but failed to sue till June 1914.

Determination of trade mark.—The right of the proprietor of a mark to the exclusive use of it upon the goods of the kind in respect of which the right existed is determined.—(i) when the mark so used ceases to be distinctive ; (ii) when the proprietor is no longer able to use it in the business in connection with which the right was acquired ; (iii) when he has abandoned it ; (iv) when he has forfeited his claim to protection of his right by using the mark deceptively or in a fraudulent trade ; and (v) in the case of the name of an articl or substance manufactured under any patent, when the patent expires or determines (9).

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(1) *Gillete Safety Razor* v. *Diamond Edge*, 43 R. P. C. 310.

(2) Kerley on Trade Marks p. 508.

(3) (1907) W. N. 211.

(4) *Yoshimi Boshaka* v. *Dwarka Das.* A. I. R. 1933 Sind. 28.

(5) *Moolji* v. *Ramjan*, A. I R. 1930 Cal. 678=129 Ind Cas. 612. In *Proctor* v. *Bennis*, 36 Ch. D. 740, *Cotton L. J.* observed : "It is necessary that the person who alleges this lying by should have been acting in ignorance of the title of the other man and that the other man should have known that ignorance and not mentioned his own title." In the same case *Bowen L. J.* added : "In order to make out such acquiescence it is necessary for them to establish that the plaintiff stood by and knowingly allowed the defendants to proceed and to expend money in ignorance of the fact that he had rights and meant to assert such rights." See also *Ramsden* v. *Dyson*, 1 H. L. 129 ; *Mohideen* v. *Rigand* A. I. R. 1932 Rang. 114.

(6) *Abdul Karim* v. *Abdul Karim*, A. I. R. 1931 Mad. 461=132 Ind. Cas. 650= 1931 M. W. N. 311 ; *Rowland* v. *Mitchell*, 13 Rep. Pat. Cas. 457 ; *Fullwood* v. *Fullwood*, 9 Ch. D. 176.

(7) 41 L. J. Ch. 101.

(8) 45 P. R. 1919=51 Ind. Cas. 434.

(9) Kerley on Trade Mark p. 420.

Loss of distinctiveness.—The distinctiveness is an essential condition of a valid trade mark. A mark which has ceased to be distinctive is incapable of being the subject of trade mark rights, and no action for infringement could be successfully brought to prevent any trader using it (1). Distinctiveness may be lost through the action of the proprietor or by reason of successful piracy. Thus if the proprietor abandons his mark, it will almost inevitably become a common mark, unless there are other persons who have trade mark righ in it which they assert (2). But extensive infringement by a single tradert can hardly suffice to make a trade mark common, "It has been said" said *James L. J.* (3), 'that one murder makes a villain, and millions a hero; but I think it could hardly do to act on that principle in such matters as this, and to say that the extent of a man's piratical invasion of his neighbour's rights is to convert his piracy into a lawful trade." But in the same case *Mellish L. J.* added, "There is no doubt I think, that a word which was originally a trade mark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become *publici juris*. I think the test must be whether the use of it by other persons is stlll calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that no body can be deceived by it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trades, yet practically, as the right to a trade mark is simply a right to prevent the trade from being cheated by other person's good being sold as his goods through the frandulent use of his trade mark, the right to the trade mark must be gone (4).

Separation of the Mark from the good will.—A trade-mark can exist along with the good will of the business, so the trade mark is lost when the good will of the trade passes to other persons (5).

Abandonment.—A trade-mark right, as any other right, can of course be abandoned by the owner. But a mere non-user is not abandonment (6). But from disuse for a long time an intention to abandon may be inferred (7). So where a new mark has been adopted, it shows that the old one has been abandoned (8). As the right to a trade-mark may be acquired, so it may be abandoned and no length of time is required for either (9).

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(1) Kerley on Trade Mark p. 421.
(2) *Ibid* p. 422.
(3) *Ford* v. *Foster*, L. R. 7 Ch. 625.
(4) See also *A. J. Von* v. *Jivan Das*, 28 Bom. L. R. 243=50 B, 402=93 In l. Cas. 857=A I. R. 1926 B. 200.
(5) Kerley on Trade Mark p. 425.
(6) *Mouson* v. *Boehm*, 26 Ch. D. 398; *Noor Ilahi* v. *Wood & Co.*, A. I. R. 1928 Lah. 924=29 P. L. R. 615.
(7) *Louise* v. *Gainsborough*, 20 R. P. C. 61; see also 35 B 42.
(8) *Lee* v. *Miller*, Seb. Dig. at p. 305.
(9) *Lanergue* v. *Hooper*, 8 M. 149; *Jagannath* v. *Cresswell*, 40 C. 814; see also *West End Watch* v. *Berna Watch*, 13 Bom. L. R. 212.

Forfeiture of right to protection.—A deceptive mark will not be protected by the Court (1).

Right of importer.—A mere importer has no right to sue for an infringement of a trade-mark of his consignor or producer (2). An importer can only protect a trade-mark representing his own reputation and the advantages accruing therefrom but not the trade-mark of another, a manufacturer or producer. He is not in the legal sense aggrieved at any use of the trade-mark which belongs not to himself but to the producer. Importers can only protect marks indicating importation by him. If their importation is not indicated by the marks but otherwise, as for instance by the style and name under which they trade as importers, they could not sue to restrain the use of the marks, and could only sue if their trade name and style were deceitfully assumed by a rival. A trade-mark, which represents not the importer's reputation but the manufacturer's is under the control and protection of the latter, not of the former (3). But in *Jawla Prasad* v. *Munna Lal* (4), it has been held that an action for the infringement of a trade-mark is maintainable, even though a person who begins the suit is not the manufacturer or selector of the good, but is merely a vendee of them. Where the trade-mark has upto the date of the suit been associated in the minds of the buyers in a particular country with a particular kind of commodity sold by the plaintiff, then, unless there is abandonment of the trade-mark by him, he is entitled to an injunction against any other person importing and selling the commodity under that name, notwithstanding that the plaintiff's name has, in addition to the word or trade-mark, always appeared on the article sold and is well-known to all dealers. The importer who by advertising and pushing the sale of goods under a particular mark, secures a wide popularity in relation to the goods sold by him, is entitled to the protection of the Court for that mark in the country of importation, even against the producer of the goods (5).

But in the absence of contract, a seller of goods has no exclusive right to a mark which merely denotes goods which he sells even though he may have designed the mark himself (6).

Limitation.—The period of limitation in a suit for an injunction to restrain from the infringement of a trade-mark is prescribed by art. 120 of Sch. II of the Indian Limitation Act. In the case of an infringement of a trade-mark the owner of the mark has a right to sue for every infringement of the mark until the mark becomes *publici juris*, that is to say, until the

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(1) *Leather Cloth* v. *American Leather Cloth*, 4 De. G. J. & S. 137.

(2) *Hirsh* v. *Jonas*, 3 Ch. D. 584.

(3) *Heiniger* v. *Droz*. 3 Bom. L. R. 1=25 B. 433.

(4) 37 C. W. N. 204=5 Ind. Cas. 1000; see also *Lavergue* v. *Hooper*, 8 M. 149; *West End Watch* v. *Burma Watch*, 35 C. 425; *Imperial Tobacco* v. *Bonnam*, 29 C. W. N. 81=51 C. 892 P. C.; *Ebrahim Currim* v. *Essa*, 24 M. 163; *Taylor* v. *Viraswami*, 6 M. 103; *Ralli* v. *Fleming*, 3 C. 417.

(5) *The West End Watch Co.* v. *The Berna Watch* 13 Bom. L. R. 212.

(6) *Vadilal* v. *Burdett*, 7 Bom. L. R. 272.

proprietor of it has in effect thrown open the use of it to the public by allowing his right to be so habitually infringed that the trade-mark, no longer conveys to those who see it the impression that the goods to which it is attached are the manufacture of one manufacturer, or the goods of one person or firm who originally adopted the mark' (1). The infringement of a trade-mark is a continuing wrong, and so long as the infringement continues, a fresh cause of action arises *de die in diem* (2). In *Vacados* v. *McLeod* (3), it has been been held that the period of limitation applicable to a suit for damages for infringing a trade name or a trade-mark—a trade name or trade-mark being an exclusive privilege—is contained in Article 40 of Schedule I, to the Limitation Act. In a suit for injunction to restrain the defendant from infringing the plaintiff's trade-mark, it appeared that the plaintiff had taken no action beyond sending a notice to the defendant and that he had stood by for five years before coming forward with the suit. *Held* that in the circumstances, the plaintiff was not entitled to injunction (4).

Application of "clean hands" maxim.—It is a well established maxim that he who comes into equity must come with clean hands. This applies strongly to parties seeking relief against the infringement of trade marks and against unfair competition. One seeking relief against the frauds of others must be free from fraud. An exclusive privilege for deceiving the public is assuredly not one that a Court of Equity can be required to aid or sanction. Accordingly, it is held that it is essential that the plaintiff should not in his trade-mark, or in his advertisements and business, be himself guilty of any false or misleading representation; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he looses his right to claim the assistance of a Court of Equity; that where any symbol or label claimed as a trade mark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained (5). Relief will also be denied if the plaintiff is using his marks in a *ultra vires* or unlawful business, or if he makes lying or deceitful statements as to goods (6).

A trade mark adopted as a part of a scheme to deceive the public will not be protected by injunction (7). And a manufacturer who falsely represents the composition of his goods by the labels on his packages is in no position to

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(1) *Aga Mahmood* v. *Edward Peltzer*, 2 L. B. R. 113.

(2) *Abdul Salam* v. *Hamidullah*, 166 P. W. R. 1912.

(3) 51 Ind. Cas. 434.

(4) Section 56(h) of the Specific Relief Act.

(5) Pom. Eq. Jur § 2015; *Clinton* v. *California Fig Syrup*, 187 U. S. 516. In the following cases statements calculated to make the public believe an article to be patented, when in fact it is not, were held sufficient to bar relief. *Flavel* v. *Harrison*, 10 Hare 467; *Cheavin* v. *Walker*, L. R. 5 Ch. D. 850. But in other cases under somewhat different conditions, the opposite conclusion has been reached. *Marshall* v. *Ross*, L. R. 8 Eq. 651; *Ford* v. *Foster*, L. R. 7 Ch. 611.

(6) Pom. Eq. Jur. § 2003.

(7) *Fetridge* v. *Wells*, 4 Abb. Pr. 144.

enjoin a rival manufacturer from using similar labels and packages on the ground that the latter thereby deceives the public (1). Nor will equity protect from imitation of a trade-mark, if the trade in which it is used be immoral or illegal (2). But a mere exaggerated statement of an article's merits will not deprive its proprietor of the benefits of protection against its imitation (3). So where the plaintiff whose trade-mark was 'Ford's Eureka Shirt' has falsely represented in his invoices and advertisements that he was a patentee of the shirt, it was held that such false representation was not sufficient to prevent him from sustaining an action at law; and his right at law being clear, he was entitled to protection by injunction (4).

Unfair competition or passing off.—If is not essential that a party must have a technical trade mark inorder to be entitled to the protection of equity. When one imitates the goods, form of packages, labels, or name of his business competitors in such a way as to deceive the public, he may be enjoined at the suit of such competitor. The ground for this jurisdiction is the general one of the prevention of fraud. In the case of trade mark proper, the plaintiff has got the exclusive right to use those marks and as such the jurisdiction of equity is exercised to protect those exclusive rights as well as to prevent fraud. In this class of cases there is no such exclusive right, as there is in the cases of trade marks proper. Courts in speaking of these cases generally classify them as instances of unfair competition. An actual fraudulent intention; although generally present is not essential. The injury is the same whatever the motive may be. The wrong consists in deceiving the public to the injury of the plaintiff. If the public is deceived and the plaintiff is injured as a result, the defendants' good intentions cannot excuse the wrong (5).

The law relating to passing off is thus stated by *Kay L. J.* in *Powell* v. *Birmingham* (6) :—

"(*i*) It is unlawful for a trader to pass off his goods as the goods of another :

(*ii*) Even if this be done innocently it will be restrained. *Millington* v. *Fox* (7) :

(*iii*) *A fortiori* if done designedly, for that is a fraud :

(*iv*) Although the first purchaser is not deceived nevertheless if the article is so delivered to him as to be calculated to deceive a purchaser from him, that is illegal : *Sykes* v. *Sykes* (8).

(*v*) One apparent exception is, that where a man has been describing his goods by his own name, another man having the same name cannot be prevented from using it, though this may have the effect of deceiving purchasers : *Burgess* v. *Burgess* (9) ; *Turton* v. *Turton* (10).

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(1) *Clotworthy* v. *Scheph* 47 F. 62.
(2) *Ford* v. *Foster*, L. R. 7 Ch. 611.
(3) Spelling on Injunctions etc. § 905.
(4) *Ford* v. *Foster*, L. R. 7 Ch. 611 ; *Marshall* v. *Ross*, L. R. 8 Eq. 651.
(5) Pom. Eq. Jur. § 2005.
(6) (1896) 2 Ch. 54 at pp. 79, 80.
(7) 3 My & Cr. 338.
(8) 3 B. & C. 541.
(9) 3 D. M. & G. 896.
(10) 42 Ch. D. 128.

(*vi*) But this exception does not go far. A man may so use his own name as to infringe the rule of law: 'It is a question of evidence in each case whether there is false representation or not' per *Turner L. J.* in *Burgess* v. *Burgess* (1). So he may be restrained if he associates another man with him so that under their joint names he may pass off goods as the goods of another person: *Croft* v. *Dey* (2); *Clayton* v. *Day* (3); *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, (4).

(*vii*) Another apparent exception is, where a man has under a patent had a monopoly for fourteen years, and has given the article a descriptive name, he cannot when the patent has expired prevent another from selling it under that name: *Young* v. *Macrae* (5), *Linoleum Manufacturing Co.*, v. *Narin* (6).

(*viii*) I am not sure this would be so if the name so used were the name of the patentee, or even a purely fanciful name not descriptive.

(*ix*) Certainly, where there has not been a patent and an article has been made and sold under a fanciful name not descriptive, so that the article as made by one person has acquired a reputation under that name, another trader will not be permitted to use the name for a similar article made by him: *Braham* v. *Bustard* (7); *Cochrane* v. *Menish & Son* (8).

(*x*) To this last proposition there is again a limitation. If the first maker has slept upon his rights, and allowed the name to be used by others until it has become *publici juris*, the court will not interfere (9)."

Unfair competition takes many forms. It may consist in the imitation of the colour, form or style of the boxes, bottles or packages used by a competitor. It may be the designation of article by name similar to that used by a competitor, although the name is not such as can be a technical trade-mark. If may be such a close imitation of the article itself as to colour, size, or lettering as to deceive purchasers. In all these cases the question is whether the similarity is such as to cause confusion and to deceive the public into taking other goods than those of plaintiff. If this confusion and deception will result, equity will generally grant an injunction (10). "If a man makes a statement which is true, but which carries with it false representation and induces the belief that his goods are the plaintiff's goods, he will be restrained by injunction. He cannot rely on the fact that his statement is literally and accurately true, if notwithstanding the truth, it carries with it a false representation (11)."

Actions based upon direct misrepresentation are comparatively rare. The plaintiff's case more commonly is that the defendant has copied or

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(1) 3 D. M. & G. 905.
(2) 7 Beav. 84.
(3) 26 Sol. J, 43.
(4) 4 Rep. Pat. Cas. 215.
(5) 9 Jur. N. S. 322.
(6) 7 Ch. D. 834.
(7) 1 H. & M. 447.
(8) (1896) A. C. 225.
(9) This case was affirmed by the House of Lords in (1897) A. C. 710.
(10) Pom. Eq. Jur. § 2006; *Singer Manufacturing Co.*, v. *Wilson*, 3 App. Cas. 376.
(11) *Per Buckley L, J,* in *Andrew & Co.*, v. *Kuehnrich*, 30 P. R. C. 677 (691).

imitated the trade name, or the get-up or some other badge or description by which the plaintiff's business and goods are known to be his. Where the charge is one of indirect misrepresentation of this sort, the onus is cast upon the plaintiff, in the first place, to show that the things copied or imitated are reputed in the market to denote a connection between himself or his predecessors in business, and the business or goods in, upon or in reference to which they are used (1).

"Where however there has been a representation that an article made by A is made by B, by means of which one person has secured custom intended for another, so that both the purchaser and the genuine trader has been defrauded, there the injury is the same, and the court will interfere and protect the right of both parties to trade freely without fraudulent deceptions although the fraud has taken another form than that of imitating a trade-mark (2)." One of the cases relied upon in support of this passage is the case of *Wheeler* v. *Wilson Manufacturing Co.*, (3). In that case the defendant acted for a number of years as agent of the plaintiffs for sale of certain machines. After he had ceased to be their agent, he commenced selling machines made according to the principle patented by the plaintiffs, and to such sale there could be no objection as the patent had expired. But he effected his sales in a manner so as to hold himself out as an agent of the plaintiffs, and he was restrained by an injunction from doing so. In this case in the course of his judgment, *James V. C.* said at p. 41: "That is in my opinion a gross fraud in fact upon the plaintiffs, and an unjustifiable falsehood which this court will restrain. I presume it is impossible for them to say whether they are injured or not. How can any manufacturer say what injury he sustains, or may sustain, by some person holding himself out to the world as his agent when that person as appears here, is using the name for the purpose of saying he has got something better than the article to sell? Therefore it seems to me the plaintiffs have made out a case of fraudulent representation on the part of the defendant, calculated in the judgment of this court to do them an injury; at all events, one which they are entitled to prevent, as anybody, is, with respect to a person who, having once been their agent, represent himself wrongfully still to be their agent, after having in fact ceased to be so."

P had secured a monopoly of selling grey shirtings of certain mills. D purchased the shirtings from P and after removing the face laps containing the trade marks of P, put his own mark similar to that of P. The object of D in substituting a device similar to that of P and affixing it after cutting the face laps of grey shirtings was to decieve the intending purchasers into a belief that D was direct purchasers from the manufacturers and his goods were superior to those supplied to P: *Held*, that the mode in which D was using the device on cloth purchased from P was likely to deceive unwary

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(1) Kerley on Trade Marks p. 558.

(2) Sebastian on the "Law of Trade Marks" 5th Ed. p. 274 cited in *Dwarkadas* v. *Lal Chand*, A. I. R. 1932 Sind. 222.

(3) 39 L. J. Ch. 36.

purchasers that they were buying the goods superior to those supplied to P, and that P had made a *prima facie* case for restraining D from using device similar to that of P (1).

Where the labels used by the defendants are distinct from and incapable of being mistaken for or confused with the labels of the plaintiff it is essential for the success of the plaintiffs in an action for infringement of trade-marks that they should establish by evidence that their goods are known by some name or description of such nature that the use of the defendant's label will cause people to think that goods bearing the label are the goods of the plaintiff (2). In *Seixe* v. *Provinzende* (3), *Lord Cranworth L. J.* observed: "It is obvious that, in these cases questions of considerable nicety may arise as to whether the mark adopted by one trader is or is not the same as that previously used by another trader complaining of its illegal use, and it is hardly necessary to say that, in order to entitle a party to relief it is by no means necessary that there should be absolute indentity. What degree of resemblance is necessary from the nature of things is a matter incapable of definition *a priori*. All that a Court of justice can do is to say that no trade can adopt a mark so resembling that of a rival as that ordinary purchasers purchasing with ordinary caution, are likely to be misled. It would be a mistake however to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no use. If a purchaser looking at the article offered to him would naturally be led from the mark impressed on it, to suppose it to be the production of a rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have from the mark or device he has used become known in the market by a particular name, I think that by adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device (4)."

Firm name, use of.—In order to justify the Court at a plaintiff's instance from prohibiting the defendant firm from using its own name in all or any of its business transactions, it is essential for the plaintiff to establish by proper evidence two facts. He must prove that the words in the name of the firms are so alike that the latter will be taken as the same as or equivalent to the former. He must further prove that his firm name has acquired a second-

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(1) *Dwarka Das* v. *Lal Chand*, 26 S. L. R. 287=A. I. R. 1932 Sind. 222=139 Ind. Cas. 780; *Burgess* v. *Burgess*, 3 De. G. M. & G. 896; *Burbureys* v. *Cording*, 26 R. P. C. 693.

(2) *Mahomed Noordin* v. *Abdul Kareem*, A. I. R. 1931 P. C. 272=134 Ind. Cas. 657.

(3) (1886) 1 Ch. App. 192=12 Jur. N. S. 215.

(4) *Powell* v. *Birmingham Vinegar*, (1896) 2 Ch. D. 54; *Adamjee Hajee* v. *The Swedish*, A. I. R. 1928 Rang. 210=110 Ind. Cas. 905; *Eastern Asiatic* v. *Kernmendi* 134 Ind. Cas. 217=A. I. R. 1931 Rang. 213.

ary meaning, *i. e.* that the word, when applied to goods means that the goods are the goods of the plaintiff and of no one else. If the use by the defendants of their firm name does in fact necessarily result in his goods being taken for the goods of plaintiffs, the continued use by the defendants of that firm name would become fraudulent (1).

Distinction between cases of unfair competition and trade-mark.—It will be seen that a clear distinction exists between cases involving the infringement of a technical trade mark and those in which an injunction is sought against what has come to be commonly known as unfair or unlawful competition in trade. While the tendency of the earlier authorities was to confuse the two classes of cases and to bring them under the same general designation of trade-mark cases, the result of the decisions is to narrow the term trade mark to such symbols as strictly designate the origin or ownership of an article and to exclude such words as are generic or geographical, or descriptive of the nature or quality of an article. The distinction is not strictly logical since an intentional infringement of a trade-mark proper involves the very same elements of unfairness and fraud as are present in cases of unfair competition. In some respects, however, the distinction is of considerable importance. For example, in cases of a technical trade-mark, the plaintiff, having established his right to the exclusive use of a word or symbol as a trade-mark, will ordinarily be entitled to relief merely upon showing an unauthorized use thereof by the defendant; while in case of unfair competition, the aggrieved party must show not only an unauthorized use of the word or name in question but its use in such a manner and under such circumstances as will result in the likelihood of misleading and deceiving purchasers (2).

"The basis of a passing off—action" said *Lord Parker* (3), "being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may of course, have been made in express words, but cases of express mis-representation of this sort are rare. The more common case is, where the representation is implied in the use or imitation of a mark, trade-name, or get-up with which the goods of another are associated in the minds of the public. In such cases the point to be decided, is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive. It would however be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on.''

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(1) *William Dimech* v. *Goffredo*, 61 M. L. J. 334 (P. C.)=A. I. R. 1931 P. C. 15=130 Ind. Cas. 312, per *Lord Russel of Killowen.*

(2) High on Injunction § 1065.

(3) *A. C. Spadling & Bros.* v. *A. W. Ganage Ltd.*, 32 R. P. C. at p. 284 cited in Kerley on Trade Marks p. 546.

Imitation of get-up.—The general appearance of a trader's goods as they are presented to purchasers is often the most important of the signs by which the goods are recognised as his, and an imitation of it frequently affords the readiest means by which a fraudulent rival, and fraudulent retail dealer in collusion with him can pass off his goods as the goods of the other. The cases falling under this head are almost necessarily cases of deliberate fraud, for such similarity of 'get up' as is calculated to deceive is, as a rule, the result of a resemblance, more or less close, in a number of corresponding details, and this can hardly happen by accident or coincidence. What is compendiously called the get-up of goods—the dress in which they are presented to the buyers--comprises in particular, the size and shape of the packages, where the goods have no definite outline, or none which is shown to the buyer, the material, colour, and decoration of their wrappers, and the lettering and arrangements of their label (1). In *Blofield* v. *Payne*, (2), *Cotton L. J.* said: "Looking at the two tablets, one cannot but see that there is a strong general resemblance between them, and especially in the eyes of people who cannot read. But (the defendant's) contention was this..... there is no monopoly in this parchment paper; there is no monopoly in the spaced printing; then why should we be restrained, in carrying on business, from using those things as to which the plaintiffs cannot claim any monopoly? That is an obvious fallacy. There may be no monopoly at all in the individual things, but, if they are so combined by the defendants as to pass off the defendants' goods as the plaintiffs', th n the defendants have brought themselves within the old common law doctrine in respect of which equity will give to the aggrieved party an injunction to restrain the defendants from passing off their goods as those of the plaintiffs." In finding out the amount of resemblance between the two articles, not only must the Court look at the distinguishing features, *i. e.* dissimilarities, but it must look at the articles as wholes and come to a decision (3).

Unfair competitions—Labels.—The infringing labels may imitate the name of the complainant or his product, some characteristic device or catch word, or the general appearance of his label. The resemblance may not be so close as to make it difficult to distinguish the two by comparison, for this is what seldom occurs in fact. The customer remembers some characteristic about the label, more likely some catch word than the name of the maker, and having seen that, thinks of nothing else (4). The colour and size of a label cannot be regarded as any constituent part of a trade mark (5). A person who uses a label which is a deliberate combination of other registered labels with a view to represent and sell his wares as the wares of others, cannot

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(1) Kerley on Trade Marks pp. 601, 602.

(2) 4 B. & Ad. 410.

(3) *Imperial Tobacco Compay* v. *Atlantic Tobacco Co.*, 84 Ind. Cas. 1014=A. I. R. 1925 Cal. 220.

(4) Pom. Eq. Jur. § 2007.

(5) *Muhammad Isaq* v. *Alep Khan*, 98 P. L. R. 1902=55 P. R. 1902.

be allowed to take out injunctions restraining some other person from imitating his label (1).

Preventive relief by injunction is frequently granted for the protection of trade mark consisting in a particular label or fraud attached to or designing the article which is manufactured or sold by the plaintiff. And in cases of this nature, the mere fact that defendant's label which it is sought to enjoin as a piracy of plaintiff's trade mark indicates the name of the manufacturer is not, in itself conclusive evidence of the good faith on the part of the defendant (2). And when goods of an inferior quality are put in circulation under a fraud which is in imitation of that of the plaintiff, he is entitled to protection by injunction (3). Where however, a merchant dealing in cigars makes a particular label and sends it to the manufacturer to be put upon cigars of the same description and with the same label to his agents, they will not be enjoined from selling cigars of that label, upon an interlocutory application, in the absence of any evidence of a contract by the manufacturer to sell exclusively to plaintiff (4). Where plaintiff's trade marks consisted in a label of a particular form and description upon bottles sold by him in his business, and it appeared that in many instances similar labels might be and probably were sold for a legitimate purpose an injunction was refused, in the absence of proof of actual fraud, until plaintiff should establish his right by an action at law; the ground of refusal being that while an injunction might prevent defendant's fraudulent use of the label, it might also prevent its legitimate use (5).

The plaintiffs were manufacturers of aniline dyes, which they imported into Bombay in tins, the tops of which were covered with labels which had upon it the picture of an elephant as the centre figure surrounded by certain printed words. The defendants (who were also aniline manufacturers) imported into Bombay for sale in the Bombay market, aniline dyes in tins bearing the picture of an elephant, which differed in some respects from the elephant on the plaintiffs' label, and with different surroundings. The plaintiffs thereupon, brought this suit against the defendants alleging that the labels used by the defendants were a colourable imitation of theirs and prayed for an injunction against them. *Held* (*per Sargent C. J.*) that although the labels used by the defendants differed in certain respects from that of the plaintiffs, they were so similar to the latter that it was likely to deceive unwary purchasers to the detriment of the plaintiffs' trade, and that, consequently, the plaintiffs were entitled to the injunction as prayed for. The question in a case of this description is not what would be the effect on brokers, or even dealers, in Bombay, but how the labels would be likely to strike the incautious and unwary purchasers such as are to be found more particularly in the mofussil. The attention of such purchasers would

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(1) *Abdul* v. *Mahamadali*, 3 Bom. L. R. 220.

(2) *Siegart* v. *Findlater*, 7 Ch. D. 891; High on Injunction § 1095.

(3) *Upmann* v. *Elkan*, L. R. 7 Ch. 130 affirming S. C. L. R. 12 Eq. 140.

(4) *Hirsch* v. *Jonas*, 3 Ch. D. 584.

(5) *Farina* v. *Silver lock*, 6 De G & M & G. 214 reversing S. C. 1 Kay & J. 509.

no doubt be arrested by the general effect of the label, and, notwithstanding the minor differences as regards the colour and size of the elephant and in some other respects, such purchasers would regard the labels as symbolical of the plaintiff's goods. *Per Starling J.*—It is quite possible for a label, no part of which is a copy of another label, to be colourable imitation of that other label and to be so like it in general appearance as to be likely to deceive purchasers. (1)

Unfair competition-Refilling.—Another means of unfair competition consists in refilling the complainant's packages with defendant's product. In many cases it is fraud, pure and simple. But such use will be forbidden, even though the product is free to the world, unless the complainants' marks are obliterated from the container (2).

Name of play or book.—The name itself, apart from subject matter, is not protected by copyright (3), nor is it a trade mark, for it is the name of the article itself and not a mark of the owner. Yet there is a growing disposition to protect names on the theory of unfair competition (4). Titles of books, news papers, or other publications, are protected, as trade names, and no cause of action arises therefore, unless it is shown that the title is known to indicate the plaintiff's book or paper, so that its use by the defendant would be calculated to lead to deception (5).

Infringement of trade marks and property marks is also criminal offence in British India—Sections 473 to 489 of the Indian Penal Code deal with offences regarding infringement of Trade, Property and other Marks.

Trade mark—A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade mark, and for the purposes of the code, the expression 'trade mark' includes any trade mark which is regist red in the register of trade marks kept under the Patents, Designs, and Trade Marks Act, 1883, and any trade mark which, either with or without registrarion, is protected by law in any British possession or foreign state to which the provisions of the one hundred and third section of the Patents, Designs and Trade Marks Act, 1883 are under order in council for the time being applicable (6).

Property mark—A mark used for denoting that moveable property belongs to a particular person is called a property mark (2).

Using a false trade mark—Whoever marks any goods or any case, package, or other receptacle containing goods or uses any case, package or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any

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(1) *Badische Aniline* v *Manek ji Shaper ji*, 17 B. 584.
(2) Pom. Eq. Jur. § 2008.
(3) *Dicks* v. *Yats*, 18 Ch. D. 75; *Licensed Victualler's News paper & Co*, v. *Bing ham*, 38 Ch. D. 139.
(4) Pom. Eq. Jur. § 2009.
(5) Kerley on Trade Mark p. 600; see also *Schove* v. *Schmicke*, 38 Ch. D. 546; *Berth wicke* v. *Evening Post*, 37 Ch. D. 449; *Henny Black lock* v. *Bradshaw's Publishing Co*, 43 R. P. C. 97.
(6) Section 478.
(7) Section 479.

such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade mark (1).

Using a false property mark.—Whoever marks any moveable property or goods, or any case, package or other receptacle containing moveable property or goods, or uses any case, package, or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark (2).

Punishment for using a false trade mark or property mark.—Whoever uses any false trade-mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year or with fine or with both (3).

Counterfeiting a trade mark or property mark used by another—Whoever counterfeits any trade mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both (3),

Counterfeiting a mark used by a public servant—Whoever counterfeits any property-mark used by a public servant, or any mark used by a public servant, to denote that any property has been manufactured by a particular person, or at a particular time or place or that the property is of a particular quality, or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine (5).

Making or possession of any instrument for counterfeiting a trade mark or property mark.—Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade mark, or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment for either description for a term which may extend to three years, or with fine or with both (6).

Selling goods marked with a counterfeit trade mark or property mark.—Whoever sells, or exposes, or has in his possession for sale or any purpose of trade or manufacture any goods or thing with a counterfeit trade mark or property mark

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(1) Section 480.
(2) Section 481.
(3) Section 482.
(4) Section 483.
(5) Section 484.
(6) Section 485.

affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall unless he proves—

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(*b*) that, on demand made by, or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(*c*) that otherwise he had acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both (1).

Making a false mark upon any receptacle containing goods.—Whoever makes any false mark upon any case, package or other receptacle containing goods in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods, which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both (2).

Punishment for making use of any such false mark.—Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section (3).

Tampering with property mark with intent to cause injury.—Whoever removes destroys, defaces, or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both (4).

(1) Section 486.
(2) Section 487.
(3) Section 488.
(4) Section 489.

CHAPTER XXVI

Injunction against interference with freedom of trade or employment ; combination, Strikes, Boycotts, etc.

The nature of the Problem.—"So far purely equitable considerations are concerned, the questions here presented are neither new nor complicated. There is involved simply the prevention by injunction of the commission of a threatened tort or a continuance of tortious acts. The cases in the main fall naturally into the class where the complainant, if he were left to his legal remedy, would suffer irreparable damage, or be compelled to resort to a multiplicity of actions at law to secure even a substance of adequate relief (1). However, back of the equitable considerations there is a problem in the law of torts both new and complicated, for it runs the whole gamut of the struggle for commercial and industrial survival and supremacy of individuals and classes and is dependent for its correct solution upon social and economic considerations. The courts have thus been required to face such questions as the nature and extent of the capitalists' rights in the management of his business and of the working man's property in his labour, to decide how far the employer shall be protected in his right to have labour and custom flow to him free from the interference of third parties and how far the labourer shall be protected from similar interference in his contract of employment or his right to secure employ ment ; to determine what limits shall be placed upon individuals and combinations of individuals in seeking their economic advancement at the expense of their fellows. All these and other problems have come before the courts in rapid succession. At the bottom, therefore, the problem is one of substantive right and primariy a branch of the law of torts (1)."

The question regarding torts.—In this particular class of torts, as in all others, it is necessary, first to determine the nature and extent of the complainants, right, and, second, the considerations underlying the question of justification. The solution of the particular controversy will be found to turn upon three factors : (*i*) the character of the alleged right ; (*ii*) the means used in causing the injury complained of ; and (*iii*) the motive of those against whom the relief is sought. The right involved may be either (*a*) a right based on a valid subsisting contact, *i. e.* a right of A to have B left free to perform a contract then existing between A and B, or (*b*) a right of freedom to contract, appropriately termed a right of "probable expectancy," *i.e.* a right on the part of A

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(1) Highon Injunction § 1415 (b): "As in all other cases where the preventive aid of equity is invoked, the right to relief is based upon the necessity of preventing irreparable damage to property and property rights, or of restraining actionable wrongs for which the remedy at law can not afford proper and adequate radress. The prevention of a multiplicity of suits and frequently the pecuniary irresponsibility of the defendants afford additional grounds for the exercise of the jurisdiction."

(2) Pom Eq. Jur. § 2018.

to have B left free to form a contract with A. The contract may be one for a definite period or terminable at will. It may relate either to employment or the sale of chattels or lands ; in fact to any thing which is the subject of contract (1).

Procuring Beach of contract.—A having knowledge or notice of the existence of a contract between B and C, owes the duty to B not to procure C to break his contract to B's damage (2). "It is clear" said the court in *Hart* v. *Aldredge* (3) "that a master may maintain an action against any one for taking or enticing away his servant upon the ground of the interest which he has in his service and labour." To bring himself within the operation of this rule, the defendant need only employ the servant with a knowledge that he was the servant of another (4). Proof of malice as a distinct entity is not necessary (5). In the above case *Lord Herschell* said : "A study of the case of *Lumley* v. *Gye* (6) has satisfied me that in that case the majority of the court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action. It is true that the wood 'maliciously' was to be found in the declaration the validity of which was then under consideration ; but I do not think the learned judges regarded the allegation as involving the necessity of proving an evil motive on the part of the defendant, but merely as implying that the defendant had wilfully and knowingly procured a breach of contract..... Upon review, then, of the judgment in *Lumley* v. *Gye* (6), I am satisfied that the procuring was described as an unlawful act namely, a breach of contract was regarded as the gist of the action. I think the judgment would have been precisely the samt if, instead of the word 'maliciously,' the words 'wilfully and with notice of the contract,' had been found in the declaration. Every word of the reasoning of the three learned judges would have been equally applicable to that case." In the same case *Lord Macnaghten* added : "If so, it would seem to follow that, provided the violation is committed knowingly, it cannot matter whether the thing is done maliciously or not." The inducement offered to the servant to leave his master need in no event be coercive. The principle involved in these early cases has from time to time been given a more extended application, beginning with the leading case of *Lumley* v. *Gye* (6) and the case of *Bowen* v. *Hall* (7) until it may be stated to day that "it is a violation of a legal right to interfere with contractual relations if there be no justification (8)." There is thus a clear recognition of a legal right in parties to a contract to have the contractual relation, whether it be one between employer and employee or customer and dealer, safe-

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(1) Pom. Eq. Jur. § 2019.
(2) Bigelow on Torts p. 113.
(3) (1774) Cowp. 54.
(4) *Blake* v. *Langdon*, (1795) 6 Term Rep. 221.
(5) *Allen* v. *Flood*, (1898) A. C. 1, 121—123, 154.
(6) 2 E. & B. 216.
(7) 6 Q. B. D. 333.
(8) *Quinn* v. *Leatham*, (1901) A. C. 495 ; Pom. Eq. Jur. § 2020.

guarded from out side disruption. The violation of the right consists in inducing a breach of the contract by influencing the conduct of one of the parties with knowledge of the contract and without justification. More over it is immaterial by what means the result is accomplished. Mere persuation will suffice (1). Now notice of the existence of this relation is necessary in all cases of actual service ; in the absence of notice, the party enticing away or seducing the servant violates no duty to the master. But it matters not that such party had no notice at first of the existence of the relation, if he afterwards acquire notice and then persist in keeping the servant away from his master (2). It is not enough that there has been a breach of contract, though that would of course be enough for an action against the party who has broken the same. For the purpose of an action for damages against a stranger to the contract for procuring the breach, actual damage must be proved (3). But even in such a case no specific damage need be proved ; all that is required is that the plaintiff must have sustained, some damage however undefined (4).

Justification for causing a breach of contract.—Where there seem to be no actual adjudications, there are judicial utterances which indicate that, within certain narrow limits, a justification for intentionally causing a breach of such contract may be established, and which further shed some light upon the extent of such justification. These utterances furnish support for the statement that if the inducement consists merely in the giving of advice, the adviser may justify by showing that the was acting under a moral duty to give the advice (5) In *Glamargonshire Coal Co.*, v. *South Wales Miners' Federation* (6), *Stirling L. J.* said ; "That interference with contractual relations known to the law may in some cases be justified is not in my opinion open to doubt. For, example I think that a father who discovered that a child of his had entered into an engagement to marry a person of immoral character would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not. This duty is recognised by the courts ; for the Court of Chancery and the Chancery Division of the High Court of Justice have continually so interfered on behalf of wards of court, sometimes with a heavy hand ; and the principle on which the judges of those courts have acted is simply that of doing on behalf of the ward that which a right minded father would do in the true interest of his child. I conceive that circumstances might occur which would give rise to the same duty in the case of a contract of services." It is concieved that within reasonable limits a

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(1) *Temperton* v. *Russel*, (1893) 1 Q. B. D. 715, 730 ; *Exchange Telegraph* v. *Gregory & Co.*, (1896) 1 Q, B. D. 147 ; Pom. Eq. Jur. § 2020.

(2) *Blake* v. *Lanyon*, 6 T. R. 221 ; Bigelow on Torts p. 115.

(3) Bigelow on Torts p. 122.

(4) *Exchange Telegraph* v. *Gregory*, (1896) 1 Q. B. 147 C. A.

(5) Pom. Eq. Jur. § 2022.

(6) (1903) 2 K. B. 545 (577).

physician might for similar reasons justify advising a patient to break a contract. On the other hand, it seems clear that certain factors which have been held sufficient to justify an interference with the formation of a contract, *i.e.*, with the so-called right of 'probable expectancy,' will not justify the disruption of an existing contract, no matter how mild the means. It has been held for example, that trade competition is no justification. After B has entered A's employ or contracted to purchase goods from A, the competition stage has passed, and C can no longer justify any interference with B on the ground that he is in competition with A for B's services or trade (1). It would doubtless also be conceded that if force, threat of force or fraud were used to induce the breach of the contract, no justification could be offered (2).

The basis of equitable relief.—This right to have one's contractual relations free from the disruptive influence of third parties has repeatedly been declared to be a property right and thus entitled to the protection of the court of equity, provided the other grounds for equitable interposition are present. Add, as further elements, a threatened and unjustifiable violation of the right and circumstances which show the legel remedy to be inadequate, and a case for equitable relief is fully established (3). Many courts, indeed, seem to assume that an injunction should be granted as a matter of course when it is shown that contracts are about to be broken (4).

Right based on expectation of contract—The right of probable expectancy.—Somewhat akin to the right based on an existing contract, although more flexible in its character, is the right that one has to have others left free, within certain limits, to form a contractual relation with him. It is fully recognized to-day, both in law and equity, that each party is entitled to have the other left free from unjustifiable interference in the exercise of his right. It is equally true both that the employer has a legal right to a free labour market and the labourer to a free employment market. Likewise, the seller and buyer each may legally complain if the other is obstructed in his efforts to buy or sell (5). So A owes to B the duty not, by wrongful means, to procure to refuse, to B's damage, to contract with him (B) if B desires to contract with C. (6). In an American case (7), *Justice Holmes* has lucidly presented the matter thus: " It has been the law for centuries (8), that a man may set up a business in a country town, too small to support more than one, although he expects and intends thereby to ruin some already there, and succeeds in his intent. In such a case he is not held to act, 'unlawfully and

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(1) *Beckman* v. *Masters*, 195 Mass. 205.

(2) Pom, Eq, Jur. § 2022.

(3) Pom Eq. Rem. § 590.

(4) *Exchange Telegraph* v. *Gregory* (1896) 1 Q. B. D. 147 ; *Read* v. *Society of Stone Masons*, (1902) 2 K, B. 732 ; *Glamer gon Coal Co.*, v. *South Wales Miner's Fedaration*, (1903) 2 K. B. 597 ; *National Phonegraph* v. *Edison Co.*, *L.* R. (1908) 1 Ch. 335.

(5) Pom. Eq. Remedies § 591.

(6) Bigelow on Torts p. 105 ; see aiso *Garrett* v. *Taylor*, (1621) Cor. Jac. 567 ; *Tarleton* v. *Mc Gawley*, Peak, 205.

(7) *Vegelahn* v. *Guntor*, 167 Mass. 92.

(8) The first case was decided in 1410 A.D. *Anonymous* C. R. (1410) Year Book, *Henry IV Folio* 47, p. 21.

without justifiable cause. The reason, of course, is, that the doctrine has been generally accepted that competition is worth more to society than it costs." So every one has by law a right to endeavour to enter into contract with others, and for any one to use wrongful means successfully and with damage to prevent the accomplishment of the endeavour would be an infringement of that right, and therefore a tort (1). But no action lies for procuring a man to refuse a contract with the plaintiff, where there was no duty to contract, though the procuring was done with notice of the plaintiff's desire to contract and with intent to do him harm, if no wrongful means be employed (2). In the above case *Lord Herschell* said: "A man has a right to say what he pleases, to induce, to advice, to extort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium." The gist of the offence in such a case is, as has been said, wrongful means. No wrongful means should be applied by the defendants in procuring a third party to refuse to contract with the plaintiff. So in every case the question is whether or not the means are wrongful. In the case of a combination of men the means employed may more easily be wrongful, not indeed because the doing of an act by one man would not be unlawful when the doing of it by several would be unlawful, but only because one man alone might not be able to do what several together could do (3). In *Quinn* v. *Leathem* (4), *Lindley L. J.* said: "My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This many be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce." Accordingly a cause of action might well arise in the case of a combination of the kind; damage caused in that way would be a violation of legal right not because of malice, but because of the measures taken would be unlawful (5).

The means with which the Courts have had to deal may be classified as follows: (I) At the one extreme are means confessedly tortious, such as (*a*) violence; (*b*) threatened violence, actual or implied; (*c*) fraud; (*d*) defamation,—and herewith of (*i*) picketing and the attendant activities associated with it, such as assembling in large numbers, blocking streets, side walks and entrances, following employees, verbal abuse, and persistent and offensive efforts at argument; and (*ii*) fines and expulsion. (II) At the other extreme are simple persuasion and the offer of pecuniary rewards; *e. g.* reducation of prices and payment of subsidies. (III) Intermediate between these two are the threats

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(1) Bigelow on Torts p. 105.
(2) *Allen* v. *Flood*, (1898) A. C. 1; Bigelow on Torts. p. 106.
(3) Bigelow on Torts p. 108.
(4) (1901) A. C. 495 at p. 538.
(5) Bigelow on Torts p. 109; but see *Sorrel* v. *Smith*, (1925) A. C. 700= 94 L. J. Ch. 34 7 at p. 353.

of pecuniary loss, *e. g.* the threat to withdraw patronage from A in order to induce A to withdraw his patronage from B (2).

Interference with the right to contract by unlawful means—Coercion.—Some means can, under no circumstances be, justified. Fraud in all its forms is not a legitimate weapon for use on a competition. Likewise actual coercion is universally condemned. The earliest utterances of the Courts condemn without qualification the use of force and intimidation. Obviously, a trader should not be permitted to take or keep customers away from his rival by the use of actual violence (2). It is equally clear that actual threats of violence belong to the same class. But when specific conduct other than violence and actual threats of violence is presented, a conflict at once arises in the determination of what acts will be treated as unduly coercive. The term coercive is in its nature indefinite. As a matter of law nothing more than a general test can be laid down. For such a test it is suggested that the conduct in question should be examined in the light of its effect upon the reasonably prudent, reasonably courageous, and not unreasonably sensitive man. If it would deter such a person from bestowing its labour or trade where he otherwise would have bestowed it the law condemns conduct as coercive. In general it can be said only that acts of molestation cannot be justified even though the end sought may in itself be entirely commendable (3).

Unlawful means—picketing.—"Whether picketing or patrolling is unlawful must turn in the last analysis upon the answer to the question 'Is it coercive?' Some Courts in dealing with the problem have adopted the simple solvent of condemning and enjoining all picketing.....The vast majority of the Courts, however, concede that peaceful and non-coercive picketing is entirely possible, and hold accordingly, that as long as the activities of those on patrol do not go beyond the securing of information and simple persuation in the attempt to influence prospective customers and employees (not under contract) no injunction will issue. But when those limitations have been exceeded, so that the patrol becomes in fact coercive and intimidating, it is unlawful and may be curbed by injunction. Such is the case, for example, where the pickets resort to violence or threats of violence, or where a threat of physical harm can be implied in the light of all the surrounding circumstances, or, often where the patrol consists of large numbers, or is too persistent even in its efforts to persuade, or indulge in abusive epithets, especially in public places, or block the entrance to the employer's place of business. All these abuses may be prevented by injunction (4).

The Court which takes the view that picketing may be an instrument of peaceful persuation and hence is not to be prohibited *in to to* are quite ready

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(1) Pom. Eq Jur. § 2026.
(2) *Garret* v. *Taylor*, (1620) Cro. Jac. 567.
(3) Pom. Eq. Jur. § 2027.
(4) Pom. Eq. Jur. § 2028.

to concede that when the patrol consists of large numbers it becomes *per se* intimidating, in other words, that by reason of numbers alone, it becomes a standing nuisance to willing workmen and customers, reasonably calculated to influence them though an appeal to their fears, rather than their reason, and should then be enjoined (1).

Unlawful means—Picketing, continued—Persistent arguing—Abusive epithets—Blocking entrance, *etc.*—Persistent attempts to argue with employees and customers against their will may become coercive. Strikers must not carry too far the attempt to influence even by argument the strike breakers, and those who wish to continue to work or establish trade relation with the employer. The time, place and persistency of their efforts, may rob them of their character of simple persuation. "Persuasion or entreaty" it is said "may be so persistent as to constitute intimidation (2)." Like wise, abusive language is usually placed in the same category with violence, especially when it is at all extreme or persistent (3). An actual blocking of the entrance to a merchant's store or an employer's place of business is coercive and unlawful in its character, as it makes no appeal to the reason of the person sought to be influenced. Such conduct is often classed as nuisance, and though primarily a public nuisance, as where it consists of obstructing the streets and side walks, yet it generally causes damage to the plaintiff, and hence may be enjoined at his instance. Injunction have frequently been granted by American courts to eliminate such methods (4).

Injunction against picketing and injuries resulting there from.—The particular wrong against which the protection of equity by injnnction is most frequently sought in this class of cases takes the form of establishment and maintenance of a system of espionage which has come to be commonly known as picketing. And while it is often a matter of considerable difficulty to draw the line between what is lawful in this respect and what is unlawful, and while each case must depend very largely upon its own attending facts and circumstances as to whether or not the particular acts complained of are upon one side of the line or the other, it may be stated as a general rule that, while the maintenance of an organized system of picketing, when conducted in an orderly and peaceful manner, is perfectly lawful and therefore affords no ground for relief by injunction, yet where strikers or their sympathisers, or other persons acting in concert with them, are combining and conspiring together, by means of force, threats, intimidation or violence, or other means calculated to intimidate, to coerce plaintiffs' employees or those who wish to become employees from remaining in or entering his employ, or to prevent plaintiffs'

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(1) Pom Eq. Remedies § 590; see also Per *Lord Lindley* in *Quinn* v. *Leathem* (1901) A. C. 495 at p. 538.

(2) *Rogers* v. *Evarts* (1891) 17 N. Y. Supp. 264; Pom Eq. Jur. § 20 30.

(3) Pom. Eq. Jur. § 2030.

(4) Pom. Eq. Rem. § 598.

customers, or others who wish to have dealings with him, from so doing, all resulting in serious injury to plaintiff's business or in its ultimate ruin, a proper case is presented for the interference of equity and in such cases injunctions should be freely granted, and writ should be framed in such form as best to meet the exigencies and requirements of the particular occasion. Such acts are frequently in the nature of nuisance and the relief in such is allowed by American Courts upon principles similar to those which govern in the case of nuisance (1).

Trade Unions and trade disputes.—In British India, The Indian Trade Unions Act, was placed in the Statute Book in 1926. It extends to the whole of British India, including British Baluchistan and the Santhal Parganas. According to section 2 (e) of that Act, "Trade Union" means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business and includes any federation of two or more Trade Unions (2). Even at common law a combination of workmen to raise wages was legal (3). A 'trade dispute' means any dispute between employers and workmen or between wormen and workmen, or between employers and employers which is connected with the employment or non-employment, or the terms of employment or the conditions of labour, of any person, and 'workmen' means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises (4).

Criminal conspiracy in trade disputes.—No officer of a registered Trade Union shall be liable to punishment under sub section (2) of section 20 B of the Indian Penal Code, in respect of any agreement made between the members for the purpose of furthering any such object of the Trade Union as is specified the section 15, unless the agreement is an agreement to commit an offence (5).

Immunity from civil suits in certain cases.—No suit or other legal proceeding shall be maintanable in any civil court against any registered Trade Union or any officer or member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces such other person to break a contract, or employment, or that it is interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wills. A registered Trade Union shall not be liable in any suit or other legal proceeding in any Civil Court in respect of an tortious act done in contemplation or furtherance of a trade

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(1) High on Injunction § 14 15 (c).
(2) Vide s. 2 of the Trade Unions Act XVI of 1926.
(3) *Mogul Steam ship* v. *Mc Gregor, Gow* & C*r*, 1892 (A C.) 47.
(4) Vide s. 2 of the Indian Trade Union Act XVI of 1926.
(5) Vide s. 17 of *Ibid.*

dispute by an agent of the Trade Union if it is proved that the person acted without the knowledge of, or contrary to express instructions given by the executive of the Trade Union (1).

Although "(*i*) a combination of two or more persons wilfully to injure a man in his trade is unlawful, and if the result is damage to him, is actionable," yet "(*ii*) if the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, no wrong is committed and an action will not lie, although damage to another ensues" (2). "The distinction between the two classes of cases" continued his "Lordships is sometimes expressed by saying that in cases of the former class there is not, while in the cases of the latter class there is, just cause or excuse for the action taken. To quote the material parts of the series of judgments upon which the above conclusion is based would be an endless task, but an attempt to classify the more important of them may be of service. The first proposition is at least as old as *Garret* v. *Taylor* (3) and appears in many later cases; and although it seemed for a moment to be observed by some observations made in the judgments of *Allen* v. *Flood* (4), it was, I think, fully re-established in *Quinn* v. *Leathem* (5). Where *Lord Halsbury* said [70 L. J. P. C. at p. 81; (1901) A. C. at p. 506] that if upon the facts there found, which fell within the above definition, the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community. The first proposition is further illustrated by the cases of *Gregory* v. *Brunswick* (*Duke*), (6), *Temperton* v. *Russel* (7) and *Gibbon* v. *National Amalgamated Labours Union* (8). The second proposition was fully established in the *Mogul case* (9) and in *Allen* v. *Flood* (4); and effect was given to it in *Scottish Co-operative Wholesale Society* v. *Glasglow Fishers* (10), *Macken Zie* v. *Iron Trades Employers' Insurance Association* (11), *Ware and De Freville, Limited* v. *Motor Trades Association* (12) and *Renolds* v. *Shipping Federations* (13). Both propositions were stated by *Bowen L. J.* with characteristic lucidity in the *Mogul steam ship case* (9), and were summarised by *Lord Parker* in *Att. Gen. for Australia* v. *Adelaide Steamship Co.* (14). In enumerating these authorities, I have not included cases, where the defendants had procured a breach of contract as those cases stand on a special footing, and in the present case no such breach was procured. Among these are *Lumley* v. *Gye* (15), *South wales Mineral Federation* v. *Glamorgan Coal Co.* (16), *Conway* v. *Wade* (17) and *Larkin* v. *Long* (18).

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(1) Trade Unions Act, s. 18.
(2) *Sorrell* v. *Smith and others*, (1925) A. C. 700, 712, 713=94 L. J. Ch. 347, per *Viscount Cave L. C.*
(3) Cro. Jac. 567.
(4) (1898) A. C. 1.
(5) (1901) A. C. 495.
(6) 13 L. J. C. P. 34.
(7) (1893) 1 Q, B. 715.
(8) (1903) 2 K. B. 600.
(9) (1892) A, C. 25 affirming 23 Q. B. D. 598.
(10) 35 Sc. L. R. 645.
(11) (1910) S. C. 79.
(12) (1921) 3 K. B. 40.
(13) (1924) 1 Ch. 28.
(14) (1913) A. C. 781.
(15) 22 L. J. Q, B. 463.
(16) (1905) A. C. 239.
(17) (1909) A. *C.* 506.
(18) (1915) A. C. 814.

"To the text of the above general propositions I would add the following foot notes : (*a*) Although the first proposition is confined to a combination of two or more, it does not necessarily follow that the existence of a combination is essential to the commission of the offence. There is some authority for the view that what is unlawful in two is not lawful in one, and that the circumstances that two or more persons combine to cause the injury, while it may be very relevant as evidence of the purpose and as aggravation of the damage, is not an essential element in the cause of action. See opinions express by *Pales* C. B. in *Kearney* v. *Lloyd* (1) and by *Romer L. J.* in the *Giblan* cases (72 L. J. K. B. at p. 913 ; (1903) 2 K. B. at p, 619) : see also *Huttly* v. *Simmons* (2). But in the present case. where a combination clearly existed, this question does not arise ; and accordingly I express no opinion upon it. (*b*) In some cases 'malice' is postulated as an element in the tort which I am considering. If the word means only that the act complained of is wilfully and knowingly done, or that it is done for the purpose of injuring another, then it is rightly used in this connection. But there is a tendency to interpret 'malice' as connoting personal enmity, or spite, or some other evil motive ; and as such a motive is neither an essential element in the offence, nor conclusive of the offence having been committed, it seems beter to forego the words. (*c*) The second proposition, of course assumes the absence of means which are in themselves unlawful, such as violence, or the threat of violence or fraud. Your Lordships were asked to say that a threat to withdraw custom or supplies falls within this category, and of itself introduces an element of illegality, but although there are passages in the books which appear to support that contention, it did not appear to me that the contention was made good. If, a trader may withdraw his custom without breaking any law, he may with equal legality express his intention of withdrawing it unless his wishes are met, subject always to the condition that the purpose of the threat is to forward his trade interests, and not wilfully and ultroneously to injure the trade of another. See on this point *Hodges* v. *Webb* (3) and *White* v. *Riley* (4) ; and the observations of *Holmes J.* in the *American* case of *Vagelahn* v. *Gunter* (5). (*d*) There is here no question of a 'trade dispute' within the meaning of the Trade Disputes Act, 1906 (6 Edw. 7. C. 47). The quarrel here is not between employer and workman, or between workman and workman, but between trader and trader (6). The above observations, therefore, are not directed to such a case."

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(1) 26 L. R. Ir. 268.
(2) (1898) 1 Q. B. 181.
(3) (1920) 2 Ch. 20.
(4) (1921) 1 Ch. 1.
(5) 167 Mass. Rep. 92. Here also an American case has been cited by *Lord Chancellor*, in support of his contention.
(6) In British India a trade dispute means any dispute between employers and workmen or between workmen and workmen or between employers and employers—Vide s. 2 (*g*) of the Indian Trade Unions Act (XVI of 1926). According to the Trade Disputes Act of 1929, a 'trade dispute' means any dispute or difference between employers and workmen, or between workmen and workmen which is connected whith the employment or non-employment or the terms of the employment or with the conditions of the labour of any person." Vide s. 2 (*j*) of *Ibid.*

In same case *Lord Dunedin* said: "Passing, threfore, to the case of concerted action, the first and obvious avervation is that, if a combination of persons do what if done by one would be a tort, an ascernment of conspiracy, so far as founding a civil action, is mere surplusage. But when there is nothing done which is *per se* would be a tort, then one is at once faced by the consideration that a particular thing done, not in itself a tort, may, if done by an individual, be supportable, although unpleasant, but may, if done by many in concert, become insupportable and create a real injury. This truism has been recognised by many learned Judges. As example many be given the words of *Lord Halsbury* in *Allen* v. *Flood* (1) and many other passages may be quoted.... But I think the three leading cases upon the subject, without any doubt, are the well known cases of *Mogul Steamship Co.* v. *Mc Gregor* (2), of *Allen* v. *Flood* (1) and of *Quinn* v. *Leathem* (3). Now the result of those cases in my mind, is this: In the first place, every one has a right to conduct his own business upon his own lines, and as suits himself best, even although the result may be that he interferes with other people's business in so doing. That general proposition, I think can be gatherd from the *Mogul case* (2). Secondly an act that is legal in itself will not be made illegal because the motive of the act may be bad. That is the result, I think, of *Allen* v. *Flood* (1). Thirdly, even although the dominating motive in a certain course of action may be the furtherance of your business or your interest, as you conceive those interests to be, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy, where they would not have been illegal if done by a single individual. I think that is the result of *Quinn* v. *Leathem* (3).... I have read and re-read the judgment in *Quinn* v. *Leathem* (3) and I confess that I found it very hard to understand how anyone could come to the conclusion that conspiracy was only a side issue, instead of being, as I think it clearly was, the very gist or the essence of the decision." *Lord Backamaster added*: "*Non Quinn* v. *Leathem* (3) established the following propositions: (*i*) That the case of *Lumley* v. *Gye* (4) was correctly decided; (*ii*) that the case of *Allen* v. *Flood* (1), depended upon the fact that the defendant there acted alone, and neither uttered nor carried into effect any threat at all; and (*iii*) that acts done in persuance of a conspiracy having for its real purpose the injury of a man in his trade or calling is an actionable wrong."

Strikes.—"The time is long past" says *Prof Pomeroy* "when combinations of labourers formed for such worthy purposes as the securing of higher wages and better conditions of employment, by concerted action in quitting work, were illegal either criminally or civilly. Unionization and strikes are no

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(1) (1898) A. C. I.
(2) (1892) A. C. 25.
(3) (1901) A. C. 495.
(4) 22 L. J. Q. B. 463.

longer *per se* illegal (1)." "Strike" means a cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to war to accept employment (2). In *Rusell* v. *Amalgamated Society* (3), *Kemedy L. J.* said : "With regard to the question what amounts to illegal restraint of trade in a case like this, I think I cannot do better than refer to the judgment of *Mr. Jutsice Hanen* in *Farrer* v. *Close* (4) in which he said : 'I am, however, of opinion that strikes are not necessarily illegal. A strike is properly defined as a simultaneous cessation of work on the part of the workmen' and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be a part of a combination for the purpose of injury or molesting either masters or men ; or it many be simply illegal, if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Helton* v. *Eckersley* (5) ;or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfilment of an engagement entered into between employers and employed, or any other lawful purpose.' He then proceeded to quote the following paasages from '*thel aw relating to Trade Unions*, by *Sir William Earle*, formerly Chief Justice of the Common Pleas' : 'As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms, which one person may exercise and declare singly, many after consultation may exercise jointly, and they may make a simultaneous declaration of this choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms ; but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination.....The only qualification which I should be disposed to venture to introduce into that statement of the law is that such a mutual obligation must not extend beyond the limits of what under circumstances is a reasonable restraint."

But no trade dispute can exist between the Trades Union congress on the one hand and the Government and the Nation on the other. So a general strike called by the Trade Union Congress is illegal and the persons inciting to or taking part in it are not protected by the Trade Disputes Act (6)

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(1) Pom Eq. Jur. § 2035 ; see also The Trade Unions Act, 1926 ss. 17, 18.

(2) The Trade Disputes Act, 1929 s. 2 (*i*).

(3) 79 L. J. K. B. 507 at p. 516.

(4) 38 L. J. M. C. 132.

(5) 24 L. J. Q. B, 353 ; 24 L. J. Q. B. 199 ; 6 E & B. 47 66.

(6) *National Seaman's and Fireman's Union* v. *Reed and others*, (1926) 95 L. J. Ch. 192.

Sudden strikes and lockouts in Public utility services.—Any person who, being employed in a public utility service, goes on strike in breach of contract without having given to his employer, within one month before so striking, not less than fourteen days' previous notice in writing of his intention to go on strike, or having given such notice, goes on strike before the expiry thereof, shall be punisable with imprisonment which may extend to one month, or with fine which may extend to fifty rupees, or with both. Any employer carrying on any public utility service who locks out his workmen in breach of contract without giving them, within one month before such lockout, not less than fourteen days' notice in writing of his intention to lock them out, or having given such notice, locks them out before the expiry thereof, shall be liable to imprisonment which may extend to one month, or to a fine which may extend to one thousand rupees, or with both. Where the employer committing an offence is a Corporation, Company or other association of persons, any secretary, director or other officer or person concerned with the management thereof shall be punishable as herein provided unless he proves that the offence was committed without his knowledge or without his consent (1).

Illegal strikes and lock outs.—(1) A strike or lock out shall be illegal which—

(*a*) has any object other than the furtherance of a trade dispute within the trade or industry in which the strikers or employers locking out are engaged , and

(*b*) is designed or calculated to inflict severe, general and prolonged hardship upon the community and thereby to compel the Government to take or abstain from taking any particular cause of action.

(2) It shall be illegal to commence or continue, or to apply any sums in direct furtherance or support of any such illegal strike or lock-out.

(3) For the purposes of this section—

(*a*) a trade dispute shall not be deemed to be within a trade or industry unless it is a dispute between employers and workmen, or bet ween workmen and workmen, in that trade or industry, which term is connected with the employment or non-employment or the terms of employment, or with the conditions of labour, of persons in that trade or industry ;

(*b*) without prejudice to the generality of the expression 'trade or industry,' workmen shall be deemed to be within the same trade or industry if their wages or conditions of employment are determined in accordance with agreement made with the same employer or group employers.

(4) A strike or a lock-out shall not be deemed to be calculated to compel the Government unless such compulsion might reasonably be expected as a consequence thereof (2).

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(1) Section 15 of the Trade Disputes Act, 1929.

(2) The Trade Disputes Act. s. 16.

Protection of persons withholding from illegal strike or lock out.—No person refusing to take part, or to continue to take part, in any strike or lockout which is illegal under the provisions of s. 16 shall, by reason of such refusal or by reason of any action taken by him under this section, be subject to expulsion from any trade union or society, or to any fine or penalty, or to deprivation of any right or benefit to which he or his legal representatives would otherwise be entitled, or be liable to be placed in any respect, either directly or indirectly, under any disability or any disadvantage as compared with other members of the union or society, anything to the contrary in the rules of a trade union or society notwithstanding (1).

Strikes and injunction.—It must not be inferred however, that equity is entirely helpless in preventing a strike. If the purpose of the strike is unjustifiable, or if the employees are under contract, equity may enjoin the employees from combining to quit work, officers and working delegates from ordering or advising the strike, and the union officials from paying strike benefits, and the doing of other acts essential to the organization and maintenance of the strike (2). On the other hand some Courts treat such injunction as an effort to do indirectly what equity will not do directly, *viz.*, compel men to work, and hence refuse the equitable remedy, notwithstanding the strikers may subject themselves to tort or criminal liability (3).

Procedural Basis of Equitable jurisdiction.—The absence of a plain, complete and adequate remedy at law lies at the base of all equitable intervention. This condition is bound to exist in this class of cases, without difficulty, in fact, is generally assumed to exist, and hence is passed over with very little discussion. Irreparable injury, multiplicity of suits, and continuing injury are mentioned, either separately or together, in most of the cases. The insolvency of the defendants, while suggested with the other grounds mentioned, is never given as the sole reason for granting an injunction, (4). In exercising their preventive aid in such cases, the Courts are merely meeting new and unusual conditions as they arise within the application of principles which are themselves at the foundation of equity (5).

Where Act enjoined is a crime.—It is often offered as an objection to an injunction that the act threatened is a crime. While it is true that equity has no right to act for the sole purpose of preventing the commission of a crime, nevertheless it is equally true that where there are other grounds for equitable interference, as where an irreparable injury is threatened to property, the fact that the act is also a crime furnishes no reason for refusing an injunction (6).

Injunctions against boycotts.—Injunctions are frequently granted to restrain the carrying out of combinations or conspiracies, upon the part of

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(1) The Trade Unions Act. S. 18.
(2) Pom. Eq. Jur. § 2035 ; *Giblam* v. *Union*, (1903) 2 K. B. 600.
(3) *A. R. Barnes* v. *Berry*, 157 Fed. 883.
(4) Pom. Eq. Jur. § 2046.
(5) High on Injunction § 1415(a).
(6) Pom. Eq. Jur. § 2047.

strikers and those acting with them, to establish what is commonly known as boycott of plaintiff's business. And where plaintiff's employees, who have gone on a strike, are distributing circulars and notices among his customers or among the people at large, urging them to cease trading with the plaintiff or to cease having any business transactions with him, under threats or intimidations of harmful consequences which will follow their failure to comply with such demands, thereby causing serious injury to plaintiff's business or its ultimate ruin, a proper case is presented for an interposition of equity by injunction. And where defendants are thus engaged in carying out a conspiracy the purpose and result of which will be the ruin of plaintiff's business, the remedy at law in an action for libel is not regarded as affording relief commensurate with the wrong inflicted ; nor does the granting of the injunction in any way impair the constitutional guarantee of freedom of speech. And where defendants are threatening plaintiff's customers with a boycott of their busiuess if they continue to deal with the plaintiff, actual violence need not accompany the boycott, in order to justify the granting of relief by injunction, since the prospective injury which will result to those customers from such a boycott is of itself a sufficient intimidation to compel them to cease doing business with the plaintiff (1).

Parties bound by injunction.—"The question as to parties bound by injunctions granted to restrain unlawful acts committed by strikers or their sympathisers is one of practical importance, since, as a rule, the persons who are combining together and when it is sought to reach by injunction are so numerous as to render it impractical, if not impossible, to enumerate them all by name either in the bill or in the writ. And it may be stated as a general rule that where injunction runs against certain named defendants and against all others who are their confederates or associates, or who are aiding or abetting or acting in concert with them, all persons who fall within the designated class and who have knowledge of the existence of the injunction, will be held amenable to the order of the Court and will be bound thereby, even though they are not parties to the injunctive suit and are not named either in the bill or in the writ. And where such persons, with knowledge of the existence of the injunction, either directly violate it themselves or aid or assistothers in so doing, they will be held guilty of contempt of Court and will be punished accordingly (2).

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(1) High on Injunction § 1415 (*e*).

(2) High on Injunction § 1415 (*l*).

CHAPTER XXVII.

Injunctions pertaining to election Disputes.

Election.—"Election is the operation of choosing a representative, officer, etc., such as a member of Parliament, director or like (1). In every civilised state where freedom prevails, the conduct of affair, as well in the community at large as in the many subordinate institutions which exist within it, is practically in the hands of majorities, and accordingly the right to vote, the conditions under which that right can be exercised, the proportional value of each vote, the qualification of the voters, and the representatives for whom they vote, the registration of voters, the safe guards against improper exercise of franchise, the regulations under which elections are held, corrected or set aside, the penalties imposed on those who abuse the system, and above all, the nature of the tribunals to whom the decision of all these matters is committed —all these things must, or ought to be, of vital importance to every thoughtful citizen" (2).

Voters' list.—No person whose name does not appear in the voters' list is entitled to vote at the election. Every person whose name is entered in the voters' list is entitled to vote at the election or stand as a candidate, unless prohibited by any law which guides the election (3). Although the Indian Election Law is mainly based on the Election Statutes, yet the Indian Legislators purposely deviated in some essential matters from the English Statutes and as such in these matters Indian Statutes are the sole guides.

Qualifications of voters.—To entitle a person to have his name included in the voters' list, he must attain the full age which is generally fixed at 21 years, he must pay qualifying amount of taxes or must occupy a holding for which a certain amount of taxes have been paid and who possess the requisite professional or educational qualification and he must reside within a certain fixed area for a certain fixed period. Rules are also framed to register the names of companies, firms and members of undivided famlies. Entry in the register is to be regarded not so much as in itself a qualification but as evidence upon which the polling officer must proceed (4).

Civil Court's Jurisdiction in setting aside election.—Under the old Bengal Municipal Act (5), it has been held that where the chairman acted in contravention of the rules framed by the Local Government under s. 15 of the Act a civil suit is maintainable (6). In *Nishi Kanta Chaudhury* v. *Gopeswar Chatterjee* (7),

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(1) Byrne's Law Dictionary.
(2) Halsbury's Law of England Vol. 12 § 297.
(3) *Nishikanta* v. *Gopeswar*, 30 C. W. N. 977.
(4) *Mollah Atual Haq* v. *Chairman of Manik Tollah Municipality* 24 C. W. N. 969.
(5) Ben. Act. III of 1884.
(6) *Molla Atual Haq* v. *Chairman of Manik Tollah Municipality* 24 C. W. N. 969.
(7) 30 C. W. N. 977.

the Court observed: "The next contention of the Appellant is to the effect that the plaintiff was not entitled to a declaration that he was duly elected candidate. That a suit for a declaration that the election of the defendant was void is maintainable under section 42 of Specific Relief Act cannot be disputed. Rule 29 which says that all disputes arising under the rules shall be decided by the Magistrate and his decision shall be final and r. 23 which says that the presiding officer shall then and there declare such candidates as have the largest number of votes to be duly elected and which authorize the presiding officer to adjourn the proceedings in the case of a dispute which he is unable to decide and to report to the Magistrate and makes the decision of the Magistrate on the dispute final cannot be taken to oust the jurisdiction of the Civil Court in view of the proviso to section 15 of the Bengal Municipal Act. That proviso runs in these words: 'Provided that nothing contained in this section nor in any of the rules made under the authority of this Act shall be deemed to affect the jurisdiction of the Civil Courts ..... Under s. 42 of the Specific Relief Act, the Court may make a declaration that the plaintiff is entitled to a legal character or to a right as to some property, and the other declarations that may be incidentally made are merely ancillary to the declaration sanctioned by the section which limits the specific legal character or right to property (1). There is some authority for the proposition that the plaintiff in a suit under section 42 of the Specific Relief Act may obtain a declaration that he was duly elected (2)" But in *Ratish Chandra Munshi* v. *Amulya Charan Ghatak* (3), *Costello J.* said: "Had it not been for the proviso to section 15 of the Bengal Municipal Act, it would to my mind in the circumstances be perfectly plain that so far as the decision of Magistrates with regard to disputes under rule 15 goes that decision would be final and conclusive for all purposes and could not be challenged after the election had in fact been held. But the proviso to section 15does seem to suggest that inspite of Rule 16 there shall be a right to refer to the Civil Court where there has been an irregularity in connection with the holding of the election such an unqualified candidate being allowed to go to poll. While expressing this doubt as to what is the effect of Rule 16 in the light of section 15 of the Act I am not prepared to disagree with what my learned brother has said (4). I entirely agree with him on the other points. Therefore I am of opinion that the election was void and must be set aside in the entirety (5)."

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(1) *Ramdas* v. *Secretary of State*, 17 C. L. J. 75; *Kanihiamma* v. *Kunhumi*, 16 M. 140.

(2) *Sathapat* v. *Abdul Gaffur*, 24 C. 107.

(3) 34 C. W. N. 741.

(4) It is desirable to have the law so altered as to provide in unambigeous terms for the establishment of special tribunal in order to ensure expeditious and final determination of all disputed matter in connection with Municipal Election. The District Magistrate might for certain purposes at any rate be vested with powers equivalent to special tribunal. *Satyendra* v. *Chairman*, 58 C. 180=34 C. W. N. 972.

(5) See also *Chairman* v. *Bisseswar*, 26 C. W. N. 91; *Chandra Bhusan* v. *Girwar Lal*, 28 A. 475=3 A. L. J. 420; *Sarvathamma Rao's Case*, 17 L. W. 431; *Gurcharan* v. *Har Sarup*, 9 A. L. J. 383.

"But where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or expressly implied, that tribunal's jurisdiction to determine those questions is exclusive. It is an essential condition of those rights that this should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any; there is no change of the old order of things; a new order is brought into being (1)." Similarly in a Full Bench case of the Allahabad High Court (2), the Court observed: "Giving the best construction we can to this rule, we consider that it was intended to provide that the validity of municipal elections should only be tested by an election petition presented to one tribunal, and that the decision of that tribunal should be final. The same view has been taken by a Bench of this Court in the case of *Khunhi Lal* v. *Raghunandan Prasad* (3). The second Additional Judicial Commissioner of Oudh took a similar view in the case *Sundar Lal* v. *Mahammad Faiq* (4). If this view be correct (and on the whole we think it is) then the decision of the Munsiff was final and no appeal lay to the lower appellate court, and the appeal was properly dismissed (5)." If the election petition has been decided by the Election tribunal according to the Election rules, no civil suit lies to contest the election (6). Where an inferior tribunal improperly refuses to enter upon a complaint, a mandanus would issue (7). Local Boards, District councils or Municipalities are the creation of Statutes which expressly confer power on the Local Government to frame rule for the purpose of carrying out the object of the Acts. The Local Government can therefore lawfully create a forum for the purpose of deciding disputes as to elections. Since these Acts do not take away any rights which had previously vested in the public, but on the contrary create new rights by means of its rule-making power, provided the rules are not repugnent to the express provisions or the policy of the Act. The principle is that when a statute which creates the right also prescribes a special remedy the person aggrieved is limited to the remedy so prescribed (8). If however a legal right is recognized to exist apart from and independently of the statute and no special remedy is provided, the Civil Courts would continue to exercise jurisdiction under S. 9, C. P. C.

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(1) *Jenkins C. J.* in *Bhaishankar* v. *The Municipal Corporation of Bombay*, 31 B. 604 (609, 610); *Nataraja Mundaliar* v. *The Municipal Council*, 36 M. 120; *Maxwell* p. 240; *Vice-Chairman* v. *Ganosambandham*, A. I. R. 1926 Mad. 798=94 Ind. Cas. 546.

(2) *Nanda Ram* v. *Chotelal*, 35 A. 578 (F. B.)

(3) 35 A. 450.

(4) 16 Oudh. cases 36.

(5) See also Dr. *Vijaraghavulu's Case*, 1 L. W. Notes.

(6) *Muhammad Inamul Haq* v. *Mahammad Ashan*, 12 A. L. J. 459 (F. B).

(7) In *re Sarafally Mamooji*, 34 B. 659=12 Bom. L. R. 737; see also *In the Matter of Muty Lal Ghosh*, 19 C. 192.

(8) *Vithoba Chimnaji* v. *Govind Rao Vithal Rao* A. I. R. 1933 Nag. 193; see *Bhaisankar* v. *Municipal Corporation of Bombay*, 31 B. 604=9 Bom. L. R. 417; *Khunilal* v. *Raghunandan*, 35 A. 450=20 Ind. Cas. 497.

But the grant of jurisdiction to the special tribunal to deal finally or exclusively with the cases arising out of the lawful administration of a particular statute cannot take away the jurisdiction of civil courts to afford relief against any illegality committed under the colour of that statute If the special tribunal arbitrarily refuses to exercise its jurisdiction or commits an illegality in exercising its jurisdictlon, or if the rules which create the special tribunal and lay down the procedure are themselves impeached as being *ultra vires*, the Civil Courts must have jurisdiction to correct the illegality and give proper relief to the aggrieved party (1).

An election suit under the Municipal Act.—A suit for a mandatory injunction was maintainable in a civil court, by virtue of s. 15 of the old Bengal Municipal Act by a voter, whose name was improperly excluded from the voters' list, ordering the chairman to enter his name in the voter's list (2).

New Bengal Municipal Act.—Now according to the New Bengal Municipal Act of 1932, a special tribunal has been constituted to decide election disputes. Section 36 enacts! 'If the validity of any election of a Commissioner is brought to question by any person qualified to vote at the election to which such question refers, such person may at any time within ten days after the date of the declaration of the result of the election, file a petition before the District Judge of the District within which the election has been or should have been held and shall at the same time deposit fifty rupees in court as security for costs likely to be incurred: Provided that the validity of such election shall not be questioned in any such petition—(*a*) on the ground that the name of any person qualified to vote has been omitted from the electoral roll; or (*b*) on the ground that the name of any person not qualified to vote has been inserted in the electoral roll." Then section 43 enacts: "No election of a commissioner shall he called in qustion in any court except under the procedure provided by the Act, and no order passed in any proceeding under section 36 to 40 (both inclusive) shall be called in question in any court and no court shall grant an injunction—

(*i*) to postpone a election of a commissioner, or

Nanda Ram v. *Choti Lal*, 35 A. 578=20 Ind. Cas. 575; *Ganesh Madhab* v. *Secretary of Sate*, 43 B. 221=A. I. R. 19 9 Bom. 30=49 Ind. Cas. 427; *Abdur Rahaman* v. *Abdur Rahaman*, A. I. R. 1925 All. 380=87 Ind Cas. 51=47 A. 513; *Timma Reddi* v. *Sacretary of State*, A. I. R. 1924 Mad. 523=78 Ind. Cas. 91=47 M. 325; *Venkata Siva Rao* v. *Rama Kristnayya* A. I. R. 1926 Mad. 246=92 Ind. Cas. 790=50 M. 91; *Nur Mahomed* v. *District Magistrate*, A I. R. 1925 Bom. 162=86 Ind. Cas. 81=49 B. 152; *S. N. Halder* v. *S. N. Mallick*, 82 Ind. Cas 930=A. I. R. 1924 Cal. 454.

(2) *Vithobai* v. *Govinda Rao*, A. I. R. 1933 Nag. 193; see also *G. I. P. Ry. Co.* v *Amraoti, Municipality*, 16 Ind. Cas. 449=8 N. L. R. 107; *Balaji Khunbi* v. *Chindeya*, A. I. R. 1930 Nag. 205; *Koyal* v. *Bhondlal*, A. I. R. 1931 Nag. 48; *Bagmol Kishan Dayal* v. *Municipal Commitee*, A. I. R. 1930 Nag. 153=122 Ind. Cas. 691=26 N. L. R. 217; *Jagannath Pillai* v. *Katha Perumal Pillai*, A. I. R. 1927 Mad. 1035=105 Ind. Cas. 88=51 M. 76; *Balavant Ram Chandra* v. *Secy. of State*, 29 B. 480=7 Bom. L. R. 497; *In the goods of Bhola Nath Pal*, A. I. R. 1931 Cal. 580=134 Ind. Cas. 1279=58 C. 581.

(1) *Molla Atual Huc* v. *Chairman of Manik Tallah Municipality*, 24 C. W. N. 969; see also *Rash Behary Ghosal* v. *J. C. Stalkart*, 16 C W. N. 710.

(*ii*) to prohibit a person, declared to have been duly elected under the Act, from taking part in the proceedings of a municipality to which he has been elected a commissioner, or

(*iii*) to prohibit the commissioners formally elected or appointed for a municipality from entering upon their duties."

The court can interfere by issue of madamus.—The court cannot under section 45 of the Specific Relief Act, make any order unless, amongst other things. it is shown that the doing or the forbearing to do an act by any person holding a public office, or by any corporation or inferior court, is clearly incumbent on such person or court in his or its public character, or on such corporation in its corporate character (1). The omission of a statutory officer to perform the public duties as to settlement of election roll in the manner provided by the Act amounts to doing or forbearing to do something not consonant to right and justice and it is within the jurisdiction of the High Court to issue an order in the form of a mandamus on the officer under section 45 of the Specific Relief Act (2). It seems that the High Court has jurisdiction by a proceeding in the nature of a *qua warrato* to restrain a person who has not been duly elected from exercising the functions of a duly elected commissioner (3).

A municipal election petition having been lodged with the Chief Judge of the small cause court, the latter unseated two of the successful candidates and found cause of objection against the candidate in whose favour were recorded the next highest number of valid votes after those returned as elected. He declined to inquire further into the claims of any other candidate or to declare any other candidate elected, as, on his representation of section 33 (2) of the Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V. of 1905) he was not able to do so. The two highest of the other unsuccessful candidates there upon obtained rules against the Chief Judge under section 45 of the Specfic Relief Act (I of 1877), to show cause why he should not proceed to declare them elected under section 33 (3) above mentioned. *Held* that the case fell within the general principle referred to in *Ex parte Milner* (4), that where an inferior tribunal improperly refused to enter upon a complaint, a mandamus would issue (5). A rule was obtained by a candidate for election as commissioner of a certain ward calling upon the chairman of the Corporation of Calcutta to show cause why he should not prepare and publish the revised list of voters for the ward under rule 10 of Schedule IV of Calcutta Municipal Act, by rejecting applications filed by a second candidate to have his name entered in the list as the representative of certain associations ; and a copy of the rule was served on the second candidate, who

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(1) *In the matter ol Mutty Lall Ghose*, 19 C. 192 ; see also *In the matter of Rajendralal Mitter*, 19 C. 195.

(2) *In re Mr. Romesh Chandra Sen*, 16 C. W. N. 472.

(3) *In the Matter of W. Corkhil*, s 22 C. 717.

(4) (1851) 15 Jur. 1037.

(5) *In the matter of Jaffer Jusub*, 34 B. 659.

together with the chairman appeared and showed cause. The rule was made absolute (1).

The petitioner was a Licentiate in Medicine and Surgery of the University of Calcutta and as such was admittedly entitled to be registered under s. 4 of the Bengal Medical Act. The petitioner's name was omitted from the preliminary list of persons qualified to vote at the first election under the Act published by the Returning officer appointed by the Local Government. His name was also omitted from the final Electoral Roll. The petitioner's application to the Returning officer to have his namc entered was not considered by that officer. The petitioner applied to the High Court under soction 45 of the Specific Relief Act for an order compelling the Returning officer to include and publish his name in the final Electoral Roll. *Held* that the High Court had no ju-isdiction to interfere (2).

The power given to the High Courts under section 45 of the Specific Relief Act is not to be used if the tribunal whose decision is impugned has exercised the descretion entrusted to it *bona fide* not influenced by extraneous or irrelevant considerations and not arbitrarily or illegally ; they are not courts of appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous consideration in arriving at their conclusion or deciding a point other than those brought before them, in which cases the courts have regarded them as declining jurisdictlon (3) The returning officer for constituency of Bengal Legislative Council rejected the nomination paper of a candidate seeking election to the council who on the date of the filing of the nomination paper was a member of the Indian Council of State, but has resigned his seat thereon before the date of the scrutiny of the nomination. Under the Bengal Electoral Rules, a person was not eligible as a member of the legislative council if he was a memberof the council of state or any other legislative body constituted under the Government of India Act. The rejected candidate in an application under section 45 of the Specific Relief Act asked that the Returning officer should have decided the question of his eligibility with reference to the date of the scrutiny and not with reference fo the date of the filing of the nomination paper: *Held* that the High Court could not interfere as, although the Returning officer may have put a wrong interpretation on the Electoral Rules, he had not refused a jurisdiction which was vested in him nor had he usurped a jurisdiction that he did not possess (4).

A sitting commissioner who expresses his intention of becoming a candidate at the ensuing election is entitled, after his objection under rule 7 (2) of

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(1) *In re Nishit Sen*, 39 C. 754=15 C. L. J. 488.

(2) *Norendra Nath Basu* v. *H. L. Stephenson*, 19 C. W. N. 129.

(3) *Manindra Chandra Nandi* (*Maharaja*) v. *Provas Chandra Mitter* (*Hon'ble*) 51 C. 279=39 C. L. J. 58=79 Ind. Cas. 1042.

(4) *Ibid.*

Schedule IV of the Calcutta Municipal Act has been dismissed by the chairman to apply to High Court under section 45 of the Specific Relief Act for an order directing the chairman to expunge certain names from the Municipal Roll (1).

The nomination paper of S. H. a candidate for election to the Bengal Legislative Council, was rejected by the Returning officer on the ground, that not being dated, it was not in the form prescribed in Sch. III of the Bengal Electoral Rules and Regulations. The nomination paper of S. M. the rival candidate, was accepted by the Returning officer, overruliug S. H's objection that S. M. being a whole time Government servant, was not eligible for election. S. H. applied under section 45 of the Specific Relief Act to the High Court for an order requiring the Returning officer to accept his nomination paper and reject S. M's nomination paper. The High Court refused the application and S. H. appealed. Pending the appeal, the Returning officer declared S. M. to be duly elected under rule 14 (2) of the Bengal Electoral Rules : *Held* that the jurisdiction which is given to the High Court under s. 45 of the Specific Relief Act is a discretionary jurisdiction and that such jurisdiction is limited by the provisos (*d*), (*e*) and (*h*). *Held* that it had no jurisdiction to interfere in the present case inasmuch as (*i*) the court having no power to set aside S. M's election, any remedy which it might give under s. 45 of the Specific Relief Act would be incomplete ; (*ii*) the Appellant had a specific and adequate legal remedy by an election petition ; (*iii*) r. 31 of the Bengal Electoral Rules and Regulations provides that no election shall be called in question except by an election petition in accordance with the provisions of this part (2).

A suit for a declaration, that the preparation and publication of the lists of voters for a certain Local Board is illegal, void, *ultra vires*, and that no valid election of the member of the District Board could take place under the said lists, and for an injunction restraining the Collector of the District from himself or by his subordinates holding elections of members of the District Local Board under the alleged illegal lists, is of the nature contemplated by the provisions of section 45 of the Specific Relief Act, and therefore, had no application to the case (3). Where a Court or similar authority, gives to itself a jurisdiction which it properly has not got, by taking an erroneous view of the law, a writ of *certiorari* will be issued, but there will be no writ if it makes a mistake in the law when acting in the exercise of a jurisdiction which it undoubtedly possesses. Thus an erroneous decision on the question whether a candidate is disqualified for election by reason of s. 49 of the Madras District Municipalities Act is no ground for ordering a writ if the

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(1) *In re Surendra Chandra Ghose*, 49 Ind. Cas. 454=45 C. 950 ; See also *In re Nishit Chandra Sen*, 39 C. 754=15 C L. J. 488=15 Ind. Cas 441 ; *Romesh Chandra Sen*, 39 C. 598=16 C. W. N. 472.

(2) *S. N. Haldar* v. *S. N. Mullick*, 28 C. W. N. 127.

(3) *Kanaiylal* v. *Secretary of State*, 27 Bom. L. R. 368=87 Ind. Cas. 475=A.I.R 1925 Bom, 255.

lower court had otherwise acted within the limits of its jurisdiction. Where, however, the Election Commissioner, declares an election to be void on a ground not taken in the election petition his action is one in excess of jurisdiction and a writ may be issued (1). S. 27 of the Rules framed by the Local Government under s. 8 of the Burma Municipal Act, 1898, contemplates disqualification for nomination as well as election and consequently if an objection as to the validity of nomination upon the ground of disqualification is not brought under Rule 27, it is not open to the objector to bring it under Rule 53 and if such objection is brought under Rule 53, High Court can in a suitable case issue a mandamus on the officer holding inquiry under Rule 53 to forbear from doing so (2).

The preparation of a new electoral roll is in no sense a judicial act but is purely a ministerial act. The court has no power to issue a writ of *certiorari* if the rules are not observed in such a matter. In such a case the proper remedy would seem to be an election petition (3).

Where under Rule 6 of the Rules under the Madras City Municipal Act the commissioners omitted to give three days' notice before the date fixed for election and sought to give effect to an invalid notification of the Government *Held*, that he committed a breach of duty which could be restrained by a proceeding under s. 45 of the Specific Relief Act (4),

Election offences—*Bribery*—Whoever (*i*) gives a gratification to any person with the object of inducing him or to any other person to exercise any electoral right or of rewarding any person for having exercised any such right ; or (*ii*) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right, commits the offence of bribery : Provided that a declaration of public policy or a promise of public action shall not be an offence under the section.

(2) A person who offers or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he has not intended to do, or as a reward for doing what he has not done shall be deemed to have accepted the gratification as a reward (5).

Undue influence at elections.—(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

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(1) *Shanmuga* v. *Subbaraya*, 140 Ind. Cas. 540=63 M. L. J. 932.

(2) *Malia Singh* v. *Bourne*, A. I. R. 1931 Rang. 326.

(3) *Desi Chettiar* v. *Chinna Swami Chettiar*, 28 L. W. 642=A. I. R. 1928 Mad. 1271.

(4) *Ekambor Nayaker* v. *Commissioner of Madras Corporation*, 99 Ind. Cas. 18= A. I. R. 1927 Mad. 22=(1926) M. W. N. 842 ; see also *U. P. Thin* v. *Burjorjee*. A. I. R. 1927 Rang. 224.

(5) Section 171 B of the Penal Code.

(2) Without prejudice to the generality of the provisions of sub-section (1) whoever—

(*a*) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(*b*) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will beeome or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of subsection (1).

(3) A declaration of public policy or a promise of a public action, or the mere exercise of a legal right without intent to interfere with an eletoral right, shall not be deemed to be interference within the meaning of this section ( ).

Personation at election—Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name, and who ever abets, procures or attempts to procure the voting by any person in a such way, commits the offence of personation at an election (2).

Punishment for bribery—Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both :

Provided that bribery by treating shall be punished with fine only.

Explanation—'Treating' means that form of bribery where the gratification consists in food, drink, entertainment, or provisions (3).

Punishment for undue influence or personation at an election.—Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both (4)

False statement in connection with an election—Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine (5).

Illegal payments in connection with an election.—Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees :

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(1) Section 171 C. of the Penal Code.
(2) Section 171 D, of the Penal Code.
(3) Section 171 E. of the Penal Code.
(4) Section 171 F, of the Penal Code.
(5) Penal Code section 171 G.

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate (1).

Failure to keep election account.—Whoever being required by any law for the time being inforce or any rule having the force of law to keep accounts of expenses incurred at or in connection with, an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees (2).

Injunction to restrain election.—" An injunction " says *Prof. Pomeroy* ' will not issue as a general rule, for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determing the rules of law in pursuance of which, an election shall be held. An injunction is a political matter, with which Courts of equity have nothing to do. Moreover the effect of interference in such matters might often result in the destruction of the Government. This is specially so when the relief is sought to prevent the holding of an election (3) ". In an American case it has been said: "The attempt to check the expression of opinion—to forbid the peaceable assemblance of the people to obstruct the freedom of elections—if successful, would result in the overthrow of all liberty regulated by law. The mere effort to assume such power is dangerous to the right of the citizens. If the Courts can dictate to the officers of the people that they shall not hold an election from fear of some imaginary wrong, then people and officers are entirely subservient to the Courts, and the consequences are too fearful to comtemplate (4). But in England, under the Judicature Act authorizing the issuance of an injunction to protect any right which could be asserted either at law or in equity an injunction may issue to prevent an election to office (5). In British India where the Courts are guided in granting perpetual injunctions by the Specific Relief Act and temporary injunctions by the Civil Procedure Code (6), it has been held in a recent Madras case (7), that though a candidate for election to a Local Board like any one has a right to pursue his legal remedies, whatever they may be, save in exceptional circumstances, it is an abuse for a candidate who for some reason is shut out, to make his pursuit of his remedies in the Civil Courts a weapon for dislocating the electoral machinery and stopping an election. In the absence of any special reasons an order for injunction for that purpose should not be granted.

In *Savothama Rao* v. *Chairman Municipal Council, Saidapet* (8), *Schwabe C. J.* said: " If a man entitled to vote or to be a candidate at an election

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(1) Penal Code section 171 H.
(2) Penal Code section 171 I.
(3) Pom. Eq. Jur. § 1753.
(4) *Walton* v. *Daveling*, 61 Ill. 201.
(5) *Richard* v. *Michfy School Board*, (1893) 3 Ch. 510 ; *Awlatt* v. *Corporation of Southamton*, 16 Ch. D. 143 ; *North London Ry.* v. *Great Northern Railway*, 11 Q. B. D. 30.
(6) Order XXXIX, rule 1.
(7) *In re T. Balajee, Rao*, A. I. R. 1933 Mad. 103.
(8) A. I. R. 1923 Mad. 475=47 M. 585=73 Ind. Cas. 619.

is wrongfully deprived of that right, an action for damages lies against the person so depriving him. This was established in England in *Ashby* v. *White* (1), which case has since been uniformly followed, and in my judgment this is also the law of this country as was stated in *Municipal Board Agra* v. *Asarfi Lal* (2). But this statement requires qualification, for if the act by which the right is interfered with is an act done in a judicial capacity, then the rule applies that no action lies unless the act is done maliciously, which in this context means dishonestly; see *Pickering* v. *James* (3), particularly the judgment of *Brett J.* at page 509. In this case the chairman was acting in a judicial capacity in rejecting these nominations and it is not alleged that he acted dishonestly and, therefore, no action would lie for damages against him. But there may still be a cause of action of a different nature, not in respect of the chairman's past acts, but to prevent by injunction the carrying out of any threatened action by him which would have the effect of illegally interfering with the plaintiff's rights; and in my judgment, this is such a case. The chairman has unlawfully rejected the plaintiff's nomination paper and he has announced his intention of holding an election for Ward No. 5 without permitting the plaintiff to be a candidate. I do not think that the law is such that the plaintiff must wait until the election is held and then bring an Election Petition, which is bound to succeed, nor indeed, would that remedy give him all that he is entitled to, because after the Election Petition had succeeded, there would have to be a fresh nomination, and there might be other candidates in the field that he would not have to meet, to say nothing of the trouble and expense that he would necessarily be put to. There is ample authority to support this view. In *Aslat* v. *Corporation of Southamnton* (4), where it was proposed to hold an election of an Alderman of a Borough in the place of the plaintiff, who it is wrongly alleged, had vacated his seat, the Court of Chancery interfered by injunction forbidding the holding of the election. In *Richardson* v. *Methby School Board* (5), that Court granted an injunction to prevent the holding of an election for the part of School Master in place of the plaintiff, who was wrongly alleged to be disqualified for the office, and it was laid down that, where there is a legal right which can be asserted in law or equity a Court of Equity can grant an injunction in protection of the right . . . . . I have no doubt that this Court possesses the same powers under the Specific Relief Act, 1877, and, in my judgment this is a case for exercising them. Reliance is placed by the defendant on section 352 of the Madras District Municipalities Act, 1920, which protects the Chairman from suits in respect of acts done in his official capacity, but in my judgment, there is nothing in that section to preclude a suit being brought to restrain him from doing a threatened wrongful act to the detriment of another. It is also

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(1) 1 Sm. L. C. (11th Ed.) 240 at p. 295=2 Ld. Raym. 938.
(2) 65 Ind. Cas. 984=44 A. 202.
(3) 8 C. P. 489 (509).
(4) 16 Ch. D. 143=50 L. J. Ch. 31.
(5) (1893) 3 Ch. 510.

contended that no action lies because the decision of the chairman is final and conclusive. I can find nothing in the rules to make it so." In the same case *Wallace J.* added: "Is the Civil Court then the final authority for that purpose, and will a civil suit lie, which, in essence is merely calling upon the Civil Court to intepret the rules regarding the nomination of candidates for election? I think that the answer would ordinarily be in the negative for the short reason that, as I read the rules, another tribunal is set up for the very purpose. Rule 31 of the Election Rules clearly lays down that "if any question arises as to the interpretation of these rules otherwise than in connection with the Election Enquiry, the question shall be referred to the Local Government whose decision shall be final," that is, the Local Government who drafted the rules is the final arbiter for deciding what the rules mean, and the Civil Court cannot ordinarily be asked to decide whether the Local Government's interpretation of its rules is right or wrong.....The petitioner after an unfavourable ruling of chairman made a reference to the Local Government and asked it to interpret the rules and revise the chairman's order and permit his nomination, and that the Goverment's answer was that it declined to interfere.....I, therefore, agree that the correct principle is that, when a duly constituted tribunal has refused to try the question of the right of a party to the legal character of one entitled to be nominated to stand as candidate for an election, and there is no other remedy available, the ordinary Civil Court has jurisdiction to entertain a suit for that relief and the right to grant a proper temporary injunction retaining matters in *status quo ante* until the suit is tried."

The plaintiff offered himself as a candidate to be elected a councillor in the Municipal elections, but his name was not included in the list of candidates published by the Receiving officer appointed by the collector under Rule 13 of the District Municipal Election Rules. The plaintiff thereupon brought a suit against the Municipality for a declaration that he was entitled to be elected a councillor at the elections and for an injunction restraining the Municipality from holding the elections without accepting him as a candidate and without receiving the votes of his voters. *Held* that the suit for a declaration against the Municipality could not lie because the Municipality neither denied nor was interested to deny the character or right which the plaintiff sought to establish. It was the officer mentioned in Rule 13 of the District Municipal Election Rules that was concerned with that question and over which the Municipality had no control. The claim for an injunction could not be sustained against the Municipality when it had done no wrong and had proposed to proceed in accordance with the District Municipal Act (Bom. Act III of 1901) and the Rules so far as they relate to it (1).

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(1) *The Surat City Municipality* v. *Chunilal.* 30 B. 409=8 Bom. L. R. 209.

Where the holding of an election under a Government order would result in no harm, damage orwaste courts should not issue an injunction restraining the holding of election (1).

Injunction should generally be confined to preserve the *status quo ante* to prevent irremediable damage or loss to the property in suit or to avert substantial injury. An injunction restraining even elected candidate at a Municipal election from taking his sitt does not fall under any of the above categories. It is doubtful whether the High Court in a Civil Revision petition against the order in an election petition has power to grant such an injunction (2).

A District Judge inquiring into a petition contesting the validity of an election to a Municipal Council under Madras Act V of 1920, has no power, statutory or inherent, to restrain the successful candidate by *interim* injunction from taking his seat in the council pending the enquiry. Rule 6 of the rules framed by the Local Government for the decision of election disputes has not the effect of making the provisions of s. 94 and order 39 Rule 2, C. P. Code applicable to election inquiries (3). A temporary injunction can only be issued to the defendant and not to any other person A suit for a declaration that a certain person is not eligible to stand as a candidate cannot be said to be a suit for restraining him from committing an injury of any kind. Where a person has been declared by competent authority to be eligible for standing as a candidate at the election, and as the election itself could not be stopped, it would not be right to restrain him from taking part in it. To restrain the defendant in such a case would be tantamount to granting the plaintiff the relief sought in his suit and might deprive the defendant of a right to which he is really entitled. This would be a great injustice to him for which he would not be adequately compensated afterwards (4).

The plaintiff was a candidate for election as a non-official additional member of the Governor-General's Council by the non-official members of the Bengal Legislative Council. In that election, the defendant No 2 stood at the head of the poll, the defendant No. 1 standing second, the plaintiff being third. Acting under the term of the Regulation framed by the Governor-General in Council, the plaintiff preferred an appeal to the Governor General in Council, asking that the election should be declared to be void on the ground that two of the electors who had voted had not, at the time of voting, taken the oath of allegiance as required by the terms of the Regulation. The appeal was rejected and it was decided that the two defendants were duly elected members of the Governor-General's Council

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(1) *Mahomed* v. *Duraisami*. (1926) M. W. N. 582=A. I. R. 1926 Mad. 1147.

(2) *Gopal Krishna* v. *Vilanga Konour*, 90 Ind. Cas. 819.

(3) *Venkata Subba* v. *Sesadyer*, 47 M. C. J. 201=47 M. 700=80 Ind. Cas. 664.

(4) *The Election officer* v. *Abdul Ghani*, A. I. R. 1923 Lah. 47.

The plaintiff then brought a suit for a declaration that the election of the defendant was void and prayed for an injunction restraining the defendants from exercising powers and functions as non-official members of the Governor General's Council : *Held* that S. 9 of the Civil Procedure Code dealt with the courts not with the rights of parties, to find what was the jurisdiction of the court and what civil suit the court migh try ; that the rights if any, which the plaintiff had in this case, were governed by the Specific Relief Act ; that upon the facts, as the plaintiff deliberately elected to carry his appeal to the Governor-General in council and as very serious delay had been occasioned, and the two defendants sat and voted in the Imperial Council for the whole Sessions, the injunction should not be granted (1).

Where it is clear that if the new Board is not legally constituted its acts will be *ultra vires* and that if it be restrained from functioning, the duties of the Board cannot be carried on at all, the Chairman and Vice-chairman of the old Board should continue to perform their routine duties until the new Board begins to function, and in such a case the balance of convenience is on the side of a person who has brought a suit for a declaration that the election to the Board is illegal and for an injunction to prevent the Board functioning ; temporary injunction should therefore, be granted (2).

CHAPTER XXVIII.

Injunction aginst Municipal Corporation.

Introductory suggestion.—No where it is so important to keep constantly in view the fundamental principles governing courts in granting and refusing the relief as under this head ; without this the decisions are on some points irreconcilable, and frequently unaccountable. The absence or inadequacy of legal remedies, and the presence of imminency of irreparable injury are the only tenable grounds for equitable interference herein not withstanding that in many decisions these important landmarks of jurisdiction appear to have been lost to view. For though the avoidance of multiplicity of suits be an element of the evil to be provided against by granting an injunction at the suit of an individual tax-payer, it cannot recognize as a matter of additional merit in his claim to relief against the abuse of trust confided in a Municipal Corporation. It is rather a consideration of public convenience, it being desirable to have the rights of all persons similarly affected as the immediate complainant settled in a single action. Keeping in view irreparable injury as the true basis of relief, there is no material difference in the merits of an application for relief against a fradulent or *ultra vires* disbursement of public

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(1) *Bhupendra Nath Basu* v. *Ranjit Singh Bahadur*, 20 Ind. Cas. 676=41 C. 384.

(2) *Mahomed Azis* v. *District Local Board*. A. I. R, 1929 Sind. 224.

funds from which an individual suffers in common with others, and a case where a relief is sought against an injury which is special and peculiar to the complainant. But if we refer the exercise of jurisdiction to trust relation between the corporation and the inhabitants within its territorial limits, it is obvious that the jurisdiction could not extend to individual injuries such as result from opening streets, laying sewers on private premises, disturbing easements and the like. In reality there is in the case of illegal and fraudulent diversion of the public funds a double basis of jurisdiction ; the threatened breach of trust, and the infliction of irreparable injury (1).

Jurisdiction based on Trust.—A Muncipality is considered to hold a similar relation to citizens and taxpayers within its boundaries as that held by a private corporation to its members ; that is, it occupies the relation of a trustee. As agents and trustees, those for the time occupying municipal offices may be called to account in equity for various actions, and restrained by injunction from all breaches of trust and abuses of power (2). In the exercise of this jurisdiction the Courts proceed upon substantially the same principles which govern their interference in cases of trusts, a municipal corporation being regarded in equity as charged with and made the depositary of a public trust, and thus amenable to the jurisdiction of equity for a breach of trust (3). But an injunction will not be granted against a municipal corporation on account of its trust relation unless its officers be clearly acting in excess of the powers conferred by law ; or exceeding the territorial limits of its authority and attempting to exercise jurisdiction in territory over which it has not given jurisdiction ; or violating a statute ; or unlawfully attempting to dispose of its property, to the injury of tax-payers ; or threatening to issue and put in circulation illegal and void or fraudulent evidences of public indebtedness (4).

Irreparable Injury and Multiplicity of suits.—When a municipality through its common council or other officials is in the exercise of authority delegated to it by the Legislature of the State, it is vested with the right and duty to exercise the discretion and judgment incidental to the proper performance of what is delegated and with that discretion a court of equity will not ordinarily interfere (5). This rule applies to those cases where the action of the municipal officers or council is legislative in its character (6). Equity will not enjoin a municipal corporation in the exercise of its legislative function unless, the proposed bye-law is *ultra vires*, and would work irreparable injury (7). The jurisdiction to enjoin municipal corporation at the suit of individual citizens and tax-payers to prevent irreparable mischief and multiplicity of suits

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(1) Spelling on Injunction and other Extra ordinary Remedies § 675.

(2) High on Injunction § 1236 ; Spelling on Injunction § 676 ; Kerr p. 571 ; see also *Att. Gen.* v. *Aspinall*, 2 M & C. 613 ; *Att. Gen.* v. *Wilson*, 10 L. J. Ch. 53 ; *Tymouth* v. *Att. Gen.* (1899) A. C. 305 ; *Att. Gen.* v. *Corporation of Newcastle*, 23 Q. B. D. 492.

(3) High on Injnnction § 1236.

(4) Spelling on Injunction and other Extra Ordinary Remedies § 676.

(5) H. C. Joyce on Injunction § 1277.

(6) *Ibid* § 1278.

(7) Spelling on Injunction § 677.

is well establishsd. A frequent and most meritorious ground for interference is where public funds are about to be diverted to illegal and unauthorised purposes: and it may be stated without qualification that Courts of equity will interfere at the suit of tax-prayers in every such case, both on the ground of preventing a breach of trust, and to protect complainants from an injury for which, if any remedy whatever is provided by action at law, it is inadequate to meet the necessities and exigencies of the case (1). Two things must therefore be made apparent to the court in order to warrant relief by injunction. First that the act is in excess of legal authority conferred upon the municipal body; second, that its consequences if not prevented will result in an increase of taxation, thus imposing an additional burden upon individual tax-payers, or otherwise inflict irreparable injury, or lead to numerous actions or proceedings to correct the wrong. In the case of acts resulting in additional taxation, an important reason for interfering consists in the fact that a more speedy and efficacious remedy is required than that afforded by the tardy action of courts of law. But the increase of taxation, or of indebtedness alone does not warrant the relief. It must be connected with some recognised ground for equitable relief (2). And when an act about to be committed by a municipal corporation is clearly illegal, and its necessary effect will be to impose heavy burdens upon the property of citizens and tax payers, a court of equity is warranted in interfering by injunction for the prevention of such Act (3).

By section 56 of the Specific Relief Act an injunction cannot be granted where efficacious relief can be obtained by any other usual made of proceeding (4).

Misappropriation of Municipal Fund is enjoined.—The most frequent ground of application for relief by injunction against municipal corporation is for the prevention of an illegal or unauthorized diversion of public fund belonging to the municipality (5). The foundation of the relief which is invoked in cases of this nature rests in the doctrine of trusts and the relief is freely granted in aid of citizens and tax payers, as to when the officers of the municipality sustains the relation of trustees (6). And while courts of equity are averse to any interference with the proceeding of municipal officers while acting within the scope of their authority, and while they

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(1) Spelling on Injunction § 677.

(2) Spelling on Injunction and other Extra Ordinary Remedies § 678; High on Injunction § 1236.

(3) High on Injunction § 1236.

(4) *Chunilal Thakurdas* v. *The Surat City Municipaility*, 27 B. 403.

(5) *Att. Gen.* v. *Mayor of Wigan*, Kay 268; *Att. Gen.* v. *Mayor* of *Butley*, 26 L. T. N. S. 302; *Att. Gen.* v. *West ham*, (1910) 2 Ch 560; *Att. Gen.* v. *Newcastle upon Tyne*, 23 Q B. D. 493; *Att. Gen.* v. *De Winton*, (1906) 2 Ch. 106; *Att. Gen.* v. *Manchester Corporation*, (1906) 1 Ch. 651; *Att. Gen*, v. *Swanse Cor*, (1898) 1 Ch. 602; *Att. Gen.* v. *Tynemouth Cor*, (1899) A. C. 293; *Att. Gen.* v. *London Country Council*, (1901) 1 Ch. 781; (1902) A. C. 165; *Vaman* v. *Municipality of Sholapur*, 22 B. 646; *Municipal Com.* v. *Branson*. 3 M. 201; *Bennett* v. *National Amalgamated Society*. (1915) W. N. 73.

(6) High on Injunction § 1237.

will not by injunction control the judgment or revise the action of municipal bodies in matters resting within their own well defined jurisdiction, they will yet relieve on behalf of citizens and tax-payers against illegal action on the part of such bodies, without authority of law and in excess of the corporate powers. An injunction will therefore, lie to restrain even illegal diversion, or misappropriation of the public funds to purposes unauthorized by law, the action of the municipal authorities in making such appropriation being regarded both in the nature of a breach of terms of official and public trust, and also wholly void (1). The persons ordering the payment may be directed to pay the cost (2).

Tax-payer's interest entitling him to sue.—Any tax-payer is a proper plaintiff in an action to enjoin an illegal appropriation of corporate funds by a municipal corporation, or the illegal creation of a corporate debt (3). Indeed, it may be stated as a general rule that where an act is unauthorized by law, in other words *ultra vires*, and calculated to impose additional burdens upon tax-payers, the latter may maintain injunction for its prevention (4). Whether or not the danger of loss to the public treasury, and the consequent charge upon tax-payers, constitutes irreparable injury within the general rule requiring it to be shown, seems immaterial. The demoralization in public administration of municipal affairs, if no such right of interference were recognised, ought to justify an exception based upon considerations of public welfare. A tax payer can sue to enjoin a municipal corporation from appropriating money for a purpose not authorized by its charter, although his tax would be increased thereby only a mere trifling amount; and his private purpose in bringing the suit is immaterial. Nor does the fact that one has paid a tax imposed for an illegal purpose estop him from seeking to enjoin other appropriations for the same purpose (5). Illegal imposition of a tax may also be restrained at the instance of a rate payer (6). In *Vaman* v. *Municipality of Sholapur* (7), *Tyabji J.* said: "The suit was instituted by the plaintiffs as voters and tax-payers of *Sholapur* for an injunction restraining the Municipality of *Sholapur* from expending any sum of money out of the Municipal funds in the purchase of a band of music on the ground that the resolution in favour of such a purchase was *ultra vires*. The contention of the municipality was, that the plaintiffs had no cause of action, that they were not competent to sue, and that the purchase of a band was not illegal. The

(1) High on Injunction § 1237; *Newcastle upon Tyne* v. *Att. Gen.*, (1892) A. C. 568; *Tynouth Cor* v. *Att. Gen.*, (1899) A. C. 293.

(2) *R.* v. *Vaile*, 23 Q. B. D. 483.

(3) *Mc Coy* v. *Briant*, 53 Cal. 247 (Am.); see also *Vaman* v. *Municipality of Sholapur*, 22 B. 646.

(4) Spelling on Injunction and other Extra-ordinary Remedies § 678.

See also *Harmasji* v. *Pedder*, 13 B. H. C. 199; *Muniaipal Com.* v. *Branson*, 3 M. 201.

(5) Spelling on Injunction and other Extra-ordinary Remedies § 678.

(6) Vide The *Surat City Municipality* v. *Ochhavaram*, 21 B. 630 (635).

(7) 22 B. 646. In the above suit the court held that a suit will lie at the instance of an individual tax-payer for an injunction restraining a municipality from misapplying its funds.

subordinate Judge decided all these points in favour of the plaintiffs and passed a decree against the defendants. The District Judge without deciding the question whether the purchase of the band would or would not be *ultra vires* reversed the decree of the Subordinate Judge and dismissed the plaintiff's suit with costs, on the ground that the plaintiffs as individual voters and tax-payers, could not maintain the suit. I am however, of opinion that the District Judge was wrong in the course pursued by him.....

"First as to the question of pleading. It is no doubt true as a general rule, that courts of Justice will not permit individuals interested in any fund or estate to institute or maintain a suit without bringing before the court all persons who are interested in the matter. The convenience and indeed the necessity of the rule is obvious ; for otherwise, different individuals might file different suits against the same defendants in respect of the same cause of action, and such defendants might thus be unnecessarily harrassed by a multiplicity of suits. The ordinary method of avoiding this inconvenience and difficulty is by the plaintiff giving not only on his own behalf but also on behalf of all other persons in the same situation as himself (see Daniell's Chancery Practice 6th Ed. p. 194). This general rule has been expressly recognised by section 30 of the Civil Procedure Code and by clause (5) of section 13 which makes a decision in such a suit *res judicata* against all persons interested in the subject matter of the suit. There can therefore, be no doubt that the first and safest course for the plaintiffs would have been to proceed under section 30 of the Civil Procedure Code (1).

"This general rule however is not without exceptions and it is now clearly settled that any individual member of a corporation may file a suit for the purpose of restraining the corporation from doing any act which may be illegal or *ultra vires* of the corporation. In *Simpson* v. *Westminster Palace Hotel* (2), *Lord Campbell L. C.* observed : 'The funds of a Joint Stock Company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is *ultra vires*, and although sanctioned by all the directors and by a large majority of share holders, any single share-holder has a right to resist and a Court of Equity will interpose on his behalf by injunction'. This doctrince is more fully explained by *Jessel M. R.* in *Russel* v. *Wakefield Water Work* (3), where he says : 'It remains to consider what are these exceptional cases in which for the due attainment of justice, such a suit (that is, a suit by individual members) should be allowed. We are all familiar with one class of cases which are certainly the first exception to the rule. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation. Such a bill, indeed, may be maintained by a single corporator not suing on behalf of himself and of others, as was settled in the House of Lords in the case of

(1) See now C. P. Code order 1 r. 8.
(2) 8 H. L. Cas. 712,
(3) L. R. 20 Eq. 474 (481).

Simpson v. *Westminster Palace Hotal Co.*, (1). Again in *Hoole* v. *The Great Western Railway Co.*, (2). *Lord Cairns L. J.* said: 'I have a very strong opinion that any corporator or member of a company may maintain a bill against the corporation and the executive, to restrain them from doing an act which is *ultra vires*, and therefore illegal.' I confess I can see no substantial distinction between an individual share-holder or an individual policy-holder suing a company, in the funds of which he is interested, and an individual rate payer suing a municipal corporation, to the funds of which he contributes and in the proper application of which he is necessarily interested. His personal interest may be small, but is not less real (3),"

In *Attorney General* v. *Compton* (4), *Sir J. L. Knight Bruce V. C.* said at p. 427 : "Where property affected by a trust for public purpose is in the hands of those who hold it devoted to the trust, it is the privilege of the public that the crown should be entitled to intervene by its officers for the purpose of asserting on behalf of the public generally that public interest and that public right which probably no individual could be found willing effectually to assert, even if the interest were such as to allow it."

This right of the individual to sue, is also forcibly stated by *Gree J* in *Shepperd* v. The *Trustees of the Port* of *Bombay* (5) in these terms : "There can, I think, be no doubt that if the Port Trustees or any other corporation or public company in Bombay were to do or attempt to do any act in excess of their powers, or contained in the charter as legislative Act from which they devive their being, and such act would be injurious to the rights of property of an individual, such individual would, on general principles have a right to the protection of this court by injunction or other appropriate relief."

Diligence in seeking Relief.—It has been held thet the tax payers' laches in bringing an action to enjoin misappropriations of public funds constitutes no bar to the relief (6). But the better doctrine and that sustained by the weight of authority is that under some circumstances tax-payers may be estopped by reason of new equities arising from long delay, if acts of acquiscence with full knowledge are imputable to them (7). And it has been frequently held that those who allow the making of municipal improvements by which their property is immediately injured, such for instance as water works, to proceed without protest, the large expenditures to be made thereon, will be estopped from enjoining and putting a stop to the improvement (8).

The Doctrine of Ultra vires—There is nothing preculiar in the doctrine of *ultra vires* as applied to municipal corporations in this connection ; nor

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(1) 8 H. L. Cas. 712.
(2) L. R 3 Ch. 262 (272).
(3) See aiso *Mayor of Liverpool* v. *The Chorley Water Works*, 2 De. G. M. & G. 852.
(4) 1 Y. & C. Ch. 417.
(5) 1 Bom. 132 (142).
(6) *Austin* v. *Coggeshall* 12 R. I. 329.
(7) *Tosh* v. *Adam*, 10 Cush 252.
(8) Spelling on Injunction and other Extra ordinary Remedies § 681.

is there anything different from its application in the case of private corporations, it being in both cases a well-established rule that equity will enjoin all acts injurious to those for whom the trust is held and exercised, and which are in excess of legal duty and authority imposed and conferred in connection with such trust (1). "I have used the expressions" said *Lord Cairns L C.* in *Riche* v. *Ashbury Railway Carriage* (2), "*Extra Vires* and *Ultra vires*. I prefer either expression very much to one which occasionaily has been used in the judgments in the present case, and has also been used in other cases, the expression 'illegality'. In a case such as that which your Lordships, have now to deal with, it is not a question whether the contract sued upon involved that which is *malum-prohibitum or malum in se*, or is a contract contrary to public policy and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract ; the question is as to the competency and power of the company to make the contract." Where action being taken or about to be taken by the authorities of a municipality. is clearly illegal, and where the necessary result of such action will be the imposition of a burden upon the property of a citizen and tax-payers, a court of equity will, on application of the latter, interpose by injunction to restrain such public corporation, or to restrain it from any other abuse of its corporate powers, which would have a similar result. Any expenditure which is not made to accomplish a legitimate municipal object may be enjoined (3). The plaintiff applied on 1-12-1913 to the defendant Municipality for permission to build a privy on his own land, which permission was granted on the 19th idem. The Municipality gave notice to the plaintiff on 6-1-1914 requiring him not to build the privy until further order. The plaintiff sued for cancellation of the last named order and for a perpetual injunction restraining the Municipality from preventing the plaintiff in the work of constructing the privy : *Held* that the first order made by the Municipality to build the privy was a final order under s. 96 (2) of the Bombay District Municipalities Act and that the subsequent order which purported to be provisional in its character was therefore not legal ; and that consequently the plaintiff was entitled to the injunction claimed, he having commenced the work within a year within the meaning of s. 96 (4) of the Bombay District Municipal Act (4).

Non-interference with discretionary powers.—The general rule of non-interference with the exercise of discretionary powers legally conferred applies with exceptional force and appropriateness to municipal bodies having extensive and important trusts of a public character confided to them and being generally vested with important legislative powers. And it is a well settled equitable doctrine that the domain of discretionary powers conferred

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(1) Spelling an Injunctions etc. §684.
(2) (1874) L, R. 7 H. L. 653, 672
(3) Spelling on Injunction and Extraordinary Remedies § 684.
(4) *Vithal* v. *Alibag Municipality*, 20 Bom. L. R. 756=47 Ind. Cas. 145.

upon municipal bodies will in no case be invaded by the courts (1). The rule that courts will not interfere to restrain the construction of works of public improvements such as streets, sewers, bridges, and public buildings : and when such matters are by law intrusted to municipal bodies equity will not revise or control the exercise of discretionary powers as to the terms upon which or the manner in which the improvements shall be made (2). The general rule is that a court of equity will not assume to judge of the expediency and wisdom of laws conferring authority upon municipal officers and boards to make public improvements whether the latter are acting witin the scope of his legal authority, however impolitic or oppressive may be the law under which they are acting (3). The limits within which a court of equity interferes with the acts of a body of public frunctionaries, are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves with the exercise of those duties which are confined to them by the law, a court of equity will not interfere. The court will not interfere to see whether any alteration or regulation which they may have directed is good or bad ; but if they are departing from that power which the law has vested in them—if they are assuming to themselves a power over property which the law did not give them, the court no longer considers them as acting under the authority of the law, but treats them whether they be a corporation or individuals, merely as persons dealing with property without legal authority (4). The discretion used by the Municipal Commissioners must not be arbitrary (5). In a case, where the Municipal commissioners have ordered the pulling down of a house, if the owner can prove to the satisfaction of the court that his house is not in such a dangerous condition as to warrant an order to pull it down, that would be *prima facie* evidence that the person appointed by the commissioners has not exercised his discretion. In the circumstances the court is justified in granting a temporary injunction restraining the commissioners from demolishing the house (6).

The plaintiff, the owner of a house in Surat took in 1898 a water connection from the main pipe laid by the defendant Municipality. Under the rules, he was chargeable with one rupee a month for the water supplied to him and the condition was that his house was not to be inhabited by more than three families. The defendant Municipality made a new set of rules in 1905, under which they called upon the plaintiff to take separate water connection for each of the families being in the house; and they threatened to cut off the connection in case of non-compliance, The plaintiff brought this suit to restrain the Municipality from doing so. *Held* that under the rules so long as the plaintiff occupied a

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(1) Spelling on Injunction etc. § 687.
(2) Spelling on Injunction etc. § 689.
(3) Spelling on Injunction, etc. § 689 ; see also *Chuni Lal* v. *Kripasankar*, 31 B. 37.
(4) *Frewin* v. *Lewis*, 4 My & Cr. 249, 254; 9 Sim. 66; Joyce on Principles 24, 25.
(5) *Parkall* v. *Passmore* 15 Pa. St. D. 304 ; *Gunjibhoy* v. *The Municipal Corporation of Bombay*, 1 Bom. L. R. 754 (764).
(6) *Lalbhai Tricumlal* v. *Municipal Commissioner*, 33 B. 335.

house not inhabited by more than three families, he was entitle to the water supply (1).

But where a public body has received by statute discretionary power to levy and is laid under an obligation to collect a rate, an injunction cannot be granted by a court so as to deprive such public body of the power of exercising its discretion or to prohibit it from discharging the obligation (2).

Injunction not granted where injury remote and contingent.—Where relief is sought against specific acts alleged to threaten special injury to complainant, equity will not interfere if the danger threatened be uncertain and remote; nor will it assume jurisdiction upon allegations of the mere probability of future injury to question the lawful election of officers or the validity of bye-laws. The injury which will justify relief must be immediately impending and of such a character as ordinarily warrants interference. The injury must be specified and so pointed out that the Court can see that it will be an inevitable consequence of the act threatened and complained of. An equity will not interfere, at the suit of a tax payer, to enjoin, *ultra vires* proceedings by a city to establish a system of water works when the city has done nothing further in that direction than to pass a resolution directing the mayor and clerk to take steps for the entering into a contract for the construction of such works (3).

Consideration of Public convenience.—Equity will sometimes decline to interfere upon considerations of public interest, especially where the legal questions are doubtful. Thus, when it is sought to enjoin the erection of public building by a municipality, and the effect would be to arrest a great public improvement after a large expenditure of money equity will decline to interfere except in case of a clear abuse of authority (4).

Injunction granted against a Municipality.—When a Municipality took proceedings for the removal of an alleged encroachment under section 202 of the Bengal Municipal Act and the plaintiff sued for a pernament injunction to restrain the Municipality and prove that the obstruction has existed for at least 50 years, he is entitled to a decree. His suit cannot be dismissed on the ground that the Municipality might proceed under section 233 (5). A suit for a delaration that the land on which the plaintiff's house was built belonged to him and was not a public road and for the withdrawal of an order issued by the Magistrate directing him to demolish it, is not barred by section 56 of the Specific Relief Act (6). A suit by the owner of a house for a purpetual injunction restraining the municipality for demolishing a latrine in the plaintiff's house is maintainable in Civil Court, the object of the suit being to

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(1) *The Surat Municipality* v. *Tyabali Dadubhai*, 32 B. 460=10 Bom. L. R. 62 2.

(2) *Municipal Commissioner of Madras* v. *Branson*, 3 M. 201.

(3) Spelling on Injunctions § 693.

(4) Spelling on Injunctions etc. § 697.

(5) *Gopal Chandra Das* v. *Chairman of the Santipur Municipality*, 10 C. L. J. 613.

(6) *Jagannath* v. *Chairman*, 9 C. L. J. 286=4 Ind. Cas. 55.

prevent an infringement of the plaintiff's proprietary rights by the Municipal Board (1). If a board go beyond the powers conferred on them by the Municipalities Act, or if the board are assuming to themselves an authority which the law does not give them, no doubt their action can be challenged by a suit in Civil Courts. But if they confine themselves within the exercise of powers which the Legislature has seen fit to confer upon them, the statutory powers are sufficient answers to any suit that may be brought (2).

In *Chabildas Lallu bhai* v. *The Municip l Commissioners of Bombay* (3) it has been held that if the Municipal Commissioners of Bombay are desirous of putting in force the provisions of s. 131 of the Municipal Act (Bombay Act II of 1865), and compelling a house holder (whose house has been taken down) to set the foundations back to the general level of the street, they must exercise their powers when, or fourteen days after, the house-holder notifies under s. 160 of the Act, his intention to rebuild. Where the trespass of a continuing nature has been committed by the defendant, but has been discontinued before suit brought, the Court will not interfere by injunction to restrain the defendant from continuing such trespass, merely because the plaintiff entertains vague apprehensions that the trespass may be re-commenced (4). A local authority is not entitled to purchase lands for purposes not authorized by the Statute and it may be enjoined from making such purchases (5). In respect of property acquired by ordinary conveyance, a corporation will have an inherent power to dispose of the same ; but if the property is burdened with trust or is necessary for the performance of its public duties it can be restrained by an injunction from parting with the same (6). A tax-payer can obtain an injunction to restrain a local body from incurring debts in excess of its powers (7).

Injunction when not granted against a municipality.—In *Muthe Achayya Guru* v. *The Municipal Council of Ellore* (8) it has been held that the remedy of the aggrieved party whose projection has been unlawfully removed by the Municipal Council is by a suit for compensation and not by a suit for injunction. Where the Municipal Council launched complaints against the petitioners for working three rice mills without the necessary licences under s. 249 of the

(1) *Municipal Board* v. *Bhola Nath*, A. I. R. 1927 All. 432 ; see also *Mahimaranjan* v. *Municipal Board of Benares*, 1 A. L. J. 377 ; *Alopi Din* v. *Municipal Board of Allahabad*, 4 A. L. J. 8.

(2) *Municipal Board of Ferozabad* v. *Bhola Nath*. A. I. R. 1927 All. 432 ; *Abdul Aziz* v. *Chairman of the Board of Pilibhit*, 2 A. L. J. 222 ; *Chauli*, v. *Municipal Board of Muzaffar nagar*, 12 A. L. J. 1102=26 Ind. Cas. 781 ; *Abdul Aziz* v. *Chairman of the Board of Pilibhit*. A. I. R. 1924 All. 157.

(3) 8 B. H. O. C. 85.

(4) *Chabildas Lallu bhai* v. *The Municipal Commissioners of Bombay*, 8 B. H. C. O. C. 85.

(5) *Att. Gen.* v. *Corporation of Cardiff*, (1894) 2 Ch. 337 ; *A. G.* v. *Merthyr Tydfil Union*, (1900) 1 Ch. 516 ; *Marquess of Classicorde* v. *Congested Dt. Board*, 79 J. P. 481 (H. L.) ; *Moni Lal* v. *Calcutta Improvement Trustees*, 22 C. W. N, 1 (F. B.)

(6) Aiyangar's Municipal Corporation, p. 239 ; *Mayor of Colchester* v. *Lowton*, 1 V & B. 226 ; *A. G.* v. *Wilson*, 9 Sim. 30 ; *A. G.* v. *Sunder land Cor*, 2 Ch, D. 634

(7) *London Association of Brokers* v. *London and Indian Docks Committee*, (1892) 2 Ch. 240 ; *A. G.* v. *De Winton*, (1906) 2 Ch. 106.

(8) 19 M. L. J. 757=7 M. L. T. 66=4 Ind. Cas. 828,

Madras District Municipalities Act and the petitioners there upon applied for an injunction restraining the criminal proceedings pending disposal of a civil suit, *held* that the criminal court could also decide the question of fact whether licence was necessary and that it was not a fit case for granting an injunction (1). A municipal Board would not be justified in refusing to grant a license properly applied for under the bye-law relating to dangerous and offensive trades, in order to secure an advantage to itself in a dispute about a question of title with another person. Under the U. P. Municipalities Act of 1916 the jurisdiction of the Civil Courts is limited by the provisions of ss. 318 and 321 of the Act. Under this section the only remedy of a person who considers himself aggrieved by a bye-law made under s. 208(g) of the Act is by way of appeal to the higher authority referred to in s. 318 of the Act. It is not clear that a suit would not lie for an injunction to compel a Municipal Board to grant the plaintiff a license for carrying on a particular trade, provided always that the plaintiff was prepared to carry out the conditions prescribed by the bye-laws and could satisfy the court that the Municipal Board had refused him the license for reasons wholly unconnected with the public health (2).

CHAPTER XXIX.

Injunction agaiust Public Officers.

For What causes granted.—The general rule governing the jurisdiction in equity against public officers is that equity will interpose in behalf of individuals to restrain all illegal and unauthorized acts by them under colour and claim of official authority which tend to impair public rights or will result in irreparable or serious injury to private citizens, or when preventive relief is necessary to prevent a multiplicity of suits. A court of equity only exercises its peculiar jurisdiction over public bodies and public officers to prevent a breach of trust affecting public franchises, or some illegal act under colour or claim of right affecting injuriously the property rights of individuals; and to authorize the issuing of an injunction not only must a clear, legal, and equitable right to the relief demanded be shown but it must also appear that such a breach of trust or illegal act is being done by defendant, or is threatened and imminent (3). In general, a public officer may be restrained in a case coming under some recognized head of equity jurisdiction, from acting illegally to the injury of individuals. The mere fact that he is an officer and is acting illegally is not sufficient to warrant equitable interference. There must in addition be

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(1) *Ram Iyer* v. *Municipal Council of Madura*. 1929 M. W. N. 172=119 Ind. Cas. 465=A. I. R. 1929 Mad. 345; see also *Corporation of Calcutta* v. *Bejoy Kumar* 976=52 Ind. Cas. 785=20 Cr. L. J. 705.

(2) *Manual* v. *Emperor*, 17 A. L. J. 813

(3) Spelling on Injunction § 609.

an injury to a property right of the party applying for relief. Equity does not concern itself with political affairs as such (1). When a violation of a plain official duty, requiring no exercise of discretion, is threatened, one who will sustain injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. Therefore, when in such a case, there is irreparable injury and no adequate remedy at law, an injunction is proper. And injunction is the proper remedy when wrongful acts, involving no discretion, amount to a trespass which is either continuous in its nature or of such a character as to be a permanent injury to the free hold (2). So when a plain, official duty, requiring the exercise of no discretion, is incumbent and obligatory upon a state officer, he may be enjoined from acting in violation of such a duty by one who will thereby sustain a personal injury for which adequate compensation cannot be had at law (3). Section 54 of the Specific Relief Act confers jurisdiction on the court to issue an injunction not in respect of every breach of an obligation whether statutory or otherwise, but only in respect of a breach of an obligation extending in favour of the applicant (4).

Injuention granted only to restrain Positive Breaches of Duty.—An injunction will be granted only to prevent the violation of a positive right. And mere negligence in a matter of official routine, though under the proceeding by virtue of which an officer's claim to act be irregular, will not warrant an injunction against him (5). An injunction will not be granted, however, where the case is not brought under some recognized head of equity jurisdiction, nor where there is a complete and adequate remedy at law (6).

Acts legally authorszed not interfered with.—It is another well established rule that injunction will not issue to prevent officers from doing acts authorized by laws, enacted with a view to promoting the public welfare, whatever the opinion of the court as to wisdom or expediency of such laws may be (7).

Acts detrimental to public—suit by private party.—In the absence of a statute imposing the duty upon some officer or official board, any tax payer, on behalf of himself and others, has a right to institute proceedings in a court of equity to prevent the misapplication of public funds by Municipal officers, on the ground that the threatened illegal corporate act will increase the burden of taxation, and thus burden the plaintiffs (8).

Abuses of discretion enjoined.—But while equity will not invade the proper domain of discretionary powers, yet will extend its extra-ordinary powers to restrain abuses of discretion so gross and palpable as to evince notice, and a total disregard of the duties and obligations pertaining to the official position, and an intention to resort to arbitrary exercise of powers (9).

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(1) Pom Eq. Jur. § 1743.
(2) Pom Eq, Jur. § 1744.
(3) High on Injunction § 1310
(4) *Daily Gazette Press* v, *Karachi Municipality City*, . I. R. 1930 Sind. 287.
(5) Spelling on Injunction and other Extra ordinary Remdies § 610.
(6) Pom. Eq. Jur. § 1745.
(7) Spelling on Injunctions and other Extra ordinary Remedies § 611.
(8) Spelling on Injunction and other Extra ordinary Remedies § 614.
(9) Spelling on Injunction and other extraordinary Remedies § 619.

When a public officer is vested with discretion, an injunction will not issue to restrain acts coming with the discretionary power unless fraud or corruption is shown, or it is clear that the discretion has been abused. The distinction between discretionary and ministerial acts should be carefully noted, however, for if the act is of a ministerial nature it may be freely enjoined (1). The court cannot interfere with Government Departments in the performance of their statutory duties, if they exercise the discretion entrusted to them by the legislature, *bona fide* and uninfluenced by extraneous or irrelevant considerations. But the court has power to prevent the assumption by such bodies of a jurisdiction beyond that given to them by the law, and the refusal of their true jurisdiction by the adoption of extraneous considerations in ariving at their conclusion, or deciding a point other than that brought before them (2).

Temporary Injunction against President of Legislative Bodies.—A Civil Court has no jurisdiction to grant an injunction to restrain an act which inflicts no legal wrong on the plaintiff. An interlocutory injunction can be granted only if the court is satisfied that in all probability the declaration, which is the foundation for the permanent injunction claimed, will be made when the suit comes to be tried. A temporary injunction against the President of the Legislative Assembly, restraining him from proceeding with a certain Bill introduced in the Assembly on the ground that certain of its clauses were *ultra vires* or were void and inoperative, cannot be granted for a Bill has no legal effect, and if the declaration refers to a future Act which may be passed it is really dealing with a future and hypothetial question which may never arise. If the Bill is ultimately passed and becomes an Act of the legislature, then the court may have to deal with it. For the court to make a declaration that the Bill is in the form in which it is introduced, is perfectly futile (3).

In *Kumar Sankar Roy* v. *H. E. Cotton* (4), the plaintiff a member of the Bengal Legislative Council, brought a suit on the original side of the Calcutta High Court and applied for an *interim* order that the first defendant the President of the Legislative Council, may be restrained from putting a certain motion, being item No. 6 in the list of business, before the Bengal Legislative Council at its Sessions and for an *interim* order restraining the second and third defendants, the Minister in charge of Education and Agriculture from discharging any duties as ministers or receiving any payment of salary. Objection was taken to the jurisdiction of the court on the ground that the Legislature was supreme and that the court could not interfere in any way with the conduct of business in the Legislative Council. In delivering the judgment *Mr. Justice C. C. Ghose* said: "I am perfectly aware of the fact that in England the Legislature is sufreme, but what I have to consider

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(1) Pom Eq. Jur. § 1751.

(2) Kerr on Injunction p. 581; see also *Rex* v. *Board of Education*, (1910) 2 K. B. 179=79 L. J. K. B 603 S. C. on appeal (1911) A. C. 179=80 L. J. K. B. 796; *Rex* v. *Electricity Commissioners*, (1924) 1 K. B. 192—194=93 L. J. K. B. 399, 400; *Short* v. *Poole Corporation*, (1926) 1 Ch. 85=95 L. J. Ch. 115.

(3) *Mulje Haridas* v. *Ibrahim*, A. I. R. 1932 Bom 166=34 Bom. L. R. 231.

(4) 40 C. L. J. 515=85 Ind. Cas. 14=1925 Cal. 373.

on the present application is not whether the English Parliament is supreme, but whether the Bengal Legislative Council, which is a subordinate Legislature and a creation of Parliament, is supreme in the sense contended for by the Advocate General and whether the jurisdiction of High Court, so far as the President of the Legislative Council is concerned, is excluded by statute or judge made law or by implication. If I have no jurisdiction to entertain this suit, it would be obviously improper for me to express any opinion on the merits of the questions, discussed before me, though that discussion was necessary before I could determine the issue as to jurisdiction [*Cf. Pritchard* v. *Bangor Corporation* (1)] In my view, the question now before me does not really relate to the powers of Local Legislature ; but if it did, I have no doubt that it would have been a legitimate subject of discussion in this court and I am prepared to hold that the proceedings of a subordinate Legislature like the local legislature can be questioned in this court (see in this connection the observations of *Jenkins C. J.* in *Hari* v. *Secretary* of *State for India* (2). But as I say the substantial question is whether the President of the Council is immune from the jurisdiction of this Court. This Court is a superior Court of Record and *prima facie* no matter is deemed to be beyond the jurisdiction of this court, unless it is expressly shown to be so. By the word 'jurisdiction' is meant the authority which the court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. Now, this is a suit of the civil nature and in the Civil Procedure Code it is provided that the Courts shall have jurisdiction to try all suits of a civil nature, but from this rule are excepted "suits of which the cognizance is barred by any enactment.' As stated above there is nothing in the Government of India Act to exclude the jurisdiction of this Court. The President of the Bengal Legislative Council is appointed under the provisions of s. 72 C of the Government of India Act, the present President being a person appointed by His Excellency the Governor. He is the holder of an office created by Statute and nothing has been shown to me during the course of the argument, which can remotely suggest that the President of the Bengal Legislative Council is immune from the jurisdiction of this Court. As was observed by *Bailhache, J.* adopting the satement of the law by the Attorney-General, *Sir Richard Webester*, if any person, whether an officer of state or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parliament or State authority, the legal justification can be enquired into in this Court [See *China Mutual Steam Navigation Co. Ltd.* v. *Maclay* (3)]. Therefore in my opinion, a suit can lie against the President of Bengal Legislative Council. I now proceed to discuss *Mr. Advocate General's* points under heads (*b*) and (*c*). This is a representative suit instituted by the present plaintiffs. Leave under Order I, rule 8 C. P. Code, has been given to the Plaintiffs to sue on behalf of themselves and all others who pay Government revenue or pay taxes. The interest

(1) (1888) 13 A. C. 241.
(2) 27 B. 424 at p. 439.
(3) (1918) 1 K. B. 33=87 L. J. K. B. 95.

which *Mr. Sen Gupta* (1), in his application failed to show, is in the present plaintiffs and it is sufficient to sustain them to maintain this suit [See in this connection the judgment of *Tayabji and Parsons J.* in the case of *Vaman* v. *Municipality of Shalapur* (2)]. The present plaintiffs have, in my opinion made a sufficient demand on *Mr. Cotton* ; *Mr. Cotton* would not be here through his Council before me if a demand had not been made, and I am satisfied on the contentions raised on behalf of *Mr. Cotton* that he has refused to comply with the demand. As I have already said in the other judgment, it is not necessary to use the word 'refuse' or any equivalent to it ; refusal may be inferred from conduct, and on the facts of this case, I think the plaintiffs are not wrong when they say that there has been a refusal on the part of *Mr. Cotton*. That being so, it is necessary to consider whether the plaintiffs would be injured by *Mr. Cotton*, putting the motion, being item No. 6 in the agenda, before the Bengal Legislative Council, at its meeting this afternoon ; and secondly, what is the extent of the imminence of danger which will induce the Court to make an order in favour of the present plaintiffs. The present action is what in England would be described as in the nature of a *Quia Timet Bill*. It is very old head of Equity Jurisdiction and according to Story, it has been traced back to so early a period as the reign of Edward IV. These *Quia Timet* Bills are in the nature of Writs of Prevention, to accomplish the ends of precautionary justice and are ordinarily applied to prevent wrongs or anticipated mischiefs and not merely to redress them when done. There are two necessary ingredients for a *Quia Timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proved that the apprehended damage will, if it comes, be very substantial and irreparable, *i. e.*, it must be shown that if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it, if relief is denied to him in a *Quia Timet* action [see in this connection *Fletcher* v. *Bealey* (3).] The power is entirely discretionary : it is a large power and I have ever present in my mind *Lord Mansfield's* caution that the greater the power, the more cautious must be the exercise of it. Time is pressing and I am unable to develop all the points which are passing through my mind, because Mr. Advocate-General has desired an immediate decision. I must

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(1) *In re Jatindra Mohan Sen Gupta*, 82 Ind. Cas. 374=40 C. L. J. 44=51 C. 874. In the above case Mr. Justice C. C. Ghose said : "Has the applicant here shown that his 'property,' or 'franchise or 'personal right' would be injured ? As to injury to property, it has been stated before me that the applicant pays Government revenue in respect of his immoveable properties in the District of Chittagong, and that the money so paid by him being part of the fund out of which the salaries of Ministers are met, his 'property' would be injured, if in the pursuance of *Mr. Donald's* motions, the supplementary demand for grant is acceded to by the Bengal Legislative Council. I am clearly of opinion that what has been shown by the applicant in this connection is insufficient to make him a competent relator. The applicant pays Government revenue, it is true ; but he pays it along with thousands of other people, a fact of which I am entitled to take judicial notice. This by itself cannot, in my opinion, constitute such an injury to the applicant's 'property' as the proviso contemplates".

(2) 22 B 646.

(3) 28 Ch. D. 688.

say, however, this that on both heads, the plaintiffs have been able to satisfy me that this is a fit and proper case for the exercise of my discretion. There can be no doubt of the imminence of danger having regard to the conclusions at which I have already arrived. That there will be substantial damage and irreparable injury within the meaning of the Rule laid down above, it is impossible to doubt. In these circumstances, when the various considerations are so balanced and when the motion itself is in complete violation of the spirit and letter of the Government of India Act and of the Rules made thereunder, it is my obvious duty to protect the plaintiffs by a temporary order till the suit is heard. In these matters the Court, in the exercise of its discretion, is under an obligation to take large and liberal views, so that the rights of the subject may be preserved and the constitution as laid down by the Government of India Act safeguarded by such means as are in the power of the Court. The right to vote supplies is perhaps the greatest privilege accorded to a Legislative Body, and any infraction of the Rules and Regulations guarding the provision as to the voting of supplies is an 'injury' which the plaintiffs in a representative suit, are entitled to be protected from.....

"There now remains for me to consider Mr. Advocate General's, point under head (*a*), namely, that in disposing of the present application I should follow the same principles as were followed by me in the application for the writ of Mandamus. I have read and re-read, during the last two days, the case to which Mr. Advocate General has drawn my attention, namely, the case of the *Bank of Bombay* v. *Suleman Somji* (1). To a certain extent the contention is correct so far as it goes; but I am by no means prepared to say that in disposing of an application for an injunction, my powers sitting here on this side of the court are wholly circumscribed by the rules laid down in section 45 of the Specific Relief Act. I have given to his matter my very best and most anxious consideration within the time at my disposal, and I have come to the conclusion that the plaintiffs having made out a *prima facie* case, I really have no other alternative but to make an order restraining *Mr. Cotton*, the President of the Bengal Legislative Council, within which expression are included the persons mentioned in page 238 of the Bengal Legislative Council Rules and standing orders, from putting the said item No. 6 before the Council for its consideration until the final determination of this suit."

In this connection the following observations of *Prof. Pomeroy* should be borne in mind (2): "The right of a tax-payer to enjoin acts of an officer of a municipal corporation which involve waste and improper expenditure of public funds is considered in the chapter on Municipal Corporations. A different question arises, however, when a tax-payer seeks to enjoin a state officer. The principle upon which the doctrine in regard to municipal, or quasimunicipal corporations is based, flows from its analogy to well settled

(1) 12 C. W. N. 825=8 C. L. J. 103=32 B. 466=10 Bom. L. R. 636=18 M. L.J. 865=5 A. L. J. 463=35 I. A. 130 (P. C.).

(2) There is of course great difference between the sovereignty of the states in the United States of America and the

doctrine in equity governing private corporations, where each stock-holder has an interest in the property of the corporation, and may interfere to protect the corporate funds from the illegal or fraudulent act of its officers. But this reasoning cannot apply to a state Government. The country is a *quasi* corporation; the state is a sovereignty. The country only possesses such powers as the legislature of the state confers upon it. Its revenues, its property, its very existence, depend upon statutory enactment. It can be enlarged, dismemberred, or annihilated, at the will of the state. The state, on the contrary, has all the powers not relinquished to the general Government by the articles of federation and, subject to these relinquishments, its sovereignty is supreme. One of the necessary attributes of sovereignty is the protection of the sovereign power and the maintenance of the state organization (1). Hence it would seem that an injunction should not issue against a state officer unless some special and direct injury to the plaintiff is shown (2)."

Injunction against Executive officer.—An injunction will not issue against an executive officer of the Government nor against one acting under him, to restrain the performance or execution of administrative acts and orders within the scope of his authority. This is based on the principle which governs also the legal remedy of mandamus. It would be contrary to the theory of Government for the judicial department to interfere with the reasonable discretion of the executive. Hence, courts of law and of equity refuse the remedies of *mandamus* and injunction when they will have the effect of controlling a reasonable discretion. When no question of discretion is involved, both law and equity will interfere without hesitation. It is generally stated that *mandamus* may issue in a proper case to compel the performance of a ministerial act. The corresponding statement as to injunction is that it may issue in a proper case to restrain an act in excess of the officer's authority (3).

Whether notice under s. 80 of the Civil Procedure is necessary in a suit for injunction against public officer.—An action for injunction against a public officer acting as such cannot be maintained without the requisite notice under s 80 of the C. P. Code (4). But when public officers are sued not in their admitted official capacity but as individual trespassers, no notice under this section is necessary (5).

Local Governments here which exercise delegated powers.

(1) *Jones* v. *Reed*, 3 Wash, 57.

(2) Pom. Eq. Jur. § 1748.

(3) Pom Eq. Jur. § 1750.

(4) *Gobinda Chandra Poddar* v. *Subdivisional Officer, Chandpur*, 58 C. 1288; *Secretary of State* v. *Krishna Rao*, 35 B. 362, Per *Chandra Varkar J*; *Bagchand* v. *Secretary of State*, 54 I. A. 338=51 B. 725=104 Ind. Cas 257=A. I. R. 1927 P. C. 176; see also *Secretary* of *State* v. *Rajluckhi*, 25 C. 239; *Vishnumal* v. *Court* of *Wards* 105 Ind. Cas. 729 =A. I. R. 1928 Sind. 76=22 S. L. R. 63; *Narayan* v. *Secretary of State*, A. I. R. 1927 Bom. 521=29 Bom. L. R. 1427; *Kotireddi* v. *Subbiah*, 41 M. 792; *Arunachelam* v. *David*, 50 M. 239=A. I. R. 1927 Mad. 166; *Abdul Rahim* v. *Abdul Rahaman*, 46 A. 884; *Bachha Singh* v. *Secretary of State*, 25 A. 284; *Dakshina* v. *Omar Chand*, 50 C. 992:

(5) *Ganada Sundari* v. *Nalini Ranjan*, 12 C. W. N. 1065=36 C. 29.

CHAPTER XXX.

Injunction against private corporations.

Corporations—different kinds of—Corporation is a succession or collection of persons having in the estimation of the law an existence and rights and duties distinct from those of the individual persons who form it from time to time. Corporations are of three kinds. A corporation sole consists of only one member at a time, the corporate character being kept up by a succession of solitary members. Corporations sole are always holders of a public office, the principal examples being the sovereign, and ecclesiastical person, etc. In British India Administrator Generals and Official Trustees are also corporations sole. A corporation aggregate consists of several members at the same time. The most frequent examples are incorporated companies and municipal corporations. The chief peculiarity of a corporation aggregate is that it has a perpetual succession (i. e. existence), a name and a common seal by which its intention may be evinced; that, being merely a creation of the law, it cannot commit a crime or enter into a personal contract or relation; and the majority of the membess have power to bind the minority in matters within the powers of the corporation. There are also certain corporations which are partly aggregate and partly sole (1).

Jurisdiction founded in trust.—The jurisdiction of equity to control or restrain the operations of corporate bodies, while exercised upon the same principles which govern in other cases, may not inappropriately be considered as a breach of the general jurisdiction of courts of equity over the subject of trust. And unless a breach of trust can be satisfactorily established, an injunction will rarely be allowed to restrain the application of corporate property or funds to other than corporate purposes (2). Where, however, the existence of a trust is established, or corporate property is affected by a trust, equity will interfere for the protection of the rights of the members of the corporation (3). To warrant a court of equity in interfering with the proceedings of an incorporated company in the constructions of its works, two things must occur; first it must appear that the company is transcending its articles of association or charter; and second, that the interference of a court of equity is necessary to prevent an injury which cannot adequately be compensated in damages (4).

Ultra Vires Act.—A court of equity has jurisdiction at the instance of share holders in a corporation, to restrain the corporation and those who have control and management there of, from acts tending to the destruction of its

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(1) Byrne's Law Dictionary.
(2) *Evan* v. *Avon*, 29 Beav. 144; *Att, Gen* v. *Carmarthon*, Cooper 30.
(3) *Dummer* v. *Chippenham*, 14 Ves. 245; *Att. Gen* v. *Mayer*, 1 Blish. N. S. 312; High on Injunction § 1184.
(4) High on Injunction § 1184.

franchises, from the violations of the charter, from misuses or misappropriations of corporate powers and property, and from other acts prejudicial to share holders amounting to a breach of trust (1). In *Pickering* v. *Stephenson* (2) the court said : "It is not a mere cannon of English Municipal law, but a great and broad principle, which must be taken (in the absence of proof to the contrary) as part of any given system of jurisprudence, that a governing body of a corporation which is trading partnership—that is to say, the ultimate authority within the society itself—cannot, in general, use the funds of the community for any purpose other than those for which they are contributed. Therefore the special powers given to such ultimate authority—whether it be the directors or a general council, or a majority at a general meeting, by the statutes or other constituent documents of the association (however absolute in terms)—are always to be construed as subject to a paramount and inherent restrictions and they are to be exercisedi n subjection to the special purposes of the original bond of association." The jurisdiction in equity to afford protection by injunction and otherwise extends to ecclesiastical as well as to lay corporations (3).

Neither the directors nor a majority of the stock holders can direct the corporate enterprise to objects foreign to those specified or implied in the terms of the articles or charter under which the corporation was formed, against the dissent of stock holders : and where such diversion or deviation is attempted a dissenting minority, however small, will be entitled to an injunction to arrest the same (4).

So as a general rule, it may be stated that a share holder may obtain an injunction against *ullra vires* acts. It is also based on the principle that there is contractual relation between the share holders and the corporation which is a subject of equitable protection (5). This is very lucidly stated in an American case (6), where the Court observed :" "The directors are their trustees to employ the joint capital in the management,...to the end that from the investment the stock holders have chosen they may reape the contemplated profits. And this is the agreement of the stock holders among themselves. They each contract with the other that their money shall be so employed. What the majority determine within the scope of this mutual contract they agree to abide by, but there their mutual contract ends, and no majority however large, has a right to divert one cent of the joint capital to any purpose not consistent with, and growing out of this original fundamental joint intention (7)." Thus a minority

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(1) Spelling on Injunctions and other Extra ordinary Remedies § 734 ; *Pickering* v. *Stephenson*, L. R. 14 Eq 322 ; *Hutton* v. *Scarborough*, 13 W. R. 631 ; *Salamons* v. *Laing* 12 Beav. 339 ; *Colman* v. *Eastern Counties Hotel*, 10 Beav. 339 ; *MacDonnell* v. *Granad Canal Co.*, 3 Ir. Ch. 578.

(2) L. R. 14 Eq. 322,

(3) *Att. Gen.* v. *St. John's Hospital*, 2 De G J. & S. 621 ; *Parr* v. *Att. Gen.* 8 Cl. & F. 409.

(4) *Beaman* v. *Ruffoyd*, 1 Sim. N. S. 564 ; Spelling on Injunction § 734 ; *Oldaker* v. *Hunt.* 19 Beav. 485 ; *Att. Gen* v. *Andrews*, 2 Mac. & G. 225.

(5) Pom. Eq. Jur. § 1725.

(6) *Kean* v. *Johnson*, 9 N. J. Eq. 401, 409.

(7) Pom. Eq. Jur. § 1725,

share holder is entitled to an injunction to restrain a corporation from selling, leasing or transferrin · all of its property (1 , or from consolidating, *ultra vires*, with another corporation (2), or from issuing paper to circulate as money (3), or from guaranteeing bonds of another corporation (4). Likewise such a share holder may obtain an injunction to restrain the appropriation of corporate funds for any object not warranted by the charter, or to prevent the fraudulent payment of private debts with corporate funds (5). Upon the same principle he is entitled to restrain the *ultra vires* purchase of land (6) ; to restrain such a change in the certificate of incorporation as will reduce the dividend on perferred shares (7) ; and to restrain an increase of capital stock to be given for the property worth less than the face value of the stock (8). Likewise a share-holder may enjoin a bank from discounting notes at usurious rates in violation of its charter (9). The fact that such contracts may be beneficial both to the corporation and to the stock-holder is no ground for refusing the relief, for the stock holder has a contract right which he is entitled to have protected (10). But until this contract is fully made there is no ground for action. Therefore, a subscriber for stock who has not fulfilled the condition of his subscription, has no standing in Court (11). It has some times been held that relief will be granted only to a *bona-fide* stock-holder, and accordingly injunction has been refused when the plaintiff has been in reality acting in the interest of another corporation (12).

Where there is a doubt whether the arbitrary powers given to local boards are properly exercised, it is the duty of a court of equity to take care that the checks appointed by the Legislature have due operation in favour of the persons affected and therefore it will restrain a local board of works, which has exceeded its statutory powers, and has attempted to exercise arbitrary powers, without leaving to a person affected thereby the right of appeal given by the Act, from so doing, until the question shall have been determined by the proper tribunal (13).

Wrong without a remedy.—It has already been stated that the principle on which a simple share holder is allowed to sue in equity is, that there is no legal remedy available, and where there is a wrong a party will not be left without a remedy, if it be in the power of a Court to furnish it (14). So in order that a share holder in a corporation may sue in his own name to restrain the

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(1) *Kean* v *Johnson*, 9 N. J. Eq. 401.
( ) *Botts* v. *Simpson Ville & B. C. Turn Pike Road Co.*, 88 Ky 54.
(3) *Blish* v. *Anderson*, 31 Ala. 612 = 70 Am. Dec. 511.
(4) *Zabriskie* v. *Cleveland*, 23 How. (64 U. S.) 381.
(5) *Scears* v. *Hotchkiss*, 20 Conn. 171 =65 Am. Dec. 557.
(6) *Hugh* v. *Cook*, 24 Am. Rep. 230.
(7) *Pronick* v. *Spirits Dist. Co.*, 58 N. J. Eq. 97.
(8) *Donald* v. *Ameriean S. & R. Co.*, 62 N. J. Eq 729.
(9) *Manderson* v. *Commerciel Bank.* 28 Pa St. 379.
(10) *Burne* v. *Schuyler*, 65 Conn 336.
(11) *Buse1* v. *Hooper*, 6 Am Rep. 350.
(12) *Jenkins* v *Auburn City Ry.*, 27 App. Div 553 ; Pom Eq Jur § 1725.
(13) *Tinkler* v. *Wandsworth Distr ct Road Works*, 2 De G, & J. 261 ; Joyce on Doctrines p. 297.
(14) *Bill* v. *Western Un. Tel Co*, 16 Fed. Rep. 14 ; *Fors* v. *Har bottle*, 2 Hare, 495.

directors it must be made to appear that they are about to take action beyond their authority which will result in serious injury to the corporation and the stock-holders or that the majority of the stock-holders are illegally pressing a course in the name of the corporation which is in violation of the rights of the other stock-holders ; and in such a case the plaintiff must show that he has exhausted all available means to obtain redress within the corporation itself for redress of his grievances and must show with particularity what efforts he had made to obtain such redress from the directors and from the body of stock-holders (1). Thus where a certain share holders of a rail road company sue to restrain the company and officers from removing a certain station house it is not enough to allege that they have in vain requested the directors to take action to prevent such removal, but they must also specifically allege acts of fraud or *ultra vires* on the part of the directors or managers (2).

Jurisdiction cautiously exercised.—Especial caution is observed by Courts of equity in granting injunction whose effect would be to interfere with or suspend the operations of important public works which are being carried on by corporations. The power of granting injunctions being one of the extra-ordinary powers of equity, its improper exercise in cases of public works would be productive of serious injury. The jurisdiction in such cases should therefore be exercised only for the prevention of irreparable mischief, or where the injury complained of is so great and the risk so imminent that no prudent man would think of incurring it (3).

Bona fide ultra vires Acts of majority not restrained.—Where the preventive relief sought is not against the directors but aginst the majority, the contemplated acts must be clearly shown to be unauthorized by the company's charter or contrary to the general law. It is not enough merely to show that it will be injudicious ; as for instance, that it will result in loss, or involve the corporation in expensive and vexatious litigation. It is for the majority and not the individual stock-holders to say how the authorized powers shall be exercised and in what authorized enterprises the funds shall be invested (4). Accordingly, where a corporation has the power of doing or not doing an act, at his discretion, equity will not interfere with the lawful exercise of the discretion. It will not interpose until fraud is shown (5). So Courts of equity rarely interfere with the exercise of discretionary powers by corporate bodies or their officers, to whom such powers are confided (6). And it is a well established principle of equity, that where acts requiring exercise of judgment, science and propossional skill are confided to the discretion of a corporation, the exercise of that discretion will not be lightly disturbed, nor will such officers be enjoined, except when abusing their power to the injury of others (7). The

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(1) H. C. Joyce on Injunction § 1333.
(2) *Latimer* v. *Richmond R. Co.*, 39 S. C. 44.
(3) High on Injunction § 1185.
(4) Spelling's Private Corporation § 594.
(5) Spelling on Injunction and other Extra ordinary Remedies § 736.
(6) *Att. Gen.* v. *Foundling Hospital*, 4 Bro. C. C. 165.
(7) High on Injunction § 1186.

Court will not restrain a company from doing an act within the scope of its objects, on the ground that if the company does that act the doing of it may incapacitate the company from performing something else which also is within the scope of its objects (1). A Court of Equity will decide upon the existence and the extent of the powers possessed by corporations aggregate, but if it is satisfied that they are not exceeding their powers, it will not interfere by injunction (2). But the Court will not allow corporate aggregate to procure performance of acts which they have no power to enforce (3).

Diversion of funds from corporate purposes.—Equity will enjoin any improper division of corporate funds for other than corporate purposes (4), and will restrain the managers of a company from engaging in any enterprise not contemplated by the articles of incorporation (5). This rule is especially applicable to Railway Companies (6). The reason is well laid down in a leading English case (7) as follows : "Now, why has the rule been established, that Railway Companies must not carry on any business other than that for which they were constituted ? It is because these companies, being armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating influence and command over some particular branch of trade or commerce, as would enable them to drive the ordinary private traders out of the field, and create in their favour a practical monopoly, whereby the interests of the public would be most seriously injured (8)."

In *Simpson* v. *Westminster Hotel* (9), *Lord Chancellor Lord Campbell* said : "The funds of a joint stock company established for one undertaking cannot be applied to another. If an attempt to do so is made the act is *ultra vires*, and although sanctioned by all the directors and by a large majority of shareholders, any single shareholder has a right to resist it, and a Court of Equity will interfere on his behalf by injunction. A railway company cannot apply its funds to make a line of railway different from that described in the Act by which the company was constituted (10). A company established for granting fire and life insurances cannot engage in marine insurance. A company established to make a railway and exercise the trade of carriers upon the line from one town in England to another cannot add to it the trade of a

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(1) *Syers* v. *Brighton Brewry*, 11 L. T. N. S. 560.

(2) *North London Ry. Co.* v *Metropolitan Board of Works*, 1 Joh. 405 ; *Salmon* v. *Randall*, 3 My & Cr. 139 ; *Temple Pier Co.* v. *Metropolitan Board of Work*, 34 L. J. N. S. Ch. 262 ; *Imperial Gas Light* v. *West London Junction Gas Co.* 14 W. R. 1019 ; Joyce Doctrines 297.

(3) *Clarke* v. *Paddington Vestry*, 5 Jur. N. S. 138.

(4) *Colman* v. *Eastern Countries Ry.* 10 Beav 1 ; *Forrest* v. *Manchester Sheffield Ry*, 30 Beav. 40 ; *Thompkinson* v. *South Eastern Ry.* 35 Ch. D. 678.

(5) High on Injunction § 1192.

(6) Vide Kerr on Injunction p. 548.

(7) *Att. Gen.* v. *Great North Ry.* 1 *Drew & S.* 154.

(8) Pom. Eq. Jur. § 1724.

(9) 8 H. L. C. 712.

(10) See also *Att. Gen.* v. *Mersey Ry. Co*, (1907) A. C. 415 ; *Salomons* v. *Laing*, 12 Beav. 339 ; *Bagshaw* v. *Eastern Union Ry*, 2 Mac & G. 389 ; *Cohen* v. *Wilkinson*, 12 Beav. 138.

steam-packet company; and no company can ever abandon the business for which it was established and undertake another (1)".

in *Ashbury Railway Carriage and Iron Co.* v. *Richie* (2), the objects of the company were "to make and sell, or lend on hire, railway carriages and waggons and all kinds of railway plant, and to carry on business of mechanical engineer's and general contractors; to purchase, lease, work and sell mines, minerals, lands and buildings; to purchase and sell, as merchants, timber, coal and other materials; to buy and sell any such materials on commission or as agent; to acquire, purchase, hire, construct or erect work or buildings for the purposes of the company; and to do all such other things as are necessary, contingent, incidental or conducive to all or any of such objects." The company with this memorandum defining its objects had entered into a contract with the plaintiff in relation to the construction of a railway in *Belgium*, and the question raised in the action was, whether the contract was valid. The Exchequer chamber, affirming the decision of the Court of Exchequer, held that the contract was *ultra vires*, but in the Exchequer chamber, L. R. 9 Ex. 249, the judges were evenly divided in opinion. On appeal the House of Lords held that the contract was *ultra vires* the company and therefore altogether void. *Lord Chancellor Cairns* after premising that the subscribers "are to state the objects for which the proposed company is to be established, and the existence, the coming into existence of the company, is to be an existence and to be a coming into existence for those objects and for those objects only, and after referring to the words at the end of section 12, to the effect that 'no alteration shall be made by any company in the conditions contained in its memorandum of association' proceeded as follows:—"Now, my Lords, if that is so—if that is the condition upon which the corporation is established—if that is the purpose for which the corporation is established—it is a mode of incorporation which contains in it both that which is affirmative and that which is negative It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary to state, negatively that nothing shall be done beyond the ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified (3)". "A statutory corporation" said *Lord Shelborne* in the same case, "created by Act of Parliament for a particular purpose, is limited as to all its powers by the purposes of its incorporation, as defined in that Act. The present and all other companies, incorporated by virtue of the Companies Act, 1862, appear to me to be statutory corporations within this principle. The memorandum of association is, under the Act, their fundamental and, except in certain specified particulars, their unalterable law: and they are incorporated only for the objects and purposes expressed in that memorandum. I am unable to see any distinction for this purpose

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(1) Palmer's Company Law § 61.
(2) L. R. 7 H. L. 653.
(3) Palmer's Company Law p. 62.

between statutory corporations under the Railway Acts and statutory corporations under the Companies Act, 1862 . . . . . I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies is to make such contracts rest on an original limitation and circumscription of their powers by the law and for the purposes of their incorporation, than that it depends upon some express or implied prohibition making acts unlawful which otherwise they would have had a legal capacity to do."

In *Att. Gen.* v. *Great Eastern Ry. Co.* (1), the principle laid down in *Ashbury Railway Co.* v. *Riche* (2), was again recognized in the House of Lords, but it was in some degree qualified by the rule laid down by *Lord Shelborne L. C.* and other Law Lords, to the effect that the principle was one to be reasonably, and not unreasonably,' understood and applied, and that whatever may fairly be regarded as incidental or consequential upon those things which the legislature had authorized (that is, those things specified in the memorandum as objects) ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires* (3). *In London County Council* v. *Attorney General* (4), *Lord Halsbury* referring to *Ashbury Railway Co.* v. *Richie* (2), and *Att. Gen* v. *G. E. Railway Co.* (1), said: "I think now it cannot be doubted that those two cases do constitute the law upon the subject. It is impossible to go behind those two cases. They are now part of the law of this country and we must acquiesce in them whether we like them or not."

"It cannot be questioned" said *Lord Herschell* in *Trevor* v. *Whitworth* (5), "since the case of *Ashbury* v. *Richie* (2), that a company cannot employ its funds for the purposes of any transactions which do not come within the objects specified in the memorandum. The capital may, and no doubt, be diminished by expenditure upon and reasonably incidental to, the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting on company are aware and take the risk. But I think they have a right to rely on the capital remaining undiminished by any expenditure outside those limits (6). An act *ultra vires* of the company cannot be ratified by the acquiescence of the share holders (7). But share holders can ratify an act which is *intra vires* as regards the company but *ultra vires* the directors (8)."

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(1) 5 App. Cas. 473.
(2) L. R. 7 H. L. 653.
(3) Palmer's Company Law p. 63; see also *King's bury Collieries Co.*, (1907) 2 Ch. 268; *Att. Gen.* v. *Fulham Corporation*, (1921) 1 Ch. 450; *Deuchar* v. *Gaslight*, (1924) 1 Ch. 428; (1925) A. C. 695.
(4) (1901) A. C. 26=70 L. J. K. B. 77.
(5) 12 App. Cas. 414.
(6) Palmer's Company Law p. 66.
(7) *Simpson* v. *Westminister Palace Hotel*, 8 H. L. C. 712, 717.
(8) *Hould worth* v. *Evans*, L. R. 3 H. L. 263; *Ho Tung* v. *Manon Insurance Co.*, (1902) A. C. 232.

If the company is doing an *ultra vires* act the remedy of a member is by injunction (1). The Directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the share-holders may sue for an injunction to restrain them (2) The Directors of a fire and life Insurance Company are about to engage in marine insurances. Any of the share holders may sue for an injunction to restrain them (3).

Injunction regarding internal management.—The Court very rarely if ever restrain a company from holding a meeting, however useless it may be, as the company has a right to discuss what it pleases (4). A very strong case must be made out to induce the court to stop a meeting of the share-holders, specially on interloculory motion. It is an elementary principle of law relating to Joint Stock Company that the court will not interfere with internal management of companies acting within their powers (5). But the Court will grant an injunction to restrain a company from acting on a resolution which has heen invalidly passed as an extra-ordinary resolution, and which it is proposed to confirm as a special resolution (6). An injunction was refused, where the chairman refused to grant a poll, it being under the circumstances of the case perfectly competent for the plaintiff to summon a fresh meeting and to put the matter complained of right in that way (7). And in another case, the court declined to grant an injunction restraining the company from extending its business in a way authorized by the memorandum of association (8). But a court will restrain a majority from entering into an arrangement for a sale to another company, where such sale will in effect put the assets of the vendor company or a substantial part of them into the pockets of the majority, at the expense of the minority (9). An individual member suing on behalf of himself and others may restrain directors, who have a preponderating number of votes, from abusing their powers (10).

Under Ss. 21 and 57 of the Specific Relief Act, a Limited liability company cannot be restrained by Injunction from dispensing with the services of Managing Agents, even when the contract of service provides that the Managing Agents are only to be removed in a specified manner and after a specified period. Nor can the share-holders be restrained by injunction from considering the question of such removal at an Extra-ordinary General

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(1) *Exparte Fox*, 6 Ch. 176 ; see also *Beman* v. *Rufford*, 1 Sim. N. S. 550 ; *White* v. *Carmarthen*, 1 H. & M. 756 ; *Colman* v- *Eastern Countries*. 10 Beav. 1.

(2) Specific Relief Act s. 54 Ill. (*c*).

(3) *Ibid* Ill. (*d*).

(4) *Mason* v. *Motor Traction Co*, (1905) 1 Ch. 419 ; *Isle of Wight Ry Co*, v. *Tahour din*, 25 Ch. D. 320 ; Stiebel's Company Law p. 396.

(5) *Amai* v. *Pearson*, A. I. R. 1926 Sind. 295.

(6) *Young* v. *South African & Aus'ralian Ex.* (1896) 2 Ch. 268.

(7) *Macdongall* v. *Gardiner*, 1 Ch. D. 13.

(8) *Campbell* v. *Australarian Mutual Provident Society*, 77 L. J. Ch. 116.

(9) *Menier* v. *Hoopers Tel*, 9 Ch. 350 ; *Kerry* v. *Maori*, 14 T. L. R. 402 ; *Consolidated South Rand Mines*, (1909) 1 Ch. 491.

(10) *Alexander* v. *Automatic Teli*(1900) 2 Ch. 56 ; Stiebel's Com. Law p. 398.

meeting. The remedy of the Managing Agents for dismissal, if wrongful lies in a suit for damages (1). In *Mair* v. *Himalaya Tea Company* (2), it was held that the duties of the agent of a limited company being in the nature of a personal service, and as such incapable of being enforced in equity, the court refused to restrain the directors from acting upon or enforcing the resignation of A, whose management and agency was made a prominent condition in the prospectus on the formation of the company, and expressly provided for by the articles of association (3).

The payment of dividends out of the capital stock will be restrained (4). So a corporation will be restrained from paying dividends out of money necessary to make repairs (5). But to entitle a stock-holder to maintain the action, he must show that he is entitled to share in the dividend (6). Nor will a court of equity restrain the payment of a dividend merely upon the ground that the directors have acted in violation of their duties to the public (7). And another company cannot maintain a bill to restrain the payment of a dividend to stock-holders, such other company basing its action on a right of distress for the non-payment of toll charges (8).

Director and other officer may sue as share-holder.—A director or other officer may maintain an action for an accounting and an injunction in the name of the corporation without the authority of the board of trustees, or against its express direction, with the same effect as other share holder (9). And where the board of directors are themselves the wrong-doers, or they refuse to restrain or redress the wrong; or where one board, claiming to be, directors, are the wrong-doers, and another board, claiming and alleging to be the legal directors, refuse to prosecute, a share-holder may file the bill (10). On a similar principle a director of a company can, if qualified, sustain an action in his own name against other directors, on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as a director (11).

Exclusion of Director.—The articles of a company usually provide that a proportion of the directors, usually one-third shall retire by rotation year by year. If a director refuses to act the court will not force him to act, and if on the other hand, a company, by resolution of a general meeting, refuses to employ a director, the court will not force it to do so (12). But

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(1) *Sircar* v. *The Baraboni Coal Co*, 16 C. W. N. 289=13 Ind. Cas. 868.

(2) L. R. 1 Eq. 411.

(3) *Inderwick* v *Snell*, 2 Mac & G. 216=2 H & T. 412.

(4) *Bloxham* v. *Metropolitan Ry Co.* L. R. 3 Ch. 337.

(5) *Dent* v. *London Tram Co.* 1 Am. & Eng. R. R. Cas. 592.

(6) *Carlish* v. *South Eastern Ry*, 14 11 Jur. 535.

(7) *Brown* v. *Monmouthshire Ry. Co.* 13 Beav. 32; *Stevens* v. *South Devon Ry. Co.* 9 Hare, 313.

(8) *South Yorkshire* v. *Great Northern*, 9 Ex. Ch. 55.

(9) Spelling on Injunction and other Extra-ordinary Remedies § 738

(10) *Pond* v. *Vermond R. R.* Co, 12 Blatchf. 280

(11) *Palbrook* v. *Richmond Cons M. Co.*, L. R. 9 Ch. D. 610.

(12) *Harbun* v. *Phillips*, 23 Ch' D. 14; *Bainbridge* v. *Smith*, 21 Ch. D. 461.

it is a different thing altogether when a board of directors excludes one of their body from acting. The Court does not regard such exclusion as the act of the company (even though the directors have, under the articles, the general powers of the company), and it will accordingly, on application of the aggrieved director, grant an injunction restraining the other directors from excluding him from office (1). It will not however restrain the company, and if, after the grant of injunction, the share-holders, by a resolution in general meeting, declare that they do not wish the particular director to act any longer, the court will discharge the injunction and decline to assist him any further by injunction (2).

No Injunction unless iniury to complainant's interest.—While an injunction will always be granted at the suit of members or share-holders of a corporation, to restrain its officers and agents from doing *ultra vires* or illegal acts whereby an injury is threatened to their interest in the corporate enterprise, no matter in what the unwarranted attempt consists, yet not only must a clear excess of corporate power be shown, and an attempt to carry out an enterprise foreign to the purposes for which the corporation was formed, but it must also be shown that if consumated it will affect prejudicially a substantial right of the share-holder as such (3). Nor will equity interfere if by doing so the corporate business could be considerably embarrassed where the damage is slight (4), or where damages at law are sufficient or proper remedy (5), or the wrong is of a temporary character (6). Unless an actual injury results to a private individual himself from the excessive exercise of the powers of a company, he is not entitled to an injunction (7). An injunction will not lie to prevent the board of directors of a corporation from merely allowing as correct a fraudulent account against the corporation (8).

Demand made upon corporation.—In action between members, as well as where the agents or third parties are complained against, it must be made to appear to the court that the corporation is unable or unwilling, in the hands of its constituted government, to protect the complaining member; and the best and only evidence of such unwillingness or inability is a demand upon the managing agents, or evidence of such facts as show a demand to be excusable or unnecessary (9). A suit by individual share-holders of an incorporated company is not maintainable where the plaintiffs have the means of procuring the institution of a suit for the same remedy in the name of the

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(1) *Pulbrook* v. *Richmond*, 9 Ch. D. 610.

(2) *Bainbridge* v. *Smith*, 41 Ch. D. 475; Palmer's Company law p. 198.

(3) Spelling, Priv. Cor. §§ 615, 616.

(4) *Warden of Dover Harbour* v. *Eastern Ry. Co.*, 9 Hare, 497.

(5) *Turner* v. *Blamire*, 1 Drew. 409.

(6) *Standish* v. *Mayor of Liverpool* 1 Drew. 1; see also *Wood* v. *Changcross Ry.* 33 Beav. 290.

(7) *Ware* v. *Regents Canal Co.*, 5 Jur. N. S. 25.

(8) *Rogers* v. *Lafayette Agriculture Works*, 52 Ind. 296; Spelling on injunction § 737.

(9) Spelling on Injunction § 739; see also *Mozley* v. *Alston*, 1 Ph. 800; *Burland* v. *Earle* (1902) A. C. 83, 98; *Campbell* v. *Australian Mutual Society*. 77 L. J. P. C. 117; *Foster* v. *Foster*, (1916) 1 Ch. 548.

corporation ; and this rule applies equally whether the subject of complaint be an act or transaction merely voidable at the discretion of a majority, or absolutely illegal, and incapable of being confirmed (1). The primary and best evidence of the unwillingness of the corporation is proof of a demand upon the proper agents and their refusal (2).

Diligence in seeking Relief—Plaintiff required to be without fault.—To entitle a stock-holder to such preventive relief, he must be diligent in applying for it (3). In *Ware* v. *Regent Canal* (4). *Lord Chancellor* said: "Upon the question whether I am to grant the injunction, I cannot avoid being influenced by the delay which has occurred in the institution of proceedings by the plaintiff, which, though not amounting to absolute proof of acquiescence, yet is calculated to throw considerable doubt upon the reality of his alleged injury, and compels me to weigh the amount of inconvenience which he will sustain by my refusal of this particular remedy against the serious consequences which might result to the company from an order which will oblige them to alter the state and condition of their works (5)." In *Gregory* v. *Patchettt* (6), the court observed : 'Share-holders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is *ultra vires* of the company to which they belong, watching the result—if it be favourable and profitable to themselves, to abide by it and insist on its validity ; but if it prove unfavourable and disastrous, then to institute proceedings to set aside (7)." Thus where a corporation issued preferred stock *ultra vires*, a stock-holder was refused an injunction to restrain payment of privileged dividends, after the stock had reached the hands of a *bona fide* purchaser (8)

Suits by third parties.—A private individual who is not a share-holder is not entitled to an injunction to restrain an act merely *ultra vires*. He has no relation of a contractual nature which gives him any right, nor is he entitled to sue on behalf of the state. Where, however, the *ultra vires* act amounts to a private nuisance, or is a public nuisance which specially injures the individual, or where it interferes with some vested right and is otherwise a subject of equitable jurisdiction injunction will be granted. In accordance with these principles relief has been denied where a rail road trade, although a public nuisance, would not specially injure the plaintiff (9) ; or where road corporation was using material not authorized by its charter (10). Like wise a simple contract creditor has been denied an injunction to restrain the corporation from dealing with assets *ultra vires*, upon an allegation that thereby the funds

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(1) *Mozley* v. *Alslon*, 1 Ph. 790.
(2) Spelling on injuuction § 739
(3) *Ffooks* v. *Southwestern R. Co.*. 1 Sim. & Giff. 142. ; *Gray* v. *Chaplin*, 2 Russ. 126 ; *Gregory* v. *Patchett*, 33 Beav. 595 ; *Kent* v. *Jackson*, 14 Beav. 367.
(4) 3 De. G. & J. 212.
(5) Spelling on Injunction § 746.
(6) 33 Beav. 595, 602,
(7) Pom. Eq. Jur. § 1725.
(8) Pom. Eq. Jur. § 1725.
(9) *Moore* v. *Brooleyn City R. Co.*, 108 N. Y 103.
(10) Pom. Eq. Jur. § 1726.

available for paying debts would be diminished (1). On the other hand, the injunction has been granted where a street rail road was laying its tracks *ultra vires* on the street, to plaintiff's injury (2). The injunction however, will not be granted where the injury is slight (3), or where it will result in public inconvenience (4).

The right of a creditor of a corporation to an injunction to restrain wrongful acts of its agents rests upon a different basis from that except in certain special cases provided by statute. But creditors are always entitled to a judgment, and the ordinary judicial means for enforcing it, upon the maturity of their claims. But they are not entitled to an injunction against a corporation or its agents except upon general principles and in a clear case. To entitle them to extra-ordinary remedy, it must appear that the ordinary remedies at law are inadequate, and that without the specific relief asked for they would suffer irreparable loss. When these facts are made to appear, a Court of equity will administer whatever remedies the exigencies of the case demand, and will enjoin the act complained of, or appoint a receiver to wind up the company's affairs ; in short, make such orders as justice to all the parties warrant (5). It has been held that the devotion of funds and subjection of corporate control to a competing rail road company by the directors being *ultra vires* and contrary to public policy, as tending to create a monopoly, and rendering the charter liable to forfeiture, creditors are entitled to an injunction to restrain the unlawful proceeding, and to an accounting for any loss to themselves occasioned by such acts already consumated (6).

Other suits by share-holders.—Injunction is sometimes an appropriate remedy where the share-holder's individual rights, as distinguished from those of the corporation, are invaded (7).

Company in Liquidation.—Order 39 of the C. P. Code is applicable to proceedings in liquidation but the mere fact that liquidation proceedings are pending will not give a liquidation Court jurisdiction to act under order 39. Before action can be taken, the property must be in dispute in the proceedings. Before the property could be held to be in dispute, some definite proceeding should have been instituted relating to the said property (8).

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(1) *Mitts* v. *Northern Ry*, L. R. 5 Ch. 621.
(2) *Bonaparte* v. *Baltimore*, 23 Att. 784.
(3) Pom. Eq. Jur. § 1726.
(4) *Ware* v. *Regent's Canal Co.*, 3 De. G. & J. 212.
(5) Spelling, Priv. Corp. § 720.
(6) Spelling on Injunction and other Extra-ordinary Remedies § 771.
(7) Pom. Eq. Jur. § 1728.
(8) *De Souza* v. *Bellimoria*, 26 P. L. R. 803=A. I. R. 1926 Lah. 525.

CHAPTER XXXI.

Injunctions relating to Voluntary Associations and Non-Stock Corporations, etc.

General.—The jurisdiction of equity over voluntary associations and corporations not organized for profits is of a very limited character. So long as the organization acts in accordance with its valid rules, equity will not interfere at the suit of members (1); nor will relief be given when proper redress can be obtained within the body itself (2). But when powers are exceeded and rules are disregarded, equity may enjoin at the suit of injured members (3). The ground of the jurisdiction is that there is contract between the organization and its members, for a violation of which an injunction is a proper remedy (4).

Clubs and Societies.—"A club may be defined as a society of persons associated together for social intercourse, for the promotion of politics, sport, art, science, or literature, or for any purpose except the acquisition of gain (5)". A club is not a partnership (6). It was held that a club was not a company within the meaning of the Winding-up Acts of 1848-49, and although it was an association, yet it was not an association within the meaning of the Stat. 12 & 13, Vict. s. 188, that act pointing at associations established for profit (7).

Classification of clubs.—Earl of Halsbury in his *Laws of Eagland* divided the various clubs into the following classes :—

(*i*) Unincorporated members' clubs ;

(*ii*) Unincorporated proprietary clubs ;

(*iii*) Clubs incorporated under the Companies Acts, 1862 to 1907.

(*iv*) Working men's clubs registered under the Friendly Societies Act, 1896.

(*v*) Shop club (8).

But in British India such classification does not hold good. Here on the analogy of the above classification the various not-stock holders' clubs may be divided into the following classes :—

(*i*) Unincorporated members' clubs (9) ;

(*ii*) Unincorporated proprietary clubs (9) ;

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(1) Vide *Hop kinson* v. *Marquis of Exeter*, 5 Eq. 63 ; *Thompson* v. *British Medical Associatton*, (1924) A. C. 764 ; *Burn* v. *National Amalgamated Labourers Union*, (1920) 2 Ch. 364.

(2) *Grand Castle of Golden Eagles* v. *Bridgeton*, 40 Atl. 849.

(3) Pom. Eq. Jur. § 1731 ; see also *Millican* v. *Sullivan*, 4 T.L.R. 204 ; *Baird* v. *Wells*, 44 Ch. D. 661, 670 ; *Harington* v. *Sendell*. (1903) 1 Ch. 926.

(4) Pom. Eq. Jur. § 1731 ; *Hopkins* v. *Marquis of Exeter*, 5 Eq. 63 ; *Harrington* v. *Sendell* (1903) 1 Ch. 921 ; *Thelluson* v. *Viscount Valentia*, (1906) 1 Ch. 480 ; (1907) 2 Ch. 1.

(5) Halsbury's Laws of England Vol. IV. § 860.

(6) Byrne's Law Dictionary.

(7) *St. James Clubs, In re* 2 De. G. M. & G. 383.

(8) Halsbury's Laws of England Vol. IV § 861.

(9) *Michael* v. *Briggs*, 14 M. 362.

(*iii*) Clubs registered under the Societies Registration Act, 1860 and
(*iv*) Trade Unions.

Members' club.—An unincorporated members' club is a society of persons each of whom contributes to the funds out of which the expenses of conducting the society are paid. Such contributions are generally made by means of entrance fees or subscriptions or both (1). These clubs are entirely guided by the rules framed for the club. If the rules of a club are contained in a book kept by the master of the club and accessible to the members, every member of the club must be taken to be acquainted with them (2). The master of a club is the proper person to sue one of its members for the arrears of subscriptions; and it is one of its rules that every member is to be taken as continuing to be so, unless he gives previous notice of his intention to discontinue and being a member he is liable to be sued for his arrears of subscription, unless he can prove that he gave notice (3).

Management of clubs.—The entire management of the club and its property is in the hands of the members. The business of the club is either conducted by them jointly in general meeting, or, as is usually the case, delegated by them to committees in accordance with the rules (4). The rights and duties of the members of such a club as between themselves, and the internal arrangements for carrying it on, depend upon the rules (5). Subject to any rule to the contrary, the property and funds of the club belong to the members for the time being jointly in equal shares (6). No portion of the property may, however, be alienated by the club except in the ordinary course of the administration of its affairs, and for purposes incidental to its objects, without the consent of every member (7). Any member of a voluntary society who has paid his subscription for the current year and owes no further duties to his fellow-members, may in the absence of any provision in the rules of the society to the contrary, resign his membership at any time by communicating to the society his intention to resign, and such resignation does not require acceptance (8). Where a club was formed, subject to the following rules, viz., that the entrance fee or admission fee should be ten guineas and the annual subscription five guineas; and if the subscription was not paid within a certain limited period, the defaulter should cease to be a member; that there should be a committee to manage the affairs of the club, to be chosen at a general meeting; and that members should discharge their club bills daily, the steward being authorised, in default of payment on request, to refuse to continue to supply to them: *Held*, that the members of the club, merely as such, were not liable for debts incurred by the committee for work done or goods

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(1) Halsbury Vol. IV § 862; *Todd* v. *Emely*, 7 M. & W. 427.
(2) *Ragget* v. *Musgrave*, 2 Car. & P. 556.
(3) *Ragget* v. *Musgrave*, 2 Car. & P. 556.
(4) Halsbury Vol. IV. § 863.
(5) *Ibid.*
(6) *Ibid.*
(7) *Murray* v. *Johnstone*, (1896) 23 R. (Ct. of Sess.) 981; cited in Halsbury Vol. IV § 863.
(8) *Finch* v. *Oakes*, 65 L. J. Ch. 324=(1896) 1 Ch. 409=73 L. T. 716.

supplied for the use of the club , for, that the committee had no authority to pledge the personal credit of the members (1). In *Michael* v. *Briggs* (2), the Court observed : "The question is whether an action to recover the price of goods supplied to the member of a club or on his responsibility can be brought in the name of the Secretary of the club The club is not a proprietary club such as was in question in *Ragget* v. *Musgrave* (3) and *Ragget* v. *Bishop* (4), but a mere association of gentlemen for social purposes managing its affairs by a committee and a secretary. The goods, the price of which is sought to recover, belonged to the club, and not to the secretary ; and therefore it is not to him that the price is due. It may be convenient that the secretary should collect the moneys due to the club, and he may have authority to do so but if the money is not due on a contract made with him, an arrangement that he should sue cannot be recognized as giving him a right of action (5)."

The members of a club, who from the nature of the case are a perpetually changing body, are not liable, in the absence of any rule imposing such liability, to pay to the funds of the society, or to the trustees, or to any one else, any money beyond the subscriptions required by the rules of the club to be paid so long as they remain members (6).

Proprietary Club.—An incorporated proprietary club is of an entirely different nature. The property and funds of the club belong to the proprietor, who usually conduct it with a view to profit. The members, in consideration of payment by them to the proprietor of entrance fees and subscriptions, are entitled to make such use of the premises and property, and to exercise such other rights and privileges, as the contract between them and the proprietor justifies. In relation to the property of the club, the members are in the position of licencees ; and if wrongfully excluded from the privileges for which they have paid, their only remedy is an action against the proprietor for damages for breach of contract (7).

Alteration of Rules in unincorporated members' club.—Alterations in the rules of an incorporated members' club, is only allowable where there is such a provision in the original rules (8). One of the rules of a club provided that a general meeting might alter any of the standing rules affecting the general interests of the club, provided this was done with certain formalities and by a certain majority. *Held* that the rule providing for the expulsion of members who should be guilty of conduct injurious to the interests of the

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(1) *Flemyng* v. *Hector*, 2 M. & W. 172 ; see also *St. Jame's Club, In re*, 2 De. G. M. & G. 383.

(2) 14 M. 362.

(3) 2 C. & P. 556.

(4) 2 C. & P. 343.

(5) *Evans* v. *Hooper*, L. R. 1 Q. B. D. 45 ; *Gray* v. *Pearson*, L. R. 5 C. P. 568 ; see also *Todd* v. *Emily*, 7 M. & W. 427 ; *Queensbury* 1(*Duke*) v. *Cullen*, 1 Bro. P. C. 396 ; *Lee* v. *Bisset*, 4 W. R. 233.

(6) *Wise* v. *Perpetual Trustees Co.*, (1903) A. C. 139=72 L. J. P. C. 31.

(7) Halsbury Vol. IV § 865.

(8) *Harrington* v. *Sendall*, (1903) 1 Ch. 921.

club was within the regulation, and could be validly passed by a general meeting (1).

Expulsion of members—A power of expulsion of members must be exercised in strict conformity with the rules by which it is given, otherwise the purported expulsion will be inoperative (2). The foundation of the jurisdiction of the court to prevent a member of a voluntary association from being improperly expelled is the right of property vested in such member of which he is deprived (3). So in the case of a proprietary club the members of which have no right of property, but merely a right to use the club premises on payment of subscription, the court will not restrain by injunction the expulsion of a member by the committee, although the committee may have been invalidly constituted, and may not have acted in accordance with the rules (4). Where a club was a proprietary club, that is a club where a person, not a member took the fees and subscriptions and provided what was requisite for the use of members.—Semble, that the court had no jurisdiction to restrain the plaintiff's expulsion as he did not retain an interest in property (5). The social character of a club is its most distinctive feature, and if the requisite majority of its members in the *bona fide* exercise of a discretion given to them by the regulations, expel a member from the club, a court of equity will not consider whether that discretion was rightly or wrongly exercised and will not go into the ctrcumstances of the case further than is necessary to satisfy itself that there was not a merely capricious or an arbitrary exercise of the discretion (6). Where by the rules of a club, the committee is empowered to expel any member whose conduct shall in the opinion of the committee, be injurious to the character and interests of the club, and the committee exercises its powers *bona fide*, the court of chancery will not interfere to reinstate the expelled member, and the court has no jurisdiction to interfere in such a case (7). The committee of a club had, by the rules, a power to expel any member whose conduct they thought injurious to the character and interests of the club. One of the members wrote to the committee a letter which they considered discourteous, and as they felt they could not pass it over without weakening their authority, and that would be highly injurious to the interests of the club, they expelled him. The member filed a bill to have his name restored to the list of members:—*Held* on the facts, that the power had been exercised *bona fide* and not capriciously and therefore the court could not interfere (8).

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(1) *Dawkins* v. *Antrobus*, 17 Ch. D. 615=49 L. T. 557.

(2) *Innes* v. *Wylie*, 1 Car. & Ker. 257; Halsbury Vol. IV § 890.

(3) *Rigby* v. *Connol*, 14 Ch. D. 482.

(4) *Baird* v. *Wells*, 59 L. J. Ch. 673 =44 Ch. D. 661.

(5) *Lyttleton* v. *Blackburn*, 45 L. J. Ch. 212.

(6) *Hopkins* v. *Exeter* (*Marquis*), 37 L. J. Ch. 173=L. R. 5 Eq. 63.

(7) *Richardson Gardner* v. *Freemantle*, 24 L. T. 81=19 W. R. 56.

(8) *Lyttle ton* v. *Blackburn*, 45 L. J. Ch. 219=33 L. T. 641.

A rule empowered a majority of two-thirds of the committee of a club to expel any member whose conduct they deemed injurious to the character and interest of the club. The plaintiff a member had at a club meeting protested against G's re-admission as being contrary to the rules, and designated the committee as a 'pocket borough' and on another evening (30th November, 1881) the plaintiff in the same term in the club-house stated also that "the committee could propose and alter any rules they deemed fit." Some of the plaintiff's remarks were made at the bar of the club. The committee, by a majority of two-thirds, passed a resolution that the plaintiff's conduct on the 30th November, 1881, and in the club generally, in publicly disparaging the committee before the strangers and the club servants, was injurious to the character and interests of the club, and that the plaintiff be requested to resign. The majority included G without whose vote it would not have been complete. The plaintiff moved to restrain the committee from expelling him, alleging that the resolution was soly the result of ill-will towards him on the part of some of the committee, and particularly of G, and not of *bona-fide* regard for the interests of the club. The Court declined to interfere, holding that there was nothing to show that the resolution of the committee was not *bona fide*, the reason given not being of itself evidence of malice (1). So the court will not interfere against the decision of the members of a club professing to act under their rules, unless it can be shown either that the rules are contrary to natural justice, or that what has been done is contray to the rules, or that there has been *mala fides* or malice in arriving at the decision (2) The fact that a decision is unreasonable may be a strong evidence of malice, but is not conclusive, and may be rebutted by evidence of *bona fides*. It seems that even if the decision of the club had been erroneous but given *bona fide* and in accordance with the rules, the court would not have interfered (3).

So courts of equity have often been called upon to enjoin the illegal expulsion of members of unincorporated associations and benevolent corporations. Persons becoming members of these organizations usually subscribe to and are bound by certain bye laws; and so long as the association keeps strictly within its rules, the court will not generally interfere. The cases calling for the aid of equity arise when the rules are exceeded, and in rare cases when the rules are themselves illegal (4). It is generally asserted to be a fundamental principle of equity that only substantial rights of property will be protected. Therefore, it would seem that an injunction should be granted in cases of this kind only where some such right is involved (5). In all these cases the suit in law or equity has been sustained upon the ground that the relations of a member to such society were contractual, and, if the

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(1) *Lambert* v. *Addison*, 46 L. T. 20.
(2) *Dawkins* v. *Antrobus*, 17 Ch. D. 615=44 L. T. 657.
(3) *Ibid.*
(4) Pom. Eq. Jur. § 1732.
(5) *Ibid.*

relation had been severed in violation of the law regulating membership enacted by themselves, that there was a breach of contract (1). Thus it has been said that "in every proceeding before a club, society or association, having for its object the expulsion of a member, the member is entitled to be fully and fairly informed of the charge, and to be fully and fairly heard ; " and if such hearing is not allowed, he is entitled to an injunction (2). In *Harrington* v. *Sendell* (3), expulsion was enjoined, of a member who violated a resolution raising the annual dues, which resolution was not authorized by the rules governing the club. In the above case *Joyce J.* in delivering the judgment said : "The question in this case is whether the majority of the members of the Oxford and Cambridge University club assembled in general meeting have power to alter the rule prescribing the annual subscription and to raise the amount, so as in effect to deprive a dissentient minority of their privileges and exclude them from the clubs unless they submit to pay such increased subscription in every future year. When the plaintiff became a member he thereby, as provided by the introductory clause to the rules on payment of his entrace fee and subscription, became entitled to the benefits and privileges of the club, and may be taken to have declared his submission to the then rules and regulations. I say 'the then rules and regulations' because the words are not 'such rules and regulations as may be made from time to time,' but 'the following rules and regulations.' In other words, he agreed to be bound by the written contract that is to be found by the rules. Unfortunately, as I think, these rules did not, nor indeed, do the present rules, contain any provision for the making of amendments or alterations from time to time.

"But it is contended that there must be an inherent power in general meetings, by a numerical majority of the members for the time being present to alter the rules either in any manner they may think fit, or at all events, within certain limits that have not been precisely defined. For this proposition, however, nothing that can really be called an authority has been cited. Indeed, so far as there can be said to be authority upon the subject, and, as I think, upon principle, there is no more inherent authority in the members of the club by a majority in general meeting to alter the rules, against the wishes of the minority than there is in the members of any other society or association the constitution of which depends upon and is matter of contract—there being as there is a written contract expressing the terms upon which the members associate together. In my opinion, there is no power in the majority of the members to alter those terms and the constitution of the club as they may think fit, when such a power forms no part of the written contract by which the members are bound."

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(1) *Nance* v. *Busby*, 91 Tm. 303.

(2) *Fishery* v. *Keane*, L. R. 11 Ch. D. 353 ; *Labouchere* v. *Earl* of *Warncliff*, 13 Ch D. 346 ; *Lambert* v. *Addison*, 46 L. T. N. S. 20 ; *Andrews* v. *Mitchell*, (1905) A. C. 78 ; *Wayman* v. *Perseverence Lodge of Cambridge*, (1917) 1 K. B. 677=86 L. J. K B. 243 ; *Parr* v. *Warwick shire Miners*, (1912) 2 Ch. 379=81 L. J. Ch. 744 ; *Parr* v. *Lancashere etc.*, 82 L. J. Ch. 196.

(3) (1903) 1 Ch. 921.

Expulsion must be after full enquiry and strict adherence of Rules.—The Committee of a club, being a *quasi*-judicial tribunal, are bound, in proceeding under their rules against a member of the club for alleged misconduct, to act according to the ordinary principles of justice, and are not to convict him of an offence warranting his expulsion from the club without giving him due notice of the intention to proceed against him, and affording him an opportunity of defending or palliating his conduct; and the Court will, at the instance of any member so proceeded against, declare any resolution passed by the committee without previous notice to him, based upon *ex parte* evidence, and purporting to expel him from the club, to be null and void, and will restrain the committee by injunction from interfering by virtue of such a resolution, with his rights of membership (1). The rules of a club provided that in case the conduct of any member should, in the opinion of the committee, after inquiry, be injurious to the welfare and interest of the club, the Committee should call upon him to resign, and in the event of his refusing to do so, should call a general meeting, which was to be called on giving a fortnight's notice, at which it should be competent for the votes of two third's of those present to expel such member. The committee having called on the plaintiff, a member of the club, to resign, on the alleged ground that his conduct was injurious to its interests and the plaintiff having refused to do so, a general meeting was summoned by notices issued on the 1st November for the 14th of November, when 117 members were present, of whom 115 voted 77 in favour of a resolution for expelling the plaintiff, and 38 against it. The resolution was declared to be carried. On a motion to restrain the committee from interfering with the enjoyment by the plaintiff of the use and benefit of the club:—*Held* on the facts of the case, that the committee had acted without full enquiry and without giving the plaintiff notice of any definite charge; that the general meeting was summoned without proper notice; that the resolution was carried by an insufficient majority; and that the plaintiff was entitled to an injunction (2). Any society may make any rules by which the admission and expulsion of its members are to be regulated, and the members must conform to those rules, but where there is not any property in which all the members of the society have a joint interest, and where there is no rule as to expulsion, the majority may, by resolution, remove any member; but before that is done, notice must be given to him, and an opportunity given to him for making the defence (3).

The plaintiff claimed a declaration that a resolution expelling him from a club of which he was a member was null and void, and also an injunction restraining the defendants as members of the committee from interfering with him as a member of the club. *Held*, that the plaintiff was entitled to the

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(1) *Fisher* v. *Keane*, 49 L. J. Ch. 11=11 Ch. D. 353=41 L. T. 335; see also *Thellusson* v. *Viscount Valentia*, (1906) 1 Ch. 480; (1907) 2 Ch. 1; *Morgan* v. *Driscoll*, 38 T. L. R. 251.

(2) *Labouchere* v. *Wharncliffe* (*Earl*) 13 Ch. D. 346=41 L. T. 638; *Murphy* v. *Synnott* (1925) N. I. 14.

(3) *Innes* v. *Wylie*, 1 Car. & K. 257.

declaration and injunction claimed, inasmuch as no notice was given to him of the charge preferred against him and upon which the defendants purported to act in expelling them, and therefore his expulsion was in those circumstances contrary to natural justice (1).

By a clause in the charter of an institute it was provided that if any person while he was member of the institute failed to pay any subscription for six months after the same had become due he should be liable to be excluded from membership by a resolution of the council passed at a meeting specially convened for that purpose "the member having first had an opportunity of being heard" and that notice of such exclusion should be sent to the person affected thereby. In 1903 the plaintiff who was a member of the institute, failed through over sight to pay his annual subscription which fell due in January of that year. Notices were issued in September, 1903,a nd on a subsequent occasion, given to the plaintiff by letters sent through the post office to the plaintiff's address as registered in the books of the institute, calling attention to such failure. These letters were, however, returned through the Dead Letter office, as the plaintiff had changed his address, but he had omitted to give information to the institute or to the Post office of such change. In October 1903, the Council of the institute passed a resolution excluding the plaintiff from membership:—*Held* that the plaintiff had solely by reason of his own negligence not received notice of the proposed meeting of the Council at which he was to be excluded from membership; that communication through the Post office must have been within the contemplation of the parties in respect to all matters regulating their contractual rights; and that there was nothing more that the council were bound to do in order to give the plaintiff an opportunity of being heard (2).

Where nothing is done contrary to natural justice the Court ought not in dealing with the case of a club to be so matriculous in scrutinising formalities and technicalities as in dealing with the affairs of a business company (3). The executive committee of a club, which by the rules had the power of expulsion, after a committee erased the name of the plaintiff from the list of members of the club upon a complaint of her having made accusations against another member and she was refused admission to the club premises. One of the members of the committee who was within summoning distance was not given notice or summoned to the meeting on the ground that she was only a nominal member, having previously intimated that she would be unable to attend committee meetings and not having in fact attended any:—*Held* that the meeting of the committee was not properly constituted and the plaintiff was entitled to damages (4).

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(1) *Gray* v. *Allison*, 25 T. L. R. 531.

(2) *James* v. *Institute of Chartered Accountants*, 98 L. T. 225=24 T. L. R. 27 C. A.

(3) *Young* v. *Ladies' Imperial Club Ltd.* (1920) 1 K. B. 81=36 T. L. R. 70=148 L. T. Jo. 177, reversed (1920) 2 K. B. 523. Vide next case.

(4) *Young* v. *Ladies' Imperial Club*, (1920) 2 K. B. 523=89 L. J. K. B. 563=123 L. T. 191; *D' Aray* v. *Adamson*, 29 T. L. R. 367.

G, having been expelled from a club by the Committee on the ground that he had published a certain pamphiet which was considered to be a libel by the committee, sued the members of the committee for damages and to have his name replaced on the list of members. It was proved that in considering G's conduct with reference to the publication of the pamphlet, the committee took into consideration certain letters which G had written to certain members of the committee and that his expulsion was partly for printing the pamphlet and partly for writing the letters; *Held* that the decision of the committee was arrived at *bona fide*, the court had no right to decide whether the pamphlet was or was not a libel. *Held*, further as G had no opportunity for defending himself on the charge of writing the letters, his expulsion was illegal (1). In the above case *Collins C. J.* in delivering the judgment said: "We have now to consider the other objections taken by the appellant, and it must be borne in mind that we have no right to sit as a Court of Appeal upon the decision of the members of a Club duly assembled. We refrain from passing any opinion whether or not the preface of the pamplet contained a libel. If two thirds of the committee came honestly to the conclusion that the publication and circulation of that pamphlet was injurious to the character of the club or likely to disturb the harmony of the club, they had the power to decide whether the offender, *i.e.*, the publisher and circulator of that pamphlet, merited expulsion, and we are far from saying that it is impossible that reasonable men could not come to the conclusion at which the committee arrive in this case, and we have no doubt that they acted as they believed in the interest of the club and in perfect good faith (2). But before they could expel they must hear the accused. 'No proceeding' says *Lord Denman* in the case of *Innes* v. *Wylie* (3) 'in the nature of judicial proceeding can be valid unless the party charged is told he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so.' The late *Chief Baron Kelly* in *Wood* v. *Wood* (4) laid down this rule of law thus: 'The committee are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem* that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence.' This rule is not confined to strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate 'upon matters involving civil consequences to individuals.' And again in *Dawkins* v. *Antrobus* (5), *Brett L. J.* says: "If a decision is come to depriving a gentleman of his position on snch a charge as must be made out here, *viz* that he has been guilty of conduct injurious to the character and interest of the club in my opinion there would be a denial of natural

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(1) *Gompertz* v. *Goldingham*, 9 M. 319.

(2) See also *Krishna Sami* v. *Virasami*, 10 M. 133.

(3) 1 C. & K. 263.

(4) L. R. 9 Ex. 196.

(5) 17 Ch. D. 615.

justice if a decision was come to without his having an opportunity of being heard.' We are of opinion that *Mr. Gompertz* had ample notice of the charge made against him with regard to publishing and circulating the pamphlet..... The evidence of these three gentlemen makes it clear to us that the appellant was expelled partly for printing and circulating the pamphlet and partly for writing these letters to *Major Chard* and *Colonel Smith*, and there is no evidence to show that his attention was directed to anything but the pamphlet. The learned counsel for the respondent drew our attention to the fact that the appellant knew that his letter to *Major Chard* was laid before the committee, but that is not enough. Now bearing in mind the rule of law. so clearly laid down in *Innes* v. *Wylie* (1) by *Lord Denman C. J.* and in *Wood* v. *Wood* (2), by *Kelley C. B.*, we have come to the conclusion that the appellant had no opportunity of defending himself against this particular charge. Indeed, as far as we can judge, he did not know that the writing of these letters was a part of the charge against him. We believe that the committee were acting according to the best of their judgement, but they have made a mistake, and they have expelled the appellant from the Bellary Club, partly on a charge which, if they had considered the matter, they could have found, had never been brought to the appellant's notice. Upon this ground and this ground alone, we are of opinion that the appellant is entitled to succeed in his appeal. We therefore reverse the decision of the lower Court and declare that the appellant was wrongfu'ly expelled by the defendants and we order the defendants to restore his name to the list of members of the Bellary Club".

Parties to a suit against unincorporated members' club.—Rule 1 of Order XXIX of the Civil Procedure Code lays down: "In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case." But this rule applies only to corporations strictly so called *i.e.*, to bodies authorized by law to act as a person in law, and not to unincorporated bodies or associations of men. An officer of an unincorporated association can file a suit on behalf of the association only with special permission of the Court under Order 1, rule 8 (3). In a suit by an unregistered and unincorporated society the names of the members of the company must be disclosed: If this is not done, and if the society is neither a corporation nor a company authorized to sue or be sued in the name of an officer or of a trustee, so as to make the provisions of the Code of Civil Procedure, Order XXIX, rule 1, applicable, the plaint is a bad plaint (4). The reason of the rule is that the rights and privileges of a corporation, "do not attach to any bodies of persons unincor-

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(1) 1 C & K. 263.
(2) L. R. 9 Ex. 196.
(1) *Ma Gyi* v. *Pat Lon*, 9 Bur. L. T. 247 = 8 Ind. Cas. 572; see also *Hriday Nath* v. *Akhil Chandra*, 49 C. L. J. 445.
(4) *Panchaiti* v. *Gansi*, 20 A. 167; see also, *Kailash* v. *Ellis*, 8 W. R. 43.

porated, however connected they may be in point of social position, or however united by express compact, though a voluntary society of individuals should unite together by mutual agreement for common purposes, should provide a common stock by subscription, and should subject themselves to laws of its own creation for the government of their society, yet all this will not entitle them to the privilege of suing or being sued in the social capacity (1)." The Secretary of a Club could not, unless he specially accepted a personal liability, be sued personally on a contract entered into on behalf of the members of a club by his predecessor in the office; nor could the members of a club collectively be sued through their secretary as their representative (2).

Expulsion from Religious Organization.—In England and in America an injunction will not ordinarily issue to restrain expulsion from a church or religious organization, for generally there is no property right involved (3), "Church relationship stands upon an altogether higher plane, and church membership is not to be compared to that resulting from connection with mere human associations for profit, pleasure or culture The church undertakes to deal only with the spiritual state of man. It does not appeal to our purely human and temporal interests . . . . . No property rights of a personal kind depend upon membership. No pecuniary right, or civil right of any character" is affected by expulsion (4). There, ordinarily a minister cannot be enjoined from striking off plaintiff's name from the roll of church communicants (5). But a Court of equity interferes in cases of fraud. Where the plaintiff belonged to an organization whose rules permitted expulsion without trial but where plaintiff showed that a number of members had been expelled for the purpose of effecting a disposition of the church property, the Court interfered because of fraud (6).

In *A. G.* v. *David Hatan*, (7), the plaintiffs and the defendants were members of the *Beni Isreallite* community worshipping at a certain synagogue in Bombay. The administration of the synagogue and of the funds was vested in a *mukadam* or headman and four managers, a treasurer, and a crier. The *mukadam* succeeded to the office by family right according to the custom of the community, but in matters of management he was bound to keep within his powers, which were co-ordinate with those of his collegues. The first defendant was the *mukadam*, the second defendant was the *hazan* or beadle, and the third defendant was the a *samost* or crier. The first defendant has succeeded to the office of *mukadam* as the nearest lineal descendent of the founder of the *synagogue*. The second defendant was appointed by the community, and it did not appear on what terms he held office: The third

(1) Stephen's Commentaries Vol III, p. 17; see *Panchati* v. *Gansi*, 20 A. 167.
(2) *N. W. P. Club* v. *Sadullah*, 20 A. 497.
(3) Pom. Eq. Jur. § 1734.
(4) *Nance* v. *Busby*, 91 Tenn. 303; Pom. Eq. Jur. § 1734.
(5) *Wallker* v. *Howell*, 45 N. Y. Sup. 790.
(6) *Hundryx* v. *People's United Church*, 42 Wash. 336.
(7) 11 B. 185.

defendant was merely a paid official of a subordinate character. Disputes arose in the community, which became divided into two parties, to one of which the three defendants belonged. At a meeting of the community held on the 28th October 1884, which was attended by a majority of the community, resolutions were passed, dismissing all three defendants from office; and their dismissal was formally communicated to them by a letter dated the 30th October. It did not appear that they had been given any notice that the question of their dimissal was to be discussed at the meeting. They had received only the ordinary notice that a meeting was to be held. The defendants refused to recognize the authority of the resolutions passed at the meeting of the 28th October, and the plaintiffs, accordingly, filed a suit praying for a declaration that the defendants did not occupy any official position in the synagogue, and for the recovery of certain property in their hands: Held that the defendants Nos. 1 and 2 had not been duly dismissed. They could not be dismissed without an opportunity of making their defence and explaining their conduct, and they had been given no notice that their conduct and their dismissal were to be discussed at the meeting of the 28th October. Where a domestic tribunal has heen appointed for the regulation of the affairs of a community, the Court has no jurisdiction to interfere with its decision if it acts within the scope of its authority and in a manner consonant with the ordinary principles of justice (1).

In *Jagannath Churn* v. *Akilia Dassia* (2), the plaintiffs were some of the *bhaktas* or members of a *satra* or religious fraternity, and they claimed the right to enter the *kirtanghar* or prayer-hall, and perform their prayers and other rites therein. They alleged in the plaint that the management of the affairs of the *satra*, 'including the distribution of *honorarium* and offerings and the appointment and dismissal of the *satria*,' or head of the fraternity, was vested in the *samuha*, or entire body of *bhoktas*, and that they and their fore fathers had been from generation to generation in receipt of the *honorarium* and offerings, and had been performing the rites and ceremonies according to the custom of the *satra* until they had been obstructed and interfered with by the defendants in such performance and had been expelled from the *kirtenghar*. The prayer of the plaint was that the plaintiffs' right to enter the *kirtenghar* to perform the said rites and ceremonies and to receive their share of the offerings might be established; that the *kirtenghar* from which they had been dispossessed, might be made over to them for the purpose of such performance, and that a prohibitory injunction might be granted enjoining the defendants not to obstruct them in such performance. The defendants, who were the *satria* and the other members of the fraternity forming the majority

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(1) *A. G. of Bombay* v. *David*, 11 B. 185; see also *Long* v. *Bishop of Cape Town*, 1 Moore P. C. N. S. 461; *Brown* v. *Cure of Montreal*, L. R. 6 P. C. 208; *Inderwick* v. *Snell*, 2 Mac. & G. 216; *Hopkins* v. *Marquis of Exeter*, L. R. 5 Eq. 63; *Queen* v. *Sadler Co.*, 10 H. L. C. 404.

(2) 21 C. 463.

of the entire body of *bhaktas*, denied the rights claimed by the plaintiffs as *bhaktas* and stated that the *statra* was governed by the *satria* and a select body of *bhaktas*, that the plaintiff No. 1 had received *mantra* or spiritual initiation from one *Saruram*, contrary to the rules of the fraternity, and had been convicted moreover of a criminal offence, and a fine of Rs. 100 has accordingly been imposed on him and his partizans by the governing body of the *satra*, whose orders they had disobeyed by refusing to pay the fine and they had therefore, been excluded from entering the *kirtenghar*; and the defendants contended that the Civil Court had no jurisdiction in the matter and that the suit was therefore not maintainable. The lower Courts held that the Civil Court could entertain the suit, and they made decrees practically ordering the admission of the plaintiffs to the *kirtenghar* on their complying with the order imposing the fine. On appeal to the High Court, the Court observed: "We do not think that the appellants are entitled to succeed upon the first point. Having regard to the prayer for possession of the *kirtenghar* and to the allegations made in the plaint about the position and privileges of the *bhaktas* and their rights to *honorarium* and offerings, and to the defendants' denial of those rights and of the plaintiffs' right to enter the *kirtenghar*, we think the suit must be regarded as one in which right to property and to an office within the meaning of the Explanation to section 11 of the Code of Civil Procedure is contested and that being so, the suit must be regarded as a suit of a civil nature and cognizable by the Civil Courts. That similar suits have been entertained by our Courts will appear from *Debendra Nath Mullick* v. *Odit Churn Mullick* (1), *Anandrav Bhiakji Phadke* v. *Shankar Daji Charya* (2) and *Vengamuthu* v. *Pandaveswara Gurukul* (3). It was argued that the *honorarium* and offerings were of trifling and merely nominal value, and that the fact of the suit involving a dispute as to these was not, therefore sufficient to make it a suit of a civil nature; and in support of this argument *Narayan Vithi Parab* v. *Krishnaji Sadashib* (4), was referred to. But there is no finding as to the value of the *honorarium* and offerings, nor were the Courts below called upon to arrive at any finding on this point when no objection was raised before them that the suit was not cognizable by the Civil Courts.

"In support of the second contention of the appellants, namely, that even if the suit was of a civil nature, within the meaning of section 11 of the Civil Procedure Code, it was not competent to the Civil Courts to interfere with the decision of the majority of the *bhakats*, we are referred to *Sudharam Patar* v. *Sudharam* (5), *Advocate General of Bombay* v. *Haim Devakar* (6), *Hopkinson* v. *Marquis of Exeter* (7) and *Dawkins* v. *Antrobus* (8).

"Now in the first place we do not think that the rule laid down in these cases is applicable to the present case. The English cases cited are cases of

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(1) 3 C. 390.
(2) 7 B. 323.
(3) 6 M. 151.
(4) 10 B. 233.
(5) 3 B. L. R. A. C. 91 = 11 W. R. 457.
(6) 11 B. 185.
(7) L. R. 5 Eq. 63.
(8) L. R. 17 Ch. D. 615.

expulsion from clubs or voluntary associations which people are free to join or not, and where any one who joins any such an association may well be taken to be bound not only by its general rules, but also by any special orders made by its members with regard to him in accordance with those rules. The case, however, is very different with regard to castes or religious fraternities like the one before us. As a rule, people do not join them as a matter of choice; they belong to them as a matter of necessity; they are born in their respective castes or sects; and the consequences of exclusion from caste or sect are far more serious and affect a person's status in a far greater degree than those of expulsion from a club. The protection of Courts of Justice, even though presided over by Judges of a different religious persuation, against expulsion seems therefore, to be much more needed in the one case then in the other. The case of *Sudharam Pillai* v. *Sudharam* (1), is expressly stated to be one in which the exclusion complained of was not one from caste, but only from a *samaj* or association of a purely social nature, whereas the fraternity from which exclusion is complained of here is altogether of a different character. The Bombay case [*Advocate General of Bombay* v. *Haim Devakar* (2)] is no doubt more in point, but as it is opposed to the decision on this side of India [see *Gopal Gurain* v. *Gurain* (3) and *Ramkant* v. *Ram Lochan* (4)] with all respect for the learned Judge who decided that case, we must follow, as we are bound to do, the decisions of our own Court in preference to it"

But in a later Calcutta case (5), the above case has been explained and it has been held that suits as to religious rites and ceremonies, which involve no question of the right to property or to an office are not suits of a civil nature within the meaning of s. 11 of the Civil Procedure Code and are not within the jurisdiction of the Civil Court (6). A suit for a declaration of a right to recite *stotram* on a certain occasion in a temple and for an injunction to restrain the defendant, from preventing the plaintiff from doing so is a suit of a civil nature and is cognizable in a Civil Court (7). A superintendent of a mosque may also be restrained by mosque goers from using the mosque for any purpose outside its scope of dedication (8).

Plaintiffs sued for an injunction to prevent the defendant from interfering with their right to present certain persons at a certain festival in a certain temple a crown and water. The lower courts found that plaintiffs possessed the right claimed and granted the injunction. *Held* that the suit was cognizable by a Civil Court under s. 11 of the Code of Civil Procedure, and the

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(1) 3 B. L. R. A. C. 91=11 W. R. 457.
(2) 11 B. 185.
(3) 7 W. R. 299.
(4) S. D. A. 1859 p. 535.
(5) *Lokenath Missra* v. *Dasarathi Tewari*, 32 C. 1072; see also *Nagia Bathudu* v. *Muthacharry*, 11 M. L. J. 215.
(6) See also *Waman* v. *Valu*, 44 B. 410=56 Ind. Cas. 419; *Kadir Velu* v. *Nanjundyar*, 35 Ind. Cas. 88; *Thirumalai* v. *Srinivasam*, 31 M. L. J. 758; *Anand Rao* v. *Shankar*, 7 B. 323; *Krishnaswami* v *Krishnama*, 5 M. 313; *Vengamuthu* v. *Pandeswara*, 6 M. 151.
(7) *Bashiakar* v. *Venkata*, 20 M. L. J. 530=8 M. L. T. 137; see also *Laxman* v. *Vishram*, 76 Ind. Cas 629; but see 28 M. 23; 28 Ind. Cas. 604.
(8) *Abdul Rahaman* v. *Yar Muhammad*, 3 A. 636.

injunction was properly granted (1). In deliveriug the judgment in the above case the court observed : "The ordinary test is whether there is any specific pecuniary benefit attached to the office claimable in the nature of wages however small that benefit may be. If there be, the right to such benefit is a question which the courts are bound to entertain—*Nara Simha Chariar* v. *Sri Krishna Tata Chariar* (2). The same principle was approved by the Privy Council in *Krishnama* v. *Krishna Sami* (3).....It was next urged that the suit is not one in which a perpetual injunction could properly be granted. It is found, however, that the plaintiffs have a status in the temple as holders of a certain hereditary office, and when that status is violated, they are entitled to be protected by such processual remedies as are available in the circumstances of the case, even though no legal dues or damages are payable to them."

Societies registered under the Societies' Registration Act, 1860.—Any seven or more persons associated for any literary, scientific or charitable purpose, or for any such purpose as is described in section 20 of the Act (4), may, by subscribing their names to a memorandum of association, and filing the same with the Registrar of Joint Stock Companies, form themselves into a society under the Act (5). The property moveable and immoveable, belonging to a society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society, and in all proceedings, civil or criminal, may be described as the property of the governing body of such society by their title (6). Every society registered under this Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulation of the society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion : provided that it shall be competent for any person having a claim or demand against the society to sue the president or chairman, or principal secretary, or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant (7).

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(1) *Srinivasa* v. *Tiruvengada*, 11 M. 451 ; see also *Mamat Ram Bayan* v. *Bapu Ram Atai*, 15 C. 159 ; *Subbaraya Mudaliar* v. *Vedanta Char- iar*, 28 M. 23.

(2) 6 M. H. C. R 449.

(3) 2 M. 62.

(4) Section 20 : "The following societies may be registered under this Act : Charitable societies, the military orphan funds or Societies established at the several Presidencies of India, Societies established for the promotion of science, literature, or the fine arts for instruction, the diffusion of useful knowledge, the diffusion of political education ; the foundation or maintainance of libraries or reading rooms for general use among the members or open to the public, or public museums and gallaries of paintings and other works of art, collections, of natural history mechanical and philosophical inventions, instruments or designs." The religious society which had for its object, the control and management of and the protection of the property appertaining to a certain public mosque, was a society which might legally be registered under the provisions of the Societies Registration Act 1860. 28 A. 384.

(5) Vide section 2 of Act XXI of 1860.

(6) Vide section 4 of *Ibid.*

(7) Vide section 6 of *Ibid.*

Memorandum of association.—The memorandum of association shall contain the following things (that is to say) the name of the society ; the object of the society ; the names, addresses, and occupations of the Governors, Council, directors, committee or other governing body to whom by the rules of the society, the management of its affairs is entrusted. A copy of the rules and regulations of the society certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the memorandum of association (1).

Societies enabled to alter, extend or abridge their purposes.—Whenever it shall appear to the governing body of any society registered under the Act, which has been established for any particular purpose or purposes, that it is advisable to alter, extend, or abridge such purpose to or for other purposes within the meaning of the Act, or to amalgamate such society either wholly or partially with any other society, such govering body may submit the proposition to the members of the society in a written or printed report, and may convene a special meeting for the consideration thereof according to the regulations of the society ; but no such proposition shall be carried into effect unless such report shall have been delivered or sent by post to every member of the society ten days previous to the special meeting convened by the governing body for the consideration thereof, nor unless such proposition shall have been agreed to by the votes of three-fifths of the members delivered in person or by proxy, and confirmed by the votes of three-fifths of the members present at a second special meeting convened by the governing body at an interval of one month after the former meeting (2)

Dissolution of Societies.—Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and there upon it shall be dissolved forthwith (3).

Trade Unions.—In British India, the Trade Unions Act (XVI of 1926) was placed on the statute Book on the 25th March, 1926 and it makes provision for the registration of Trade Unions and defines the law relating to registered Trade Unions. It extends to the whole of British India including British Baluchistan and the Santhal Parganas. Every registered Trade Union is a body corporate by the name under which it is registered, and has a perpetual succession and a common seal with power to acquire and hold both moveable and immoveable property and to contract, and shall by the said name sue and be sued (4).

Objection on which general funds may be spent.—The general funds of a registered Trade Union shall not be spent on any other objects than the following :—

(*a*) the payment of salaries, allowances and expenses of officers of Trade Union ;

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(1) Vide section 2 of *Ibid.*
(2) Section 12 of the Societies Registration Act of 1860.
(3) Section 13 of *Ibid.*
(4) Section 13 of the Trade Unions Act.

(*b*) the payment of expenses for the administration of the Trade Union, including audit of the accounts of the general funds of the Trade Union ;

(*c*) the prosecution or defence of any legel proceeding to which the Trade Union or any member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any right of the Trade Union as such or any rights arising out of the relation of any member with his employer or with a person whom the member employs ;

(*d*) the conduct of trade disputes on behalf of the Trade Union or any member thereof ;

(*e*) the compensation of member for loss arising out of trade disputes ;

(*f*) allowances to members or their dependants on account of death, old age, sickness, accidents or unemployment of such members ;

(*g*) the issue of, or the undertaking of liability under policies of assurance on the lives of members, or under policies insuring members against sickness, accidents, or unemployment ;

(*h*) the provision of educational, social or religious benefits for members (including the payment of the expenses of funeral or religious ceremonies for deceased members) or for the dependants of members ;

(*i*) the unkeep of a periodical published mainly for the purpose of discussing questions affecting employer or workmen as such ;

(*j*) the payment, in the furtherance of any of the objects on which the general funds of the Trade Union may be spent, of contributions to any cause intended to benefit the workmen in general, provided that the expenditure in respect of such contributions in any financial year shall not at any time during that year be in excess of one-fourth of the combined total of the gross income which has up to that time accrued to the general funds of the Trade Union during the year and of the balance at the credit of those funds at the commencement of that year ; and

(*k*) subject to any conditions contained in the notification, any other object notified by the Governor-General in Council in the Gazette of India (1).

Constitution of a separate fund for political purposes.—(1) Any registered Trade Union may constitute a separate fund, from contributions separately levied for or made to that fund, from which payments may be made, for the promotion of the civic and political interests of its members, in furtherance of any of the objects specified in sub-section (2).

(2) The objects referred to in sub-section (1) are :—

(*a*) the payment of any expenses incurred, either directly or indirectly, by a candidate or prospective candidate for election as a member of any legislaitve body constituted under the Government of India Act or of any local authority, before, during, or after the election in connection with his candidature or election ; or

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(1) Vide s. 15 of the Trade Unions Act.

(*b*) the holding of any meeting or the distribution of any literature or documents in support of any such candidate or prospective candidate ; or

(*c*) the maintainance of any person who is a member of any legislative body constituted under the Government of India Act or of any local authority ; or

(*d*) the registration of electors or the selection of a candidate for any legislative body constituted under the Government of India Act for any local authority ; or

(*e*) the holding of political meetings of any kind, or the distribution of political literature or political documents of any kind.

(3) No member shall be compelled to contribute to the fund constituted under subsection (1) ; and a member who does not contribute to the said funds shall not be excluded from any benefits of the Trade Union, or placed in any respect either directly or indirectly under any disability or at any disadvantage as compared with other members of the Trade Union (except the control or management of the said fund) by reason of his not contributing to the said fund ; and contribution to the said fund shall not be made a condition for admission to the Trade Union (1)

Enforceability of agreements.—Notwithstanding anything contained in any other law for the time being in force an agreement between the members of a registered Trade Union shall not be void or voidable merely by reason of the fact that any of the objects of the agreements are in restraint of trade :

Provided that nothing in this section shall enable any Civil Court to entertain any legal proceeding instituted for the express purpose of enforcing or recovering damages for the breach of any agreement concerning the conditions on which any members of a Trade Union shall or shall not sell their goods, transact business, work, employ or be employed (2).

Expulsion of members.—An action by a member of a Registered Trade Union to restrain the Union and its officers from wrongfully expelling him from the Union is maintainable (3). The plaintiff, a printer's assistant, was expelled from the defendant society for performing the work of a poster during the day time, in addition to his work in the printing office between the hours of 10-30 P. M. and 6-30 A. M. The rules of the society provided that the members should not work at the printing trade more than a certain number of hours per week, and also that members guilty of misconduct calculated to damage the character and reputation of the society in other respects than were specially mentioned in the rules should be dealt with at the discretion of their branch committee. The rules also empowered the executive council of

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(1) Vide s. 16 of the Trade Unions Act.

(2) Section 19 of the Trade Unions Act.

(3) *Parr* v. *Lancashire etc. Fedaration*, 82 L. J. Ch. 193=(1913) 1 Ch. 366 ; see also *Osoorne* v. *Amalgamated Society*, (1911) 1 Ch. 540=80 L. J. Ch. 315.

the society to authorise, and to employ the funds of the society for the purpose of, the withdrawal of members in the event of disputes between masters and men and prohibited any member assisting any employer whose work-people were on strike. The plaintiff brought an action claiming declarations that the resolutions expelling him from the society were *ultra vires* the society and void, and that he was still a member of the society; an injunction to restrain the defendants acting upon or enforcing the resolution, and damages: *Held* that upon the construction of the society's rules the plaintiff's expulsion was *ultra vires* and that he was entitled to an injunction; but that, as a member of an unincorporated voluntary association could not recover general damages against the association as such for a breach of the rules or of the contract contained in the rules, the plaintiff was not entitled to damages (1). The rules of a trade union provided that the money arising from the subscription of its members should be applicable in various ways for their benefit. The plaintiff a member of the union, who was alleged to have broken the rule as to apprenticeship, and who having refused to pay the fine, had been expelled from the union, brought an action against the committee and the trustees of the union claiming to be entitled to participate in its benefits, and that the defendants might be restrained from excluding him from such participation. *Held* that as the action was brought to enforce the agreement between the members of a trade union "to provide benefits to members," within the meaning of the Trade Union Act, 1871 s. 4, which the Court was not by that section enabled to enforce; and as apart from the Act the Union was an illegal association the plaintiff was not entitled to any relief (2). Where the executive committee of a registered trade union-members who have acted in a manner prejudicial to the welfare of the society by working in the same shop with a non-member, the society will not be restrained at the instance of the members on whom such fines have been stated to have been imposed from levying them, even on the assumption that the rules gave no direct power of imposing fines (3). A trade union which purported to be a national federation of the members of a certain trade was made up of a number of local trade unions which in its rules were described as "the districts." It purported to expel one such local union from membership for disobedience to its resolution. In an action to restrain the expulsion: *Held* that the action was in effect to enforce an "agreement made between one trade union and another" within the meaning of the Trade Union Acts, 1871, s. 4(4) and by that section the Court was precluded from enforcing it (4).

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(1) *Kelly* v. *National Society of Operative*, 84 L. J. K. B. 2236; 31 T. L. R. 632; see also *Amalgamated Society of Carpenters* v. *Braithwaste*, (1922) A. C. 440.

(2) *Rigby* v. *Connol*, 49 L. J. Ch. 328=14 Ch. D. 482; see also *Chamberlains' Wharf Ltd.* v. *Smith*, (1900) 2 Ch. 605=83 L. T. 238.

(3) *Mullett* v. *United French Publisher's Society*, 91 L. T. 133=20 T. L. R. 595.

(4) *Mc Cluskey* v. *Cole*, (1922) 1 Ch. 7=56 L. J. 389.

Levy for election of representatives.—In *Amalgamated Society of Railway Servants* v. *Osborne* (1), it was held that it was not within the powers of a trade union registered under the Trade Union Acts. 1871 and 1876 to maintain out of its funds members of Parliament for the support of the interest of the Union and as such injunction was granted against such levy. But under the Indian Act, constitution of a separate fund for political purposes is allowable. But no member shall be compelled to contrbute to such fund (2). So if he be compelled to contribute to such a fund, he, it seems, may get an injunction restraining the Union from compelling him to contribute. It is not competent for a trade union to make a compulsory levy on its members for the purpose of securing representative on municipal and other local bodies (3).

Injunction to restrain mis-application of funds.—By the English Trade Union Act of 1871, s. 4, it is provided that nothing in the Act shall enable the Court to entertain any legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits of its members. The plaintiffs, members of a trade union within the act, sought for an injunction to restrain other members from applying the funds in a manner contrary to an agreement to provide benefits to members:—*Held* that such an injunction would not be a direct enforcement of the alleged agreement, and the Court might entertain the proceedings (4). An action by a member of a trade union to restrain the union from dealing with its funds in a manner contrary to its rules is not an action "instituted with the object of directly enforcing ..... an agreement for the application of the funds.....(*a*) to provide benefits to members, or (*b*) to furnish contributions within the meaning of the Trade Union Act, 1871, s. 4, sub-section 3(5).

Caste matters—Cognizance by Court.—A person, who is a trustee of a caste fund, has no legal claim to a roving inspection of all caste documents, on the ground that some of such documents may possibly be found to contain entries bearing upon questions of expenditure having some connection with the trust. A right to inspection of documents belonging to a caste, existing in any person by virtue of its being a member of the caste cannot be enforced by a reference to English law. A court will not grant a decree for the enforcement of a privilege granted by a caste, because such a privilege may be taken away by the caste at any time and the decree may be rendered nugatory. The proper tribunal in such case is the caste itself and not a Civil Court. "Autonomy of Caste" must at least mean that, where rights to property are not involved, all matters of internal management must be left to the decision of the caste. Court will not inter-

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(1) 79 L. J. Ch. 87=(1910) A. C. 87.
(2) *Vide* s. 16 *supra*.
(3) *Wilson* v. *Amalgamated Society of Engineers*, (1911) 2 Ch. 324=80 L. J. Ch. 469=27 T. L. R. 418.
(4) *Wolfe* v. *Mathews*, 51 L. J. Ch. 833=21 Ch. D. 194=47 L. T. 158.
(5) *Yorkshire Miners' Association* v. *Howden*, 74 L. J. K. B. 511.

fere where the rules of the caste make special provision for the qnestion in dispute. Where there is a question in dispute between the caste and a section of the caste, it is outside the jurisdiction of the court. The Hindu caste is a unique aggregation so wholly unknown to the English law that English decisions concerning English corporations and partnerships tend rather to confusion than to guidance upon matters relating to caste. A Hindu caste may have points of resemblance to English corporations and partnerships, but its points of difference appear more numerous and radical. Where according to well-established principles certain questions have been removed from the jurisdiction of the court they cannot be brought within the jurisdiction, on the plea that the court has inherent jurisdiction to do what justice requires for the parties before it. That plea cannot be urged in order to extend the jurisdiction of the court, but to meet the objection often raised that, in matters within jurisdiction, the court can only exercise such powers as are expressly given by the legislature and no others (1).

The plaintiff who was *pujari* of a Jain temple, sued for an injunction to restrain the defendants from entering the temple and worshipping the idol, on the ground of their excommunication by the *Swami* for misconduct. Defendants pleaded that they had been guilty of no offence for which a sentence of excommunication could properly be passed, and that the inquiry into their conduct was held by *Swami exparte* and without any notice being given to them. *Held* that the Civil Court had jurisdiction to inquire into the validity of the sentence of excommunication, and that it lay on the plaintiff, who sought to enforce the sentence and by virtue of it to deprive the defendants of their civil rights, to prove that it was passed on justifiable grounds and after a fair and proper inquiry (2). In the above case *Ranade J.* said: "It has been decided in a large number of cases that a suit for restoration to caste and for obtaining a declaration that the expulsion was not justified, would lie in the Civil Courts—*Gursangaya* v. *Tamana* (3); *Pragji* v. *Govind* (4); *Anandrao* v. *Shankar* (5); *Vengamuthu* v. *Pandaveswara* (6); *Archakan* v. *Udayagiry* (7); *Srinivasa* v. *Tiru Vengada* (8); *Krishasami* v. *Krishnama Chariyar* (9). In *Gopal* v. *Gurain* (10), the suit was brought by plaintiff to secure his restoration to caste from which he had been expelled by reason of a charge brought by defendant against him of adultry. In such a case it was held that the defendant may plead justification, and plaintiff may show that the charge was false. In *Venkata Chalapati* v. *Subbarayadu* (11), it was ruled that the right to worship in a public temple is a civil right, and when it is questioned on the ground of excommunication, it is competent to the

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(1) *Jethabhai Nursey* v. *Chapsey Crowerji*, 11 Bom. L. R. 1014=34 B. 467 =4 Ind. Cas. 108.
(2) *Appoya* v. *Padappa*, 23 B. 123.
(3) 16 B. 281.
(4) 11 B. 534.
(5) 7 B. 323.
(6) 6 M. 151.
(7) 4 M. H. C. R. 349.
(8) 11 M. 450.
(9) 5 M. 313.
(10) 7 W. R. 299.
(11) 13 M. 293.

courts to inquire into the defence and they are bound, when necessary, even to examine the religious foundations on which the excommunication is based. In such an inquiry it must be shown that the Swami had jurisdiction, and that there was an express declaration and that the excommunication was passed in accordance with usage, and after hearing the explanation of the person charged. This same view was expressed still more strongly in *Jagannath Churn* v. *Akali Dasia* (1). There also the plaintiff's right to enter a prayer house was resisted on the ground of an alleged expulsion by the majoriry of the *Samaj*. The court followed the ruling in *Gopal* v. *Gurain* (2) and dissented from the Bombay ruling in *Pragji* v. *Gobind* (3). It was observed that even if this last ruling were accepted, it would be still necessary to see if the rule or order of the majority was properly arrived at in the *bona fide* manner, and that it was in conformity with natural justice. In *Ganapati Bhatta* v. *Bharati Swami* (4), which was also a case of expulsion from caste, it was held that a *Guru* has, no doubt, a right to exercise his jurisdiction according to caste usage, and when he exercises his jurisdiction with due care and in accordance with custom, Civil Courts will not interfere with his action—*Murari* v. *Suba* (5). If these limits are exceeded, there is no protection—*Queen* v. *Shankara* (6). Similarly it was held in *Krishnaswami* v. *Viraswami* (7), that even when the expulsion had been ordered under a *bona fide*, but mistaken belief on a point of fact, and it was shown that plaintiff had not been guilty of the misconduct, imputed to him, he has a right to have the order of expulsion set aside. *Kernan J*, who decided the case, observed that a caste custom permitting expulsion without notice would be invalid. The caste institution is not above or outside the law. Usage and custom exist only under, and not against, the law'.

"When a man had been expelled from his caste for alleged adultery, and the caste had allowed him no opportunity to defend himself, the order of expulsion was set aside—*Vallabha* v. *Madusudanan* (8). The fact is that in such matters the courts treat caste corporations like any other voluntary societies or clubs. If their proceedings are *bona fide* and fairly conducted, their action is upheld and not otherwise. The principle of the rulings in *Advocate-General* v. *David Haim Divakar* (9), which was a dispute hetween *Beni Israelite* parties, and the case in *Gompertz* v. *Goldingham* (10), which related to a club, apply equally to expulsions from caste. If there is jurisdiction, and the procedure is fairly conducted and *bona fide*, *the action of the caste*, *corporation* or *club is upheld*. If *possible*, for the reasons stated by the Judges who decided the case of *Jagannath Churn* v. *Akali Dasia*, the Civil Courts have to be more careful in the matter of

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(1) 21 C. 463.
(2) 7 W. R. 299.
(3) 11 Bom. 534.
(4) 17 M. 222.
(5) 6 B. 725.
(6) 6 M. 381.
(7) 10 M. 133.
(8) 12 M. 495.
(9) 11 B. 185.
(10) 9 M. 319.

caste expulsions than is necessary in the case of voluntary associations. It might be indeed contended that section 21 of Regulation II of 1827 imposes a special limitation on the power of the Courts of this Presidency. This contention is, however, not correct. As laid down by *West J.*, in *Anandrav* v. *Shankar* (1), and affirmed by the same Judge in *Pragji* v. *Gobind* (2) and by *Sargent J.*, in *Murari* v. *Suba* (3), section 21 of Regulation II of 1827 only prevents such interference as is likely to affect the autonomy of caste tribunals. The section itself provides a remedy in the matter of alleged injury to caste or character in the shape of damages. This means that Courts have jurisdiction when the injury is due to the illegal or injustifiable conduct of the other party. Such suits must be clearly distinguished from caste disputes proper. Claims between rival factions of the same caste to common caste property, claims to leadership of caste, claims to require voluntary offerings and honours and presents to be paid to particular members, claims to officials as priests against the consent of the caste, claims for compulsory invitations to dininers, etc.—*Girdhar* v. *Kalya* (4); *Dullabh* v. *Narayan* (5); *Murar* v. *Nagria* (6); *Murari* v. *Suba* (3); *Archa Kam* v. *Udaya Giry* (7); *Gossain Dass* v. *Gooroo Dass* (8); *Krishnaswami* v. *Krishnama* (9); *Dayaram* v. *Jethabhat* (10); *Mayasankar* v. *Hurisankar* (11); *Karuppa* v. *Kolanthayan* (12); *Joychunder* v. *Ramchurn* (13); *Sudharam* v. *Sudharam* (14); *Shankara* v. *Hanma* (15); *Striman* v. *Krishna* (16). These are matters which affect the internal autonomy of the caste and its social relations, and suits in regard to them have been properly held be to barred by section 21 of Regulation II of 1827 and similar enactments in other parts of India.

"But where, as in this case, a man's character and status as a member of a caste is called in question, and on the strength of an alleged ex-communication it is sought to deprive him of the use of a priestly office connected with temple, with lands and perquisites attached to it, it is clear that the Courts must inquire into the factum of ex communication, and to see that the expulsion was in accordance with caste usage and in conformity with natural justice. It may not be possible for a Court to determine the adequacy of the religious grounds on which the ex-communication is based, but it can and ought to satisfy itself that there are fair and *bonafide* grounds for such action. There is nothing in the record to show that the ex-communication in the present case fulfilled that character. It appears that the misconduct attributed to the appellants is that they did not attend upon the swami, and that they refused to allow a share in the temple lands in their possession to the other sharers. The

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(1) 7 B. 323.
(2) 11 B. 534.
(3) 6 B. 725.
(4) 5 B. 83.
(5) 4 B. H. C. Rep. A. C. J. 110.
(6) 6 B. H. C. Rep. 17.
(7) 4 M. H. C. R. 349.
(8) 16 W. R. 198.
(9) 5 M. 313.
(10) 20 B. 784.
(11) 10 B. 661.
(12) 7 M. 91.
(13) 6W. R. 325.
(14) 3 B. L. R. 91.
(15) 2 B. 470.
(16) 1 M. H. C. R. 301.

District Judge himself states that there are no adequate grounds for the alleged expulsion. It is also not clear whether the Swami has a right of dismissing or employing the *pujari* in the temple, or whether the ex-communication has been resorted to in order to compel obedience to the wishes of the *bhaubands* for a share in the temple lands. If the appellants as plaintiffs had a right to require the Courts to make an inquiry into the factum and regularity and *bonafides* of the ex-communication proceedings, it is clear they have a stronger right as defendants to insist upon such inquiry before an injunction is given against them."

Plaintiffs brought a suit for injunction and damages on the ground that, although they were the hereditary priests of *Mochi* castes, the defendant employed another *Brahmin* to perform certain ceremonies for them. It was found that a resolution had been passed by the *Mochi* caste to the effect that no work should be taken at the hands of the plaintiffs. *Held* that the Civil Court had no jurisdiction; and under the circumstances of the case could not enquire into the validity or otherwise of the decision of the caste in the matter (1). The plaintiff who was a member of the *Kharra* caste alleged in his plaint (*i*), that by custom of the caste, a member thereof in whose family a death has taken place was entitled to call upon the other members of the caste to come to his house and assist in the removal of the dead body to the burial ground and to take part in performing the customary caste ceremonies incidental to the funeral, (*ii*) that on the death of a child in his family, the defendants not only refused to assist him, but also induced others of the caste to refuse, in consequence of which the plaintiff and his family had sufferred in their status and character He therefore, prayed (*i*) for a declaration that the aforesaid acts of the defendants were illegal and contrary to the usages of the caste and that he was lawfully entitled to exercise and enjoy all his customary caste rights and (*ii*) for an injunction restraining the defendant from preventing other members of the caste from recognising the plaintiff as a member of the caste and (*iii*) for damages. *Held* that the suit must be dismissed, as the plaint disclosed no cause of action against the defendants (2).

The plaintiff and defendants were members of the *Kutchi Dassawal* resident in Bombay. The plaintiff alleged that by a resolution of the caste unanimously passed at a general meeting of the caste held on the 19th September 1893, a committee of which they were members, was appointed on behalf of the caste for the purpose of preventing *Brahmans* from attending the feast of the caste in the caste *oart*, and the committee was authorized not to allow any caste man wishing to feast *Brahmans* in the *oart* to use the caste *oart* and the caste vessels, and if necessary to take legal steps in the matter. The plaintiff alleged that the defendants proposed to give a feast in the caste *oart* to which they had invited *Brahmans*, and prayed for an injunction and for a

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(1) *Dayaram* v. *Jethabhai*, 20 B. 784.

(2) *Kunji Bavla* v. *Arjun Shamji*, 18 B. 115.

declaration that the above resolutions were validly passed and they bound the caste. The defendants submitted that the subject-matter of the suit was a caste question and not cognizable by a Civil Court and also contended that the meetings referred to in the plaint had not been duly convened and that the resolutions were invalid and not binding on those who were not present and who did not consent to them. They alleged that *Brahmans* had from time immemorial as a matter of course attended the caste feasts and they denied that the plaintiff or any members of the caste had a right now to exclude them. The Court found that a large majority of the castemen were in favour of excluding the *Brahmans* from the caste feasts. *Held* (*a*) that the majority of the caste having arrived at a *bona fide* decision that the convenience and comfort of the caste were best advanced by the exclusion of the *Brahmans* from their *oart*, it was not a case in which the Court could say that the decision was so subversive of the interests of the minority as to amount to a practical denial of their rights, and that the Court ought to give effect to it, (*b*) the Court accordingly passed a decree in terms of the prayer of the plaintiff prohibiting the defendants from bringing *Brahmans* into the *oart* to dine so long as the resolution of the caste prohibiting the practice continued in force (1).

Public Worship in mosque—Injunction restraining defendants from interrupting religious ceremonies.—Among *Sunni* Mahomedans, neither on the ground of any general and express rule of Mahomedan Law, nor on the ground of the growth of customs separating different schools in so marked a manner that the followers of one school could not properly worship with those of an other, did the introduction by *Imam*, of the loud-toned *Amen*, and of the *Rafadain*, show such a change of tenets. Where on the allegation that defendants, being dissatisfied with such variations in the ceremonial (introduction of loud toned *Amen* and the *Rafadian*) which plaintiff, the *Imam* appointed to conduct service in a mosque, had introduced, interfered with his performance of the service, plaintiff sued for an injunction restraining the defendants who made arrangements for separate worship in the same mosque under an *Imam* appointed by themselves, from interfering in any way his right as *Imam* and for a prohibitory order to the effect that the defendants must not do acts objected to by the plaintiff, held (*i*) that the said variations, as to *Amen* and the *Rafadain* did not constitute such an important departure from the custom among the Sunni Mahomedans as would disqualify the *Imam* from officiating in the *musjid* where those ceremonies had not been previously used or justify the defendants in setting up another leader of prayer at the same time that the prayer was being conducted by the plaintiff, the duly authorised *Imam*; (*ii*) that the *Imam* and the matwali, who appointed him were entitled to an injunction restraining the proceedings of the dessen-

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(1) *Lalji Shamji* v. *Walji Wardhman*, 19 B. 507.

tients (1). Where a mosque was a public one open to the use of all Muhammadans without distinction of sect, and a Muhammadan, who, in the *bonafide* exercise of his religious duties in such mosque, pronounced the word *Amen* in a loud tone of voice, but on being disturbed by the defendants in the enjoyment of his rights in prononncing the word *Amen*, sued for and obtained an injunction restraining the defendants from so obstructing him, held that the plaintiff was entitled to the injunction granted him. In such a mosque a person pronouncing the word *Amen* loudly in the *bona fide* exercise of his religious duties cannot be made liable either civilly or criminally (2).

CHAPTER XXXII.

Miscellaneous.

Injunction to restrain marriage.—Under the Hindu Law, the father is the legal guardian of his infant daughter and as such he can obtain an injunction against his wife for marrying the daughter against his wishes (3). A *Brahman* mother gave away her daughter in marriage without her husband's consent. The Brahman who had officiated at the marriage had been informed by her that her husband had consented to the marriage. When it was sought to be repudiated, the son-in-law filed a suit for a declaration of the validity of the marriage, and for an injunction restraining the marriage of the bride to any one else. *Held* that he was entitled to the relief sought, as the mother had authority to give away the girl and her position was higher than that of other legal guardians (4). A suit for specific performance of a contract to give a girl in marriage, is unsustainable. The Court will not in such cases grant a temporary injunction restraining marriage with a third person (5).

Marriage of a minor—guardians and Wards Act, ss 11, 12—Injunction.—Section 12 of the Guardians and Wards Act authorises the Court to make an order for the temporary protection of the person of a minor as it thinks proper, and this power is exercisable even before the production of the minor. An injunction may be granted under the Act restraining persons from marrying or allowing the marriage of a minor (6). On an application to the District Judge under Act IX of 1861, by the paternal uncle of a female Hindu minor, for the custody of the minor and for an injunction against the mother's projected disposal of the girl in marriage, held the judge had jurisdiction to determine the rights of the parties and to grant an injunction. *Held*

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(1) *Fuzl Karim* v. *Maula Baksh*, 18 C. 448 P. C.=18 I. A. 59; see also *Moulvie Abdus* v. *Kurban Ali*, 35 C. 294=12 C. W. N. 289.

(2) *Jangu* v. *Ahmadullah*, 13 A. 419 (F. B.)

(3) *Nanabhai* v. *Janardhan* 12 B. 110.

(4) *Venkatachariyulu* v. *Rangachariyulu*, 14 M. 316=1 M. L. J. 85.

(5) *In the Matter of Gunpat Narain Singh*, 1 C. 74.

(6) *Harendra* v. *Brinda Rani*, 2 C. W. N. 521.

also that the judge's decision on the *factum* of marriage could not affect its validity, though he might be justified in entering into it for purposes of the injunction. The Act does not create any new right or liability, but it simply provides for a special remedy for a right or liability already existing. That being the case, parties might resort either to the ordinary form of a suit or to the special form given by the Act (1).

Where a marriage of a girl is arranged by her guardian with a person whose father has on medical examination been found to be suffering from *leucoderma* but there is no evidence as to whether the proposed bridegroom or his brother betray an indication of the disease being in incipient state or being actually visible, it is the duty of the Court to step in and pass an injunction restraining the guardian from taking any further step in connection with the marriage, until the proposed bridegroom is proved to be a fit person (2).

Removal of worshipped property from temple.—Where a sacred book was kept in a temple and worshipped by the votaries with great veneration, a suit would lie at the instance of worshippers for an injunction against its removal to any other place as against the Superintendant (3)

Vatandar Joshi.—The *Vatandar Joshi* of a village has the right to recover pecuniary damages from a person who has intruded upon his office and received fees properly payable to him, but the courts will not grant any injunction against such intruder, which would have the effect of forcing upon any section of the community the services of a priest whom they are unwilling to recognise, and of forbidding them to employ a priest whose ministrations they desire (4)

Vagaira—Special meaning attached thereto—Right to restrain use of words by another.—The plaintiff was the *Vicharanakarta* of the *Tirumalai* and *Tirupati* temple and of some thirty other temples connected therewith, and he held a *Sanad* from Government in which the two former temples were named and the thirty other temples were included in the word *Vagaira*, which really means '*etcetra*' or 'and others.'' The defendant was the *Dhama Karta* of the *Tirumalai* and *Tirupati* temples and of three minor temples attached to them. His rights and duties were of a limited character and he was, in may respects, subordinate to the plaintiff, but by immemorial practice he had the title of *Dharma Karta* of the *Tirumalai* and *Tirupati Devastanas*. By immemorial custom he had also the right as *Dharmakarta* to use a seal. The seal had borne the figure of a God on it, but without any legend or other figures. Subsequently, he made and used, in the conduct of temple affairs, another seal with the figure of the same God and with the legenid '*Tirumalai, Tirupati Vagaira Devastanan Dharmakarta*' also on it.

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(1) *Brohmomayee* v. *Kashi Chunder*, 8 C. 266=10 C. L. R. 91.

(2) *Reotilal* v. *Shamlal*, A. I. R. 1930 All. 66=121 Ind. Cas. 690=1930 A. L. J. 152.

(3) *Dhurrum Singh* v. *Kessin Singh*, 7 C. 767=9 C. L. R. 410.

(4) *Raja Valad* v. *Krishna Nabhat*, 3 B. 232.

The plaintiff objecting to this change. sued for an injunction restraining the defendant from making use of it. *Held* that owing to the manner in which the word *Vagaira* was used in the *Sanad* of plaintiff's appointment to cover the thirty minor temples connected with the two main temples, the temple servants and others connected there with attached a special meaning to it, when used in connection with *Tirumalai* and *Tirupati Devastanams*. Further the object of the use of he words was the assertion of a right co-extensive with that of the *Vicharana Karta*. Consequently the plaintiff was entitled to restrain the defendant from using the word *Vagaira* on his temple seal (1).

The plaintiff the *Shankaracharya* of the *Sarada Math of Dwarka*, sued for a declaration that the defendant was not entitled to the style, title and dignities of a *Shankaracharya* and that he was not entitled to call for or recieve any offering from the people of Ahmedabad or other places in Guzrat either in his assumed capacity of a *Shankaracharyya* of *Joter Math*, and for an injunction restraining the defendant from styling himself as a *Shankaracharyya* in Guzrat or from claiming or receiving offerings in Guzrat as a *Shankaracharya* of the *Joter Math* or of a branch of that *Math*. *Held* that the suit was not of a civil nature such as the court would entertain (2). So also a suit by a person for a declaration of his exclusive right to act as *Khatib* in a certain locality and for an injunction restraining others from acting as such is not maintainable without allegetion of disturbance of the plaintiff in the exercise of his office (3).

Offerings at a temple—Injunction.—Plaintiffs respondents who were *males* attached to the temple of *Sitalji*, at *Medhigunj* city *Lucknow*, sued the Brahmans attached to the same temple for a declaration of their right to receive offerings at the said temple and for an injunction restraining the defendants from interfering with the receipt of their offerings. it was contended *inter alia* on behalf of the defendants (*i*) that the suit was not maintanable in a civil court, (*ii*) that no injunction could be issued, the subject matter of dispute being alms, the giving whereof depended on the free will and choice of the votaries, and (*iii*) that the plaintiffs could not maintain the suit as they were not the owners of the temple nor of the idol to which the offerings were made. *Held* (*i*) that the suit was maintainable in a civil court ; (*ii*) that the right to receive offerings being a right of property. a suit for declaration and for perpetual injunction with respect thereto would lie and (*iii*) that as the plaintiffs have acquired, by prescription a right to perform certain duties and to receive the consequent offerings, they were entitled to maintain the suit, it being immaterial whether or not they were the owners of the temple or of the idol (4).

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(1) *Sri Sadagopa Ramanuja* v. *Sri Mahant Ramkishore*, 22 M. 189.

(2) *Madhusudan Parvat* v. *Madhab Tirth* 11 Bom. L. R. 58=33 B. 278=1 Ind. Cas. 331.

(3) *Mira Mohidin* v. *Asan Mohidin*, 17 M. L. J. 421.

(4) *Badri* v. *Mulloo*, 8 O. C, 339.

Religious office—Suit to restrain certain persons from officiating as priests.—Where in a suit between priests for enforcement of a partition both of the famiiy *jagirs* and of the family *birt* the court granted the plaintiff an injunction restraining the defendants from trespassing on certain areas within which the plaintiffs were by the terms of the partition deed, entitled to sole control over the *yajmans*, held that neither the injunctlon nor an order directing the ascertainment of the defendant's earnings from the specified area during the three years prior to the suit could be maintained (1). *Yojman birt* is an immoveable property and an owner of such property is entitled to seek the protection of the court by way of injunction against any undue interference with his right as such owner by the caste (2).

Pragwals—Right to use flag.—Plaintiff a *Pragwala* carried on the business of ministering to the wants of pilgrims at the sacred confluence of the waters at Allahabad. He used a flag with a particular emblem as a means of identification for illiterate pilgrims that they would find him at the spot where the flag was fixed. Plaintiff was obstructed in carrying on the business afore-said by defendant who also set up a similar flag in the neighbourhood of the plaintiff. Plaintiff brought a suit to restrain the defendant from interfering with his business. *Held* that the rights to which the plaintiff had succeeded was a heritable and transferable right, that the had a cause of action against defendant and was entitled to restrain him from interfering with his business by the use of a similar flag as the plaintiff's (3).

Birt,—right to—When Injunction can be granted.—Plaintiffs, as heris of deceased *parohit*, sued for possession of his immoveable property and for a declaration that as such heirs they were entitled to realize *birt* offerings from the deceased's *jujmans* : On the defendant's objection, the first court held that plaintiff could not ask for a declaration in regard to rights of *birt* which might exist here-after but did not exist at the moment. The court further held that plaintiffs should ask for injunction and it directed the plaintiffs to comply with this order within a certain period. *Held*, that, as the order merely returned the plaint for amendment within a specific period it was not a decree, preliminary or otherwise, within the meaning of s. 2 (2) of the Civil Procedure Code, and was consequently not appealable, nor was it open to revision. The so called right on the part of a *parohit* to *birt* or offerings is, in law, no right at all and does not amount to property for the purposes of section 42 of the Specific Relief Act. It is at most a mere *spes successionis* or a contingent right which is admittedly dependent for its existence upon the pleasure of the *jujmans*, and which therefore, may never have any existence. It cannot as such be the basis of a declaratory decree. In the absence of an agreement with plaintiffs that defendants would not visit the *jujmans*, plaintiffs

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(1) *Lutan Panday* v. *Prayag Panday*, 4 Pat. L. J. 53=49 Ind. Cas. 383.

(2) *Daji Bhat* v. *Murlidur Narayan*, 59 Ind. Cas. 271=44 Bom. L. R. 234=22 Bom. L. R. 1202.

(3) *Beni Madho* v. *Hiralal*, 18 A. L. J. 679=59 Ind. Cas. 873.

cannot claim an injunction restraining defendants from visiting the *jujmans*. Before an injunction can be granted, the plaintiff's cause must disclose a breach, whether actual or threatened, by the defendant of some present legal right vested in the plaintiffs. Not having any legal right to *birt* vested in plaintiffs, they could not claim an injunction to restrain a threatened breach of that right (1). But where parties, entitled to '*birt jujmani* agree between themselves that the gifts made for ceriain number of days should be received by one, while those made in the rest of the days of a month should be received by the other, and one of the parties interferes with the right of the other party to receive gifts according to the agreement a perpetual injunction can be granted under s. 54 (*e*) against the interfering party to restrain him from so interfering (2).

Sale of shares-Injunction.—The plaintiff's firm which admittedly owed a very large amount to the defendant's firm, sued for an injunction to restrain the latter from realising the securities which it held by sale. *Held* that the pecuniary compensation would afford adequate relief and the suit for injunction should be dismissed (3).

Injunction to Municipal Committee.—In *Ibrahim* v. *Municipal Commissioners of Lahore* (4), the Municipal Committee of Lahore permitted the plaintiff to erect a building but subsequently finding that the site was public property, issued a notice to him under s. 95 Punjab Municipal Act, 1891, to demolish the building. In a suit by the plaintiff for a perpetual injunction restraining the defendant from interfering with the plaintiff in raising the building held, that s. 95, Punjab Municipal Act, 1891, did not empower the committee to issue notices in such cases, where permission had been given by it ; held also that sanction once given by the committee to raise a building cannot be revoked. *Held* further that s. 56 (1), Specific Relief Act 1877, was no bar to the suit.

Injunction under Guardian and Wards Act.—An injunction under the Civil Procedure Code is solely for the benefit of a party to a suit. But under the Guardians and Wards Act, the Courts act in the interest of the minor and will not suffer the minor's interests to be prejudiced. It is open to the Court to issue an order of injunction even without an application (5). But the jurisdiction of the District Court is limited by s. 9 of the Guardians and Wards Act of 1890 to infants ordinarily resident within the district and that it was impossible to hold that infants who had months previously left India with a view to be educated in England were ordinarily resident in the district (6).

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(1) *Gour Das* v. *Bhag.* 216 P. L. R. 1911.

(2) *Mansa Tewari* v. *Parmeshar,* A. I. R. 1929 All. 327.

(3) *Saliappachety* v. *Salippachetty,* 11 Ind. Cas. 806.

(4) P. L. R. 1900 p. 385=52 P, R. 1900.

(5) *Ramaswami Chetti* v. *Lakshmi Achi,* 24 M. L. J. 231=18 Ind. Cas. 927.

(6) *Annie Besant* v. *Narayaniah,* 18 C. W. N. 1089 P. C.

Chota Nagpore Tenancy Act S. 91.—Under the proviso to sub-section of the Chota Nagpur Tenancy Act, the plaintiff cannot demand a prohibition of waste or damage, but merely the prohibition of the continuance of waste or damage already committed, nor can relief be granted under it by the appointment of a receiver or the issue of a temporary injunction (1).

Suit to set aside revenue sale on ground of fraud—Restraining defendant from taking out certificate of sale.—In a suit brought to impugn a revenue sale on the ground of fraud, the plaintiff obtained an *exparte* injunction against the defendant restraining him from accepting a certificate under the Revenue Sales Act, s. 28, because the plaintiff apprehended that the defendant would be in a better position for the purpose of proof of service of notices, having regard to the provissions if the Land Revenue Sales Act of 1868. The ground of insufficiency of the notices had never been advanced in the Revenue offices, and no point was advanced before the commissioner: *Held* that the question of notice was one that could not be agitated in the present suit, under section 33 of Revenue Sale Law, 1859, and that the injunction should, therefore, be discharged (2):

Judgment debtor not to realise certain dues—Injunction.—A decree for sale of a right to receive *malikana* was passed in favour of the respondent on the basis of a mortgage. Before the sale took place he applied for and obtained an order restraining the appellant from realising the dues. *Held* that the court was not justified in attaching the *malikana* dues for preventing the appellant from receiving it (3).

Insolvency proceedings—Applicant for insolvency applies for injunction.—Plaintiff sued the defendant for a sum of money due to defendant from the District Board in the hands of the District Board. Plaintiff got a decree and at his instance the executing court issued a precept to the District Board to pay the decree holder the amount in deposit at the credit of the defendant. The defendant made an application to the District Court where he had presented an application to be declared an insolvent, asking for an injunction directing the District Board to stop payment. *Held* that the District Court had no power to issue an injunction on the District Board as is was not a party before him. The District Judge had no power to issue an injunction as the conditions laid down in order 39 rule 1 of the Code of Civil Procedure did not exist. Nor did the facts of the case indicate that justice, equity and good conscience required that the decree holder who instituted his suit before the insolvency petition was filed should be kept out of his money decree (4).

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(1) *Ram Narain Singh* v. *Lachmi Narain Deo*, 17 C. W. N. 408=17 C. L. J. 239=17 Ind. Cas. 490.

(2) *R. G. Brown* v. *Mafizuddin Choudhury*, 19 Ind. Cas. 575.

(3) *Muhammad Inamulla* v. *Narain Das*, 13 A. L. J. 565=37 A. 423=29 Ind. Cas. 601.

(4) *Ramsunder Rai* v. *Ram Dhejun Ram*, 3 Pat. L. J. 456=46 Ind. Cas. 224=5 Pat. L. W. 250.

Mahar Vatan—Suit by villagers to restrain Mahars from taking away skins from dead animals.—The plaintiffs who were residing in a village sought for an injunction to prevent the skins of their dead animals being taken away by the defendants who were village *Mahars* and claimed the right of taking away the skins as *Vatandars*. *Held* that the plaintiffs would be entitled to injunction unless the *Mahars* should succeed in showing that there was an hereditary office as alleged by them (1).

Property acquired by land Acquision Act—Right of mortgagee to obtain injunction.—Section 73 of the T. P. Act is applicable to a case where the mortgaged property is acquired under the provisions of the Land Acquisition Act. Pending a suit on a mortgage by the mortgagee, a portion of the mortgaged property was acquired under the Land Acquisition Act. The mortgagee sued for an injunction restraining the mortgagor from taking out the compensation money in respect of the portion acquired. *Held* that the suit was maintainable and the mortgagee was entitled to an injunction (2).

Encroachment of Shamilat land—Suit for mandatory Injunction.—A suit was instituted by some of the proprietors of a village for a mandatory injunction on the allegation that the defendants had constructed *Khurles* and other buildings on *Shamilat* land used as a passage for all the village proprietors. The trial court found that encroachment had been made recently but it was not clear from the judgment whether they were on the land the whole of which was used as a passage. *Held* that the suit in that form could be maintained only if the encroachment was entirely on the passage and that otherwise the plaintiff must sue for possession (3).

Grounds for injunction—Injury.—On a claim for an injunction the court has to consider not merely whether the plaintiff's legal right has been infringed but also whether under all the circumstances of the case he ought to be granted an injunction as the proper and appropriate remedy for such infringement. Where the parties were relatives on bad terms and the suit for injunction was instituted by desire to cause injury to the defendant, the Court would not grant the relief (4)

What is efficacious relief.—Where a receiver appointed in an action attempts to take possession of property in possession of a third party, and the third party sues for injunction, his going to the court appointing the Receiver and to ask to be examined *pro inter esse suo* is a remedy open to him but it is not one by which he can obtain "equally efficacious relief" within s. 56 of the Specific Relief Act (5).

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(1) *Savla* v. *Santya*, 20 Bom L. R. 913=48 Ind. Cas. 224.

(2) *Ashutosh Rai* v. *Babulal*, 2 Pat. L. T. 110=5 Pat. L. J. 650=59 Ind. Cas. 513.

(3) *Santu* v. *Narain Singh*, 132 Ind. Cas. 199=A. I. R. 1931 Lah. 494.

(4) *Ramchandra* v. *Raghbir*, 4 U. P. L. R. (Lah) 69=67 Ind. Cas. 299.

(5) *Amulya Chandra* v. *Kashi Nath*, 8 Pat. L. T. 629=102 Ind. Cas. 797=A. I. R. 1927 Pat. 297.

Public Tank—right to repair.—Where the ancestors of the members of a certain family dug a tank for public use and after stone steps and other improvements to the tank were effected by the general public, the conservancy and repairs of the tank were exclusively carried out by the members of the aforesaid family for a long time before suit, such members are not entitled to an injunction prohibiting others from interfering with the general conservancy of the tank, irrespective of the right to exclude others from interfering with the repairs of steps made by their ancestors (1).

Suit for reduction of embankment.—In a suit for reduction of an embankment, it is incumbent on the plaintiff to prove not only injury actual or prospective, but an injury caused by an infraction of right possessed by plaintiff (2).

Mortgage created benami—Injunction.—On plaintiff suing for a declaration that he was entitled to the benefit of the decree obtained by the defendant in whose name a mortgage had been executed as agent or *benamdar* for the plaintiff, and for an injunction prohibiting the defendant from recovering the amount under the decree, held the injunction prayed for by the plaintiff could not be granted under s. 56, Cl. (b) of the Specific Relief Act (1 of 1877) but that under the circumstances he should be granted the declaration sought by him (3).

Person sheltering married woman after notice from husband.—Every person who receives a married woman into his house, and allows her to continue there after receiving notice from the husband, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, has turned his wife out of doors or has, by some insult or ill treatment, compelled her to leave him : and an injunction also may be granted in such a case if so desired by the husband (4).

Jurisdiction of Civil Court—Civil suit for perpetual injunction.—A tenant who has failed in his suit in the Revenuc Court to contest his liability to ejectment, cannot maintin a suit in a Civil Court for a perpetual injunction restraining his landlord from ejecting him, basing his claim on an agreement that he should not be ejected, so long as he paid a certain rent ; for the jurisdiction of the Civil Court in such matter is excluded alike by the provisions of s. 95 of the Rent Act and expressly or impliedly by s. 56 (*b*) and (*f*) of the Specific Relief Act (5).

Interim Injunction to restrain adoption.—A suit was instituted for an injunction to restrain the defendant, a Hindu widow, from making an

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(1) *Muttaya* v. *Sivaraman*, 6 M. 229 ; see also *Sivaraman Chetti* v. *Muttaya Chetti*, 12 M. 241 (P. C.)=16 I. A. 48.

(2) *Prankristo Roy* v. *Haro Chandra Roy*, 10 W. R. 435.

(3) *Sethurayar* v. *Shanmugam Pillai*, 21 M. 353=7 M. L. J. 279.

(4) *Yamunabai* v. *Narayan Moraswar*, 1 B. 164.

(5) *Mahip Singh* v. *Chotu*, 5 A 429= A. W. N. 1883, 67 ; see also *Kanhaylal* v. *Huriyan*, 23A. 486 (F. B.)=A. W. N. 1901, 164.

adoption in violation of a settlement alleged to have been effected between the defendant and her brother-in-law, the plaintiff's father. Immediately on presenting the plaint, the plaintiff prayed for the issue of an *interim* injunction, alleging before the court that the defendant intended to take a boy in adoption on the following day. *Held* that the court had no power to grant such *interim* injunction (1).

Refuse-liquid of a Shellack factory—suit for injunction and damages.—A suit was instituted for a perpetual injunction to abate a nuisance and for damages on account of the same. The nuisance complained of consisted in the discharge by the defendant of the refuse-liquid of his shellack factory into a Municipal drain passing close to the plaintiff's garden. The defendant contended that the stench, if any, arose not from the liquid discharged into the drain but was due to the insanitary condition in which the plaintiff's garden was kept. He also contended that, if the Municipality had properly constructed the drain, there would not be any stagnation of the liquid and thus the decomposition and bad smell there of would have been avoided. *Held*, doubtless the bad odour was due to the liquid discharge and not to any insanitary condition of the plaintiff's garden. The refuse liquid stagnated in the drain in consequence of the higher level of a culvert, under which the drain had to pass and as it consisted of vegetable and animal matter, it decomposed and emitted a very bad odour. *Held* also that the Municipality is not responsible. The defendant has no right to discharge the liquid into the Municipal drain. The drain is not a sewer and is not intended to carry off whatever people may choose to discharge into it. It is only a *katcha* drain and is not intended for the mere drainage of surface water. The Municipality did not permit the defendant to discharge the refuse liquid into the drain carrying on an offensive trade so as to interfere with another's health and comfort or his occupation of property, has been held in England to be a legal nuisance against which the Court will give relief, consequently an injunction for the permanent stoppage of the nuisance is the only effectual remedy (2).

Relief by way of Injunction by Mamlatdar.—Only an interruption of physical possession or enjoyment is intended to be removed by an injunction under Cl. 2, s. 4 of the Bombay Mamlatdar's Courts Act (III of 1876). So, a landlord who has only a constructive possession of lands through his tenants cannot obtain relief under the clause (3).

There must be physical possession to enable an aggrieved person to invoke the Mamlatdars assistance in a cause falling under Cl. 2, of s. 4 of Act III of 1876 (Bombay Mamlatdars Act). So, where the possession of a person through his tenant is disturbed, he is not entitled to an injunction under the Act (4).

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(1) *Parshotam* v. *Ratan Bai*, 13 B. 56. 78 P. R. 1901.
(2) *Galstaun* v. *Dunia Lal*, 9 C. W. 612=32 C. 697 ; but see *Hari Singh* v. *The Municipal Committee of Pindigheb*, 18 B. 46.
(3) *Nemava* v. *Devendrappa*, 15B. 177.
(4) *Aba Bin Adoba* v. *Parvat Rao Bin*.

A Mamlatdar in Bombay can grant an injunction under s. 4, cl. 2, of Act III of 1876 (Bombay Mamlatdars Act), when the person praying for such injunction shows that the same is required for removing an interruption of physical possession or enjoyment (1).

Plaintiff prayed for an injunction before a Mamlatdar, under Bombay Act III of 1876, for restraining the defendant from interfering with her right to take earth from the defendant's field. The person asserting the right was not dispossessed, on her own showing of anything, but only prevented from taking earth from another's field as she had a right to do, and on such a complaint, the Mamlatdar was held to have no jurisdiction. The second clause of s. 4 of the Mamlatdars Act being intended to guard only against the disturbances of the possession which the first clause protects as such, the Mamlatdar in this case had no jurisdiction as under that clause. (2)

A suit for injunction restraining the defendants from obstructing the plaintiff in his possession and enjoyment of certain lands, filed in the *Maulatdar's* Court at Bombay under s. 15, cl. (c) of Bombay Act III of 1876, cannot be decreed, if the plaintiff is not in possession at the time of the institution of the suit. Where a person is dispossessed of his land by a bailiff of a Civil Court in execution of a decree against a third person, he must proceed for the alleged obstruction of his possession, not by a suit under the Mamlatdar's Act, but an injunction under s. 332 of the C. P. Code, or by regular suit (3).

Suit against Municipality—Notice.—A suit for an injunction to restrain a Municipality from removing a building or construction is not an action for anything done or purported to have been done in pursuance of the Act within the Bombay Act II of 1884, and therefore no notice to the Municipality need be given previous to the institution of a such a suit (4).

Agricultural purposes.—The cultivation of indigo is an agricultural purpose. But the manufacture of indigo taken out of indigo plants cannot be said to be an agricultural purpose. Where land is let out for agricultural purposes, generally, the erection of an indigo factory on the land must render it unfit for the purposes of the tenancy. The plaintiff landlord is entitled to obtain a permanent injunction restraining the defendant from building such factory (5).

Injunction—Civil Court—jurisdiction.—A person has no right to build balconics (nejaoos) to his house after a District Municipality refuses to grant the permission to build them and having once put up such balconies he is not entitled to obtain from a Civil Court an injunction to restrain the Municipality from removing the balconies erected in defiance of their refusal (6).

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(1) *Desai Malabhai* v. *Keshavbhai*, 12 B. 419.

(2) *Faki Ismail* v. *Umabai Bival Kar*, 7 B. 425.

(3) *Gulabhai Gopalji* v. *Jinabhai Ratanji*, 13 B. 213.

(4) *Patel Panachand* v. *Ahmedabad Municipality*, 22 B. 230=P. J. 1896, 296.

(5) *Surendra Narain* v. *Hari Mohan*, 31 C. 174=9 C. W. N. 87.

(6) *Godhan Municipality* v. *Heptulabhai*, 2 Bom. L. R. 572.

Suit for injunction against several defendants.—In this suit to restrain the defendants from disturbing the plaintiff in the cultivation of his land, the *Mamlatdar* found the case proved against all the defendants except one. He was of opinion that, under the *Mamla'dar's* Act III of 1876, he was bound to disallow any claim when not fully proved, and so rejected the present claim in *to to*. *Held* reversing his order, that there was nothing in the Act to prevent the *Mamlatdar*, from awarding a claim partially and that therefore he should have granted the plaintiff's prayer as regards the defendants against whom the case was found to be established (1).

CHAPTER XXXIII

Practice and Procedure.

Jurisdiction of Courts.—Perpetual injunctions are granted in British India by decree passed by the court at the final hearing of the suit, the procedure of obtaining which is guided by the Civil Procedure Code (2) and the rule of practice and procedure framed by different High Courts. The jurisdiction of the original sides of the High Courts depends upon the provisions of the Letters Patents of the respective High Courts as well as the Civil Procedure Code. The Presidency and Provincial Small Cause Courts cannot entertain suits for the specific performance of a contract, for injunction or for a dissolution of a partnership (3). All other Courts of original civil jurisdiction are competent to entertain suits for obtaining an injunction, if the provisions of the Civil Procedure Code, various Letters Patents and vaious Civil Courts Acts are satisfied. Section 15 of the Civil Procedure Code enacts that every suit shall be instituted in the court of the lowest grade competent to try it. As this section lays down the rule of procedure and not of jurisdiction, it does not oust the jurisdiction of the courts of higher grade from entertaining suits which they are empowered by the legislature to entertain (4). Section 18 of the Bengal, Agra and Assam Civil Courts Act (5) lays down that "save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of section 15 of the Code of Civil Procedure, to all original suits for the time being cognizable by Civil Courts." Section 19 of the same Act lays downs : "(1) Save as aforesaid, and subject to the provisions of subsection (2) the jurisdiction of a Munsiff extends to all like suits of which the

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(1) *Chintamanrao* v. *Bela* 14 B. 17.
(2) Act V of 1908.
(3) Vide s. 19 of Act XV of 1882 ; s. 15, Sch. II, Cl. 17 of Act IX of 1887 ; C. P. Code s. 16.
(4) *Nidhi* v. *Muhar*, 17 A. 230 ; *Matra* v. *Hari*, 17 C. 155 ; *Krishna* v. *Kanakasabai*, 14 M. 183.
(5) XII of 1887.

value does not exceed thousand rupees(2). The Local Government may, on the recommendation of the High Court, direct by notification in the official Gazette, with respect to any Munsiff named therein, that the jurisdiction shall extend to all like suits of such value not exceeding two (1) thousand rupees as may be specified in the notification." Similarly in Bombay there are three grades of courts, namely (*i*) the District Courts, (*ii*) Courts of Subordinate Judge of the first class and (*iii*) Courts of the Subordinate Judge of the second class (2). In Madras there are also three kinds of Courts, namely, District Courts, Subordinate Judge's Courts and District Munsiff's Courts (3).

Statute 24 & 25 Vict. 24 C. 104, by section 9 enact: "Each of the High Courts (4) to be established under the Act shall have and exercise all such, Civil, Criminal and Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid, grant and direct, subject however, to such direction and limitations as to the exercise of Original, Civil and Criminal jurisdiction beyond the limits, of the Presidency towns as may be prescribed thereby; and save by such Letters Patent may be otherwise directed, and subject and without prejudice to the legistative powers in violation to the matter aforesaid of the Governor General of India in Council, the High Court to be established in each Presidency shall and exercise all jurisdictions, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency established under the Act at the time of

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(1) In the new Province of Bihar and Orissa the word "four" has been substituted for the word "two" by B & O Act IV of 1922.

(2) Vide Bombay Civil Courts Act (XIV of 1869) section 7: "The District Court shall be the principal Court of original civil jurisdiction in the District, within the meaning of the Code of Civil Procedure." Section 12: "The Governor of Bombay in Council may appoint in any District a joint Judge, who shall be invested with co-extensive powers and a concurrent jurisdiction with the District Judge, except that he shall not keep a file of civil suits and shall transact such civil business only as he may receive from the District Judge or as may have been referred to the joint Judge by order of the High Court." Section 16: "The District Judge may refer to any Assistant Judge subordinate to him original suits of which the subject matter does not amount to Rs. 10,00 in amount or value, and miscellaneous applications not being of the nature of appeal." Section 24: "The Subordinate Judge shall be of two classes—The jurisdiction of a subordinate Judge of the first class extends to all original suits and proceedings of a civil nature. The jurisction of subordinate Judge of a second class extends to original suits and proceedings of a civil nature wherein the subject matter does not exceed in amount or value, five thousand rupees."

(3) The Madras Civil Courts Act (III of 1873) s. 16 enacts: "The jurisdiction of a District Judge or a Subordinate Judge extends subject to the rules contained in the Code of Civil Procedure, to all original suits and proceedings of a civil nature. The jurisdiction of a District Munsif extends to all like suits and preceedings, not otherwise exempted from his cognizance, of which the amount or value of the subject matter does not exceed three thousand rupees."

(4) Viz. the High Court of Judicature at Fort William in Bengal and the High Courts at Madras and Bombay.

the abolition of such last mentioned Courts (1)". Section 12 of the Letters Patent of the Calcutta High Court runs as follows: "And we do further ordain that the said High Court of Judicature at For William in Bengal in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immovable property, such land or property shall be situated, or in all other cases, if cause of action shall have arisen either wholly or in the case of leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally works for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta in which the debt or damage, or value of the property does not exceed one hundred rupees" (2).

In the Moffasil Courts, the general rule is that subject to the pecuniary or other limitations prescribed by any law, suits for recovery of immovable property or for the partition of immovable property, or for the determination of any other right to or interest in immoveable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. Provided that a suit to obtain relief respecting or compensation for using to, immovable property held by or on behalf of the defendant may, where the relief sought can be actually obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually or voluntarily resides, or carries on business, or personally works for gain (3). An injunction is a personal remedy and does not run with the land and as such an injunction can be granted by a Court within the local jurisdiction of which the defendant resides (4). But the mere fact that a person resides outside the jurisdiction of the Court is *per se* sufficient to prevent the court from granting an injunction to restrain him from marrying the minor (5).

A *Mamlatdar* in Bombay could under the old *Maulatdar's Act* of 1876, grant an injunction, when the person praying for such injunction showed that the same was required for removing an interruption of physical possession or enjoyment (6).

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(1) Section 11-21 of the Letters Ratent of Calcutta, Madras and Bombay High Courts describe the civil jurisdiction of the respective High Court. The Letters Patent of the three High Courts are in identical terms.

(2) Vide s. 12 of the Letters Patent of the Madras and Bomby High Court which are also worded in exactly the same terms.

(3) Section 16 of the C. P. Code.

(4) *Dahya bhai* v. *Baha lal*, 26 B. 140; *Jamsetjee* v. *Hari Dayal*, 32 B. 181; *Vulcan Iron* v. *Bishumbar*, 36 C. 233; For fuller discussion Vide pp. 49-60.

(5) *Harendra Nath* v. *Brinda Rani*, 2 C. W. N. 52.

(6) *Desai* v. *Keshav bhai*, 12 B. 419;

Granting of Temporary Injunction.—In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold (1). The powers of the Court to grant temporary injunctions are laid down by Order XXXIX, of the Civil Procedure Code (2). The general rule is, that injunctions are only granted upon a suit praying for that relief (3). But in some cases injunctions are granted on petition without a suit having been filed praying for injunction, and also in other cases on motion without such a suit (4). Indeed a court will not ordinarily entertain a new and independent action for an injunction in a matter already pending before the Court, and in in which plaintiff may obtain full relief by motion (5). And an injunction may be granted on motion, and without a new action, to restrain a tenant under a receiver of the Court from removing articles from the demised premises ; and in such case, the Court proceeds upon the ground that the tenant having entered into a contract with the Court itself, through its receiver, a new action is unnecessary (6). And under the practice of the Irish Court of Chancery, the Court may, in a matter of lunacy, enjoin the commission of waste merely upon motion and with no cause pending (7). So also in the case of *Re Crreagh* (8), an injunction was granted on petition without a bill being filed, on the application of a committee of a lunatic to restrain waste by the tenants of the lunatic's estate. So also it is open to court to issue an injunction without an application under the Guardian and Wards Act (9).

Procedure to obtain an injunction.—An application for injunction should be made by a separate petition. The application for such relief should certainly always be supported by affidavit and should not rest merely on the allegations in a verified plaint, even when it sets out the plaintiff's case minutely (10).

Before granting injunction Court to direct notice to opposite party.—The court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party (11). So injunctions are granted *ex-parte* and before the appearance of the defendant of the suit, in urgent cases of threatened mischief

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see also, *Faki Ismail* v. *Uma bai*, 7 B. 725 ; *Nemava* v. *Debendappa*, 15 B. 177 ; *Aba Bin* v. *Parvat Rao* 18 B. 46 ; *Ram rao* v. *Fernandes*, 2 Bom. L. R. 515 ; *Bhan* v. *Ahmedbhoy*, 8 Bom. L. R. 312 ; *Ravji* v. *Fraser* 8 Bom. L. R. 638 ; *Gulubhai* v. *Jinabhai*, 13 B. 213.

(1) C. P. Code s. 94.

(2) *Varada* v. *Narasinha*, 92 Ind. Cas. 615=23 L. W. 85=A. I. R. 1926 Mad. 258.

(3) H. C. Joyce on Injunction p. 1258.

(4) *Ibid.*

(5) High on Injunction § 1566.

(6) *Walton* v. *Johnson*, 15 Sim. 32.

(7) *In re Chinnerys*, 6 Ir. Eq. 469.

(8) 1 Ball & B. 108.

(9) *Doraisami* v. *Lakshmi*, 24 M.L.J. 231= 18 Ind. Cas. 927.

(10) *Gordit Bogla* v. *Perushaw Sorab Shaw*, 2 L. B. R. 222.

(11) Civil Procedure Code Order XXXIX, rule 3 ; *Gurdit* v. *Perushaw*,

and also where notice of intention to apply for an injunction might lead to the commission of the act before the time for hearing a motion upon notice. In cases of waste, and cases of injury in the nature of waste, such as working mines, piratically printing books, ploughing up ancient meddows, or negotiating a bill or promissory notes fraudulently obtained, the court will on a sufficient case made, issue an injunction before appearance of the other party (1). "Even in the absence of statutory provision on the subject," says *Mr. Spelling* "courts of equity had undoubted power, where the urgency and necessities of the case, as shown by the bill, or bill accompanying affidavits, require it, to grant a preliminary injunction without notice to the defendant ; but in the absence of a pressing necessity it was improper to do so (2)." But where large interests are to be affected, notice will almost invariably be required (3). As regards the desirability of issuance of temporary injunction without notice *Jenkins C. J.* said (4) : "There is one further matter on which I desire to comment ; it is the fact that an *exparte* injunction was granted. The power no doubt exists ; but having regard to the circumstances under which business has to be conducted here ; I think the greatest care should be employed in its exercise. There may be instances where the urgency is so great that an *exparte* injunction is necessary, but that was not the case here. The suit was instituted and the *ex parte* order was made on Tuesday the 24th February, 1903. But there was, so far as I can see, no reason why the plaintiff should not have been required to serve short notice of motion for the following Thursday, as this would have been in time still to give the plaintiff any *interim* relief to which he might have been entitled. Having regard to the conditions which prevail here, the court should if possible always require notice, however short, to be given. Such injunctions is a deviation from the ordinary course of justice, and nothing but the existence of great and serious danger not capable of being avoided, probably, if delay be interposed, can justify its issue (5)." So rule 3 of Order XXXIX, Civil Procedure Code, confers upon a Court the power to issue an *exparte* injunction but only when the delay would defeat the object of the injunction (6).

Parties to a suit for injunction.—It is a generalr ule that all persons should be made parties to a suit in equity to obtain an injunction who are directly interested either in obtaining or resisting the relief asked for in the complaint's bill or granting the decree (7). "The genaral rule in equity is that all persons naturally interested, either legally or beneficially, in the subject

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2 L. B. R. 222 ; *Amolak* v. *Sahib Singh*, 7 A. 550 ; *Baddam* v. *Dunnpul*, 1 C. W. N. 429.

(1) Joyce on injunction p. 1261.

(2) Spelling on Injunction and other Extra ordinary Remedies § 1016.

(3) *Ibid.*

(4) *Hari* v. *Secretary of State* 27 B 424 (451).

(5) *Freeman* v. *Mc Arthur*, 2 Tay & Bell. 25 ; see also *Baddain* v. *Dhanput*, 1 C. W. N. 429 ; *Colebourne* v. *Colebourne*, 1 Ch. D. 690 ; *Brand* v. *Mitson*, 45 L. J. P. 41 ; *Lord Byron* v. *Johnston*, 2 Mer. 29.

(6) *Burma Oil Co.* v. *Sampson*, 64 Ind. Cas. 534,

(7) H. C. Joyce on Injuuction § 346.

matter of a suit are to be made parties to it, so that there may be a complete decree which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done either to the parties before it, or to others who are interested in the subject matter, by a decree which might other wise be granted upon a partial view only of the real merits (1)."

Who can apply for an injunction.—Any person whose right to or enjoyment of property has been invaded or has been threatened to be invaded by any person can apply for an injunction (2). But the applicant must have a personal interest in the matter (3). When the plaintiff in the cause has obtained an order for a receiver, and was proceeding to cut timber upon the estates before the receiver had been appointed, the court refused to grant an injunction upon the application of the defendant, it appearing that the latter, who was the agent of the owner of the estates (also a defendant) had no interest in such estate, and no authority from his principal to make the application (4). A reversioner may apply for an injunction against the life estate holder in case of reasonable apprehension of waste by him (5). The court will not interfere on behalf of a plaintiff, who claims relief, not through direct equities of his own, but indirectly through the equities of the parties, on which equities those parties themselves do not insist (6). Parties in interest are those legally or equitably interested in the subject matter or result of the suit, but they must have a present substantial interest as distinguished from a mere expectancy (7). A life tenant may properly bring an action to restrain the opening, by a town of streets through the premises without a compliance with the statute in regard there to, or to restrain a nuisance. And to enjoin the maintenance of a ferry in violation of a statute the action may be properly brought by one who is a tenant in common and in sole possession of the latter ferry (8). An owner of any state as well as the owner of the dominant tenement may invoke the aid of a court of equity to enforce the easement in the servient tenement (9). And it has been decided that a suit for an injunction may be maintained by minors (10). But every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor (11). Persons having no interest in the controversy although they are general partners of the plaintiff, cannot properly be made parties plaintiff (12). Where there are numerous persons having the same interest in one suit, one or more

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(1) *Minnesota* v. *Northern Securities Co.*, 184. U. S. 199, 225.

(2) *Wynne* v. *Lord Newborough*, 1 Ves. 164 ; *Leak* v. *Beckett*, 1 Y & J. 339.

(3) Specific Relief Act, s. 56 Cl. (k) ; *Hunter* v. *Nocklods*, 15 L. J. Ch. 320.

(4) *Huuter* v. *Nocklod* 15 L. J. (N S) Ch. 320 ; Joyce on Injunction p. 151.

(5) *Durganath* v. *Chintamoni*, 31 C. 214.

(6) *Roberts* v. *Boxon*. 3 L. J. Ch. 113.

(7) H. C. Joyce on Injunction § 345.

(8) H. C. Joyce on Injunction § 347. citing *Lowe* v. *Prospect Hill*, 78 N. W. 488 ; *Fortain* v. *Smith*. 114 Cal. 494.

(9) *Bronner* v. *Jones*, 23 Barb. (N. Y.) 153.

(10) *Alastangh* v. *Adams*, 80 Ga. 345.

(11) C. P. Code, Order XXXII, Rule 1.

(12) *Hammer* v. *Barnes*, 80 Ga. 345.

of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested (1). "Under the old practice the court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties are so numerous that you never could 'come at justice' to use an expression in one of the older cases, if every body interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience, for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial :o all the plaintiff proposed to represent (2)." In an early Calcutta case (3) it was held that the rule had no application where the parties were not capable of being ascertained. But in a later case of the same High Court it was held that a suit may be instituted under the rule on behalf of a defined class of a general public, where all the members of such class are or are not capable of being so accurately ascertained, that notices could be, if required, served upon each and all of them (4). But under Order I, rule 8, a suit cannot be brought on behalf of the general public. This rule is designed to allow one or more persons to represent a class having special interest (5). If the Act complained of affects the public interest, in England the action should be brought by the Attorney—General at the instance of the relator. Private persons may sue alone, if their proprietary rights are affected or if they have suffered special damage from the wrongful act (6). In British India in the case of a public nuisance the Advocate General, or two or more persons having obtained the consent in writing of the Advocate General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case (7). But in case of obstruction to a high way, any one obstructed may bring a suit for damages and injunction. No special damage need be proved in order to enable a private individual to sue for damages for preventing him from conducting a religious procession along a high way (8). Where an obstruction to a public road caused a particular inconvenience to the plaintiff, he can bring a suit to remove it without the consent of the Advocate General (9).

Againts whom an injunction can be granted.—An injunction will not in general be granted unless the party against whom it is claimed is a

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(1) Order I, rule 8 ot C. P. Code ; *Commissioners of Sewers* v. *Gattatsly*, 3 Ch. D. 610 ; *Henry* v. *Great North Ry.* 1 De. G. & J. 609 ; *Navroji* v. *Dastur*, 28 B. 29 ; *Anandrao* v. *Sankar* 7 B. 323 ; *Anandrao* v. *Shankar*, 15 B. 309.

(2) *Per Lord Macnaghton in Duke of Bedford* v. *Elles*, (1901) A. C. 1 (18).

(3) *Sajedur Raja* v. *Baidyanath*, 20 C. 397.

(4) *Manmatha* v. *Hurrish*, 33 C. 915.

(5) *Adamson* v. *Ammugams*, 9 M. 463.

(6) *Soltu* v. *De Held*, 2 Sim N. S. 133 ; *Att Gen* v. *Garney* (1907) 2 K. B. 480 ; *Att. Gen.* v. *Ponty Pridd*, (1908) 1 Ch. 388.

(7) C. P. Code s. 91.

(8) *Siyid* v. *Siyid*, 29 C. W. 486 (P. C.)

(9) *Ardeshir* v. *Aimai*, A. I. R. 1929 Bom. 94 ; *Rajkumar* v. *Saheb Sada*. 3 C. 202 (F. B,).

party to the action (1). There are however certain exceptions to the rule. So a purchaser under a decree, though not a party to the suit, will be restrained from acting contrary to the decree (2), and a tenant under a receiver will also be restrained (3). So the court restrains the attorneys, agents, servants, and workmen of the party restrained, and this although the bill and notice of motion asked for an injunction only against the party himself (4) ; but the injunction will not be extended to the tenants of the party restrained (5). In a case where one seeks to overthrow a common right and establish his right against all claimants, all parties asserting the common right may be united as defendants (6). So in an action to restrain defendants from floating logs in the waters of a stream running across plaintiff s land, it is decided that all parties who assert a common right to do so may properly be joined as defendants (7). Again where the object of a suit is single and it is shown that some one or more of the defendants have interest, in distinct questions growing out of the suit, such defendants are necessary parties in order to include the entire matter. And it is proper and necessary that the lessor as well as the lessee should be made parties to a suit to enjoin the nuisance (8). An injunction being an order directed to a person, it does not run with the land (9). No injunction can issue against an unnamed person Equity acts in *personam* and an injunction must be addressed to the defendant personally (10). The court will not interfere when plaintiff and defendant are foreigners and both residing out of the jnrisdiction and the land the subject matter of the suit is in a foreign country (11). A Court can interfere by injunction where the breach of contract has not been actually committed provided the defendant claims and insists on a right to do the act which would constitute such breach (12). A man who has assigned or disposed of his interest in the subject matter should not be made a party to an action (13). But the parting by a defendant with his interest after the bringing of the action

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(1) Kerr on Injunction 632 citing *Iveson* v. *Harris*, 7 Ves. 256 ; *Brydges* v. *Brydges*, 78 L. J. P. 100 ; *Ranson* v. *Platt*, (1911) 2 K. B. p. 307=80 L. J. K. B. p. 1146 ; *Metropolitan District Ry. Co.*, v. *East Coast Co.*, 58 S. J. 807 ; See also *Ram* v. *Mantu*, A. I. R. 1926 Lah. 284 ; *Santlal* v. *Iswar* 46 P. L. R. 1919 =51 Ind. Cas. 108 ; *Ram Sunder* v. *Ram Dhyan*, 3 Pat. L. J. 456, 458.

(2) *Cosamajor* v. *Stroch*, 1 S. &. S. 381.

(3) *Walton* v. *Johnson*, 15 Sim. 352 ; Joyce on Injunction 1259.

(4) *Seward* v. *Paterson*, (1897) 1 Ch. 551 ; *Brydges* v. *Brydges* (1909) P. 191 ; *Hubbard* v. *Woodfield*, (1913) 57 S. J. 719 ; Joyce on Injunction 1259 ; Kerr on Injunction p. 632.

(5) *Hodson* v. *Copperd*, 29 Beav. 4.

(6) H C. Joyce on Injunctions § 348(a).

(7) *Myer* v. *Phillips*, 97 N. Y. 485.

(8) *O' Sullivan* v. *New York*, El. Ry. 7. N. Y. Supp. 51.

(9) Kerr p. 13 citing *Att. Gen.* v. *Birmingham & Drainage Bcod*, 17 Ch. D. 685, 692 ; *Att. Gen.* v. *Darking*, 20 Ch. D. 595 ; *Dayabhai* v. *Bopalal*, 26 B. 140 ; *Bhaisankar Nanabhai* v. *Morarji*, 36 B. 283 ; *Vithal* v. *Sukharam*, 1 Bom. L. R. 854 ; *Jamsetjee* v. *Haridayal*, 32 B. 181.

(10) *N. W. Ry. Ad.* v. *N. W. Ry. Union*, A. I. R. 1933 Lah. 203.

(11) *Blake* v. *Blake*, 18 W. R. 944.

(12) *Tipping* v. *Eckerseley*, 2 K. & J. 264 ; see also *Hent* v. *Gill*, 7 Ch. 699 ; *Shafts* v. *Blockow*, 34 Ch. D. 725 ; *Luckhamtar* v. *Billingers*, 20 T. L. R. 561 ; *Thornhill* v. *Weeks*, (1913) 1 Ch. 438 ; *Att. Gen*, v. *Parish*, (1913) 2 Ch. 444.

(13) Kerr on Injunction 361 ; *Hawkins* v. *Gardiner*, 1 W. R. 345 ; *Clements* v. *Wells*, 1 Eq. 200.

does not disentitle the plaintiff to an injunction (1). A person who has acquired from the defendant a knowledge of a secret invention for which the plaintiff claims protection is not a necessary party (2). But no suit shall be defeated by reason of misjoinder and non-joinder of parties, and the Conrt may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually befo$_r$e it (3). The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added (4).

An injunction may be granted against a minor (5). In an action to restrain several defendants from causing obstruction to the proposed construction of a buildiing by the plaintiffs defendant No. 1 acted as gardian of the minor. The acts and misdeeds complained against wer^e alleged to have been done by defendant No. 1 and by original defendant No 2, the father of the minor and there was no evidence that the minor did any act or that the acts committed by original defendants No 1 and 2 were done at the instance of the minor or on his behalf. The Defendant No. 1 filed a written statement on behalf of the minor son of defendant No. 2 raising the same contentions as he himself raised but he subsequently gave up his defence. The lower court thereon granted an injunction against all the defendants including the minor. *Held* an injunction was a remedy against an individual and should be issued only in respect of acts done by him against whom it is sought to be enforced. So no injunction can be granted against the minor merely because his guardian gave up his defence (6). "In so far as an injunction is in its nature a remedy against an individual, it will be issued only in respect of acts done by him against whom it is sought to be enforced. Thus an injunction cannot be obtained against executors on account of acts done by their testator. They may be sued for an injunction in respect of a wrong done by themselves, but they cannot be so sued in a representative character. And for the same reason, namely, that an injunction is an order directed to a person, it does not run with the land (7)." In *Kirk* v. *Todd* (8), where an

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(1) Kerr on Injunction 631 ; *Bird* v. *Lake*, H. & M. p. 121.

(2) H. C. Joyce on Injnnction § 347.

(3) C. P. Code Order I, Rule 9.

(4) C. P. Code, Order I, Rule 10(2).

(5) Halsbury Laws of England Vol. 17 p. 143 ; *Lampire* v. *Lange*, (1879) 12 Ch. D. 675 ; *Woolf* v. *Woolf*, (1899) 1 Ch. 343 ; *Chubb* v. *Griffiths*, 35 Beav. 127 ; *Rama Chandra* v. *Narasinha*, 33 Bom. L. R. 590=A. I. R. 1931 Bom. 466.

(6) *Ram Chandra* v.. *Narasingha*, 133 Ind. Cas. 839=33 Bom. L. R. 590=A. I. R. 1931 Bom. 466.

(7) Woodroffe on Injunction 5th Ed. p. 34 cited in *Ram Chandra* v. *Narasingha*, *supra* ; but see *Sakarlal* v. *Parbatibai*, 4 Bom. L. R. 14=26 B. 283, where it has been held that a decree containing an injunction against the son of the original judgment debtor after his death, under s. 234 of the Civil Procedure Code is enforceable.

(8) 21 Ch. D. 484=52 L. J. Ch. 224.

action for damages and injunction against the executors for tort committed by the testator was dismissed by, the court, *Hall V. C.* observed: "It appears to me that as regards the injunction which is asked for the objection is fatal, and must prevail, the injunction being in the nature of a remedy against an individual, I am unable to restrain the executors in respect of acts done by their deceased testator, the acts not being continuing acts in the statutory sense."

Where one of the terms of a contract of service is that the person contracting shall not take service elsewhere during the stipulated period and there is a threatened breach of this term, a Court has jurisdiction to restrain such breach by issuing a temporary injunction not only against the party contracting but also against the third party who proposes to employ him (1). In the above case the Court in delivering the judgment observed: "The *Burma Oil Company* apply for an interlocutory injunction to restrain *S. C. Sampson* from entering into the service of the Indo-Burma Oil Company in contravention of his contract of service with the petitioners, and to restrain the respondent company from employing him. By an agreement dated 28th February, 1918, *Sampson* contracted to serve the petitioners for a period of three years, subject to the following conditions: that he shall not directly or indirectly, or in any way whatsoever, give service, information or advice, or in any way become connected with any other firm in Burma; (*ii*) that he shall not acquire or seek to acquire any mining, or other property or right, for, or on behalf of himself, or any other person, company or companies in Burma; (*iii*) in the event of a breach of his obligations, he agreed to pay to the company a sum of £. 300. Petitioners state that on the 30th January, 1920 *Sampson* tendered his resignation which they refused to accept, and on the 7th February the defendant company published a prospectus stating that he had been engaged to develop their *Yenangyaung* properties. The defendant company was informed that *Sampson* was still in the employ of the *Burma Oil Company*, but refused to dispense with his service . . . . . The defendant company took exception to the jurisdiction of this Court on the ground that *Sampson* was in America, and that the leave granted by the Deputy Registrar for joinder of defendants under section 20(b) of the Civil Procedure Code was given without notice to either defendant, and ought to be revoked . . . . . In the present case the *ex-parte* injunction against *Sampson* is asked for on the ground that it is the declared intention of the defendant company to commence proceedings in the early autumn of this year and the vacation of this Court extends until the middle of November. This in my opinion, is sufficient reason for proceeding with the application, as *Sampson* is not in Burma, and may arrive during the vacation of the Court. *Mr. Giles* urges that the leave of the Court to sue *Sampson* in Rangoon should not have been granted, and that in any case notice should

(1) *Burma Oil Co. Sampson*, 64 Ind. Cas. 534=13 Bur. L. T. 227.

have been issued. It is said that if *Sampson* is employed in Burma, his work will be in *Yenangyaung*, which is within the jurisdiction of the Courts of Upper Burma. The ordinary rule of law is that where a suit may be filed in more than one Court, the plaintiff may select the *forum* in which to bring the suit. Section 20 does not require notice to issue to the other defendants interested in the litigation, who do not reside or carry on business within the local limits of the Court granting leave . . . . . It was obviously impossible to serve *Sampson* with notice of the application for leave to sue him here. Further if an injunction is issued against the defendant company to restrain them from employing *Sampson*, that injunction can be enforced under Order XXXIX, rule 2 (3), by attachment of the property of the company, and should, therefore, not be a *brutum fulmen*. The question arises whether an injunction can be made against the defendant company. Rule 2 provides for restraining defendants that commit an injury of any kind, and I think it is clear that if *Sampson* is still the servant of the plaintiff company, and the defendants propose to employ him, they are committing an injury. There is precedent for issuing an injunction in these cases against third parties. In *Stiff* v. *Cassel* (1), an injunction was issued to restrain a firm of publishers from employing an author who had contracted to write for another publisher only. In *Donnel* v. *Bennet* (2), a fishcurer contracted to sell all his fish to *Donnell*, and to no other person, but broke his contract and sold fish to *Bennet*. The Court granted an injunction against both parties. These cases are authority for the issue of an injunction restraining both parties from commiting an injury. The issue of such an injuction as that now prayed for is clearly provided for in section 57 of the Specific Relief Act, and illustration (d) is expressly in point. The High Courts of Calcutta and Madras have ruled this. See *Burn and Company* v. *Mc Donell* (3) and *M dras Railway Co.* v. *Thomas Rust* (4) and *Subba Naidu* v. *Hari Badsha Sahib* (5)" (6).

Complaint must be clear and specific.—A complainant will be required to set forth very clearly and specially the matters relied upon to entitle a party to extra-ordinary relief by injunction, since inferences which do not flow from the allegations will not be indulged to aid the pleader (7). An interlocutory injunction, being a harsh remedy, is only allowed upon such positive averments of complainant's equities as establish a *prima facie* case. And while the party seeking the injunction is not required to establish his right to relief with the same precision and certainty that are required upon a final hearing, he must in all cases allege positively the facts on which he relies. Mere argumentative allegations,

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(1) 2 Jur. N. S. 348.
(2) 22 Ch. D. 835=52 L. J. Ch. 414.
(3) 36 C. 354=13 C. W. N. 255=9 C. L. J. 190.
(4) 14 M. 18.
(5) 26 M. 168.
(6) See also *Exchange Telegraph Co.* v. *Central News*, (1897) 2 Ch. 48.
(7) Spelling on Injunction § 982 ; but see *Kunj behari* v. *Keshab lal*, 28 B. 567 (572).

or inferences from fact stated, will not entitle him to relief (1). An injunction will not be granted on a mere allegation of irreparable injury. The facts on which the allegation is founded must appear. But the omission of the bare charge of irreparable mischief would not be a defect in a bill, otherwise good, because the court must be satisfied from a statement of the grievance that the injury will be irreparable, and it is enough if the court can discover this from the allegation of facts (2). Sometimes the defendant's insolvency, rendering legal remedies unavailing, considered in connection with the equities in favour of complainant, entitle him to an injunction as for an irreparable injury, where but for such insolvency, he would be left to pursue his remedy at law. In such a case it is important to allege insolvency on the bill. The same requirements as to clearness and certainty must be observed in setting forth the facts from which the intent of defendant to commit or to continue the commission of the wrong complained of are to be inferred (3).

To obtain an injunction in a case in which the plaintiff's right depends upon his title, he should set out his title particularly. On a motion for a preliminary injunction, the case with the grounds for relief, must be made by the bill itself, and the scope of the bill cannot be enlarged by affidavits filed (4).

Where title is denied, a suit for injunction is maintainable, though not coupled with a prayer for declaration of title, as the prayer for an injunction necessarily involves a declaration of title (5).

Answer must be specific and direct.—A mere formal or technical denial of the charges of a bill is not, of course, sufficient to dissolve an injunction (6). A mere denial of the facts on which the complainant's equity is founded, unless these be of such a character that the denial is entitled to as much credit as the affirmation, does not entitle the defendant to a dissolution of the injunction (7). It is well settled that an injunction will not be dissolved on a bill and answer unless the equity of the bill be denied by the positive answer (8). On a motion to dissolve an injunction only the facts stated in the answer are to be taken as true, and not the arguments and inferences drawn and made by the defendant on and from these facts. And it may be stated generally that when an answer denies the equity of a bill upon which the injunction is founded, the injunction will be dissolved; but the answer must deny explicitly the facts on which the equity is founded. It is not sufficient that it denies the inference to be drawn from those facts, or their effect. The answer of the defendant, in order to be evidence in his favour, must respond to a fact averred in the bill, and not a mere inference of law (9).

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(1) High on Injunction § 1581.
(2) Spelling on Injunction § 991.
(3) Spelling on Injunctions §§ 992, 993.
(4) *Ibid* §§ 994, 995.
(5) *Samasi* v. *Venkata patty*, 2 Ind. Cas. 420.
(6) *Horner* v. *Jobs*, 13 N. J. Eq. 19; Spelling on Injunctions § 1001.
(7) *Morris etc. Co.* v. *Jersey City*, 11 N. J. Eq. (3 Stock 13).
(8) *Miller* v. *Mc Dongall*, 44 Miss. 682; Spelling on Injunction etc. § 1003.
(9) Spelling on Injunction and other Extra-ordinary Remedies § 1005.

So in order to entitle a defendant to a dissolution of an injunction, he must deny the entire equity of the bill, directly and without evasion. It will not suffice that he answers the several charges or allegations literally, but he must traverse the substance of each charge specifically and not merely by vague and general denial. And where defendant's answer is manifestly evasive and indirect, even though it may be true in substance as alleged, the motion to dissolve will not be allowed (1). The doctrine as thus stated seems to follow necessarily from the rule, that for purposes of a motion to dissolve an injunction, any allegation in the bill which is evaded by the answer is to be taken as true in substance (2). And where defendants answer evasively, alleging an improbable version of the transactions out of which complainants' equities have arisen, the Court may, in the exercise of a sound discretion, order the injunction continued to the final hearing (3). Where however, some of the denials in an answer relied upon for the dissolution of an injunction, although true in themselves, are yet evasive by reason of the manner in which they are made, and are not such as would be sustained on exceptions, yet if other portions of the answer allege facts responsive to the bill, and which by reason of their being inconsistent with the allegations of the bill, thus deny such allegations, such portion of the answer may be taken in connection with its evasive allegations, and this constitute a sufficient denial to warrant a dissolution (4).

Affidavits.—In the case of a suit for an injunction it is practically impossible to grant a temporary injunction, without to some extent, forming an opinion on the merits of the case, since it is the duty of the Judge so to satisfy himself that the plaintiff has made out a *prima facie* case (5). So an order granting an injunction is bad in law where it has been passed without any affidavits or without the Court satisfying itself as to the correctness or otherwise of the facts put forward in the plaint (6).

An affidavit which does not state that the deponent makes oath and makes the statement is not admissible (7). Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted: provided that the grounds thereof are stated (8). So an affidavit for an injunction to the effect that the contents of the petition are true as the affirmant believes is sufficient (9), Under the provisions of the New York Code, it is well settled that an affidavit on mere information and belief, without the supporting affidavits of the informant is not sufficient (10). So according to the American law, a preliminary injunc-

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(1) *Everly* v. *Rice*, 3 Gren Ch. 553.
(2) *Wilson* v. *Hendricks*, 1 Jones Eq. 295.
(3) *Jones* v. *Edwards*, 4 Jones Eq. 257.
(4) *Mc Mohan* v. *O' Donnell*, 4 Jones Eq. 257; High on Injunction § 1475.
(5) *E. W. Parker* v. *Khan Bahadur Setu*, 53 P. L. R. 1907; see *Jagjivan* v. *Sridhar*, 2 B. 256.
(6) *Ibid.*
(7) *Phillips* v. *Prentice*, 2 Hare 542; *Allen* v. *Taylor* L. R. 10 Eq. 52.
(8) Order XIX, Rule 3 of C. P. Code.
(9) H. C. Joyce on Injunction § 136.
(10) *Campbell* v. *Earnest*, 64 Hun, 188,

tion is not granted on a bill sworn to on information or belief, and unaccompanied by affidavit of the facts from the person from whom the information and belief were derived (1). A preliminary injunction will be refused where the affidavits are so conflicting, and the defendant's are so much more circumstantial and conclusive than the plaintiffs, that the Court does not find any well grounded apprehension of immediate injury to plaintiff's interests and property (2). Affidavit in support of injunction is admitted after answer to prove an allegation in the bill as to acts of parties, neither admitted nor denied by the answer ; but such affidavit is not to be allowed in contradiction to the answer (3). So on a motion for an injunction, the plaintiff cannot read affidavits to contradict the answer (4). Court will not, in aid of motion to prevent partner receiving or creating debts, and for appointing receiver, permit plaintiff to use affidavit made and filed after coming in of answer; though in a case analogous with irreparable waste such affidavit made, etc., before answer, might be used (5).

The affidavits, upon which an *exparte* application for an injunction is made, must show either that notice to the defendant would be mischievous, or that the mischief is so urgent that it could be done, if notice were served upon the defendant, before the injunction could be obtained. When the affidavits fall short of this point, the motion must be directed to stand over, and notice of it is to be served on the defendant (6). In England a motion to extend the common injunction was refused, because it was supported by the affidavit of the solicitor only, and no satisfactory explanation was given why the plaintiff himself had not made the usual affidavit (7).

Full disclosure of Material facts—Ex-parte Injunction.—Where a plaintiff comes for an *ex parte* injunction he must state his case in the first instance fully and fairly (8). It is an established rule, that where a party obtains an *exparte* injunction by misrepresentating the facts of the case he shall not afterwards be permitted to support the injunction, by showing another state of circumstances in which he would be entitled (9). Before a party makes an application to the Court for its interposition by injunction, he ought to make the strictest investigation into the accuracy of the circumstances stated by him (10). Upon obtaining an *interim* order, in the nature of an injunction *ex parte*, the plaintiff must bring all the material facts to the knowledge of the Court, at the peril of having his injunction refused (11). On an application for an *ex parte* injunction, a plaintiff omitted to state a material fact. A

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(1) H. C. Joyce on Injunction § 136.
(2) H. C. Joyce on Injunction § 137.
(3) *Morgan* v. *Goode*, 3 Mer. 10.
(4) *Sommerrille* v. *Buckler*, 3 Austs. 658.
(5) *Lawson* v. *Morgan*, 1 Price 303.
(6) *Anon*, 1 L. J. O. S. Ch. 3.
(7) *Spadling* v. *Reiley*, 4 L. J. Ch. 169; see also *Scotson* v. *Ganny*, 1 Hare, 99.
(8) *Hamphill* v. *M'Kenna*, 2 Dr. & Wr. 183.
(9) *Att. Gen* v. *Aspinall*, 2 Myl. & Cr. 613.
(10) *Vandergacht* v. *De Blanquire*, 8 Sim 315.
(11) *Fuller* v. *Taylor*, 32 L. J. Ch. 376; *Harbottle* v. *Poole*, 20 L. T. 436 ; *Holden* v. *Waterlow*, 15 W. R. 139 ; *Mclaren* v. *Stanton* 12 Beav. 279.

motion being made to dissolve it, the plaintiff swore that he had forgotten the circumstances: *Held* that it was no excuse for the suppression (1).

Perpetual injunction by action.—Perpetual injunction cannot be granted unless prayed by bill (2). The general prayer for relief will not extend to an injunction, which will not be granted unless prayed for (3). An injunction granted upon an interlocutory application cannot exceed that prayed by the bill (4). But amendment of bill is allowed without prejudice to an injunction obtained on merits (5).

Multifariousness—Want of parties.—It is no objection to a motion for an injunction and a receiver that the bill is multifarious or deficient for want of parties, if it is sought to protect funds which are really in danger (6).

Dissolution of interlocutory injunction.—A restraining order issued to take effect 'until hearing of the whole matter' is dissolved by a refusal, at the hearing, to grant an injunction, notwithstanding an appeal is taken from such refusal. And a reversal of a decree making a temporary injunction perpetual, on the ground that complainant was not entitled to the injunction, constitutes a dissolution of the injunction, though the cause was remanded in the court below. On the same principle, the dismissal of a suit for want of prosecution amounts to a determination that a temporary injunction issued in the course of it, was improperly granted and the same is thereby set aside and discharged (7). An interlocutory injunction may be dissolved at any time before judgment in the action: A defendant who wishes to have an injunction dissolved must serve the plaintiff with a notice of motion for that purpose (8). So a marked feature of interlocutory injunctions, as distinguished from those which are final or perpetual, is that the former are liable to be dissolved upon sufficient cause shown at any stage of the proceedings, after the coming in of the answer. And in general it may be said to rest in the sound discretion of the court to dissolve an interlocutory injunction upon the coming in of the answer denying the equities of the bill, or to continue it until a final hearing upon the merits, if such course shall seem best calculated to subserve ends of justice and to protect the rights of the parties in interest (9). And in granting a dissolution the court may in its discretion, impose such terms as may be necessary to secure substantial justice (10). When the plaintiff gets a decree for perpetual injunction, the temporary injunction is dissolved *if so facto* (11).

Order 39, rule 4, is intended to cover two classes of cases: (*i*) When an urgent *exparte* order has been passed under Rule 3, Rule 4 will allow the party against whom it has been passed to apply to have it discharged or

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(1) *Chilton* v. *Robinson*, 16 Beav. 355.
(2) *Savory* v. *Dyer*, Ambl. 70.
(3) *Davile* v. *Peacock*, Barnard 27. *Jesus College* v. *Bloom*, 3 Atk. 262.
(4) *Munroe* v. *Wivanhoe*, 4 De. G. J. & S. 723.
(5) *King* v. *Turner*, 6 Madd. 255.
(6) *Evans* v. *Coventry* 3 Eq. R. 545.
(7) Spelling on Injunction § 1036.
(8) Kerr on Injunction p. 659.
(9) High on Injunction § 1467.
(10) *Ibid.*
(11) *Mohini Mohan* v. *Surendra Narayan*, 42 C. 550=21 C. L. J. 68.

varied or set aside ; and (*ii*) when an injunctive order already in force has, owing to fresh circumstances, become unduly harsh or unnecessary or unworkable it would be open to either party to apply under Rule 4 to the court to have it discharged, varied, or set aside. Rule 4 is not intended to set at nought the ordinary *cursas curiae* that, once a court has decided a matter after giving each side an opportunity of being heard, its order is final and binding on itself as much as on the parties, and cannot be re-opened except on the presentation of some new matter not available when the original order was passed (1). An appeal will lie under Order 43, rule 1, cl. (r) from an order under this rule (2).

General Principles herein.—As a general rule, where a bill makes a case for an injunction, the injunction will not be dissolved until the material allegations of the bill are denied by answer. If the answering defendants are unable, to prove want of knowldege, to deny allegations of the bill which are material to its equity, the injunction is retained. It stands on the case made by the bill, and will be held until that case be overcome ; and that the only defendant who can answer such allegations is absent from the country is no ground of exception (3). On the other hand, it is a well settled rule of practice that a defendant, on complying with the law, may have the injunction set aside in every case where its dissolution will not work irreparable injury (4). The court exercises a wide discretion as to the keeping up or dissolving of injunctions ; and where plaintiff who had obtained an injunction, became an insolvent, and delay occurred in appointing an assignee, and the suit was thereby retarded, on an application by the defendant, the injunction was ordered to stand dissolved (5). Where the plaintiffs' legal title is doubtful, and the continuance of the injunction is unnecessary for the protection of plaintiffs and injurious to the defendants, an injunction will be dissolved (6). But although an injunction may have been imprudently granted, it will not be dissolved when it is plain from the record, that the party could be entitled to the writ immediately (7). And a trivial amount of damage already suffered by the plaintiff is no reason for refusing a perpetual injunction, where without it, the adverse use might ripen into a right (8). But a defendant will sometimes be entitled to have the injunction dissolved upon showing that the plaintiff himself has been at fault with respect to the subject-matter of the application (9). But where dissolution is sought upon *ad interim* motion, the court will not usually go into a full investigation of the rights and equities in dispute, but will dispose of the matter in a more or less summary manner according to the established practice. The continuance

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(1) *Govinda Ramanuja* v. *Vijiaramanuja*, A. I. R. 1929 Mad. 803.
(2) *Zabada* v. *Muhommad*, 15 A. 8.
(3) *Lines* v. *Spear*, 9 N J. Eq. 154.
(4) Spelling on Injunction and other Extra-ordinary Remedies § 1037.
(5) *Caird* v. *Kampbell*, 1 Moll. 484.
(6) *Shrewsburry & Birmingham Ry.* v. *L. & N. W. Ry.*, 20 L. J. Ch. 90.
(7) Spelling on Injunctions etc. § 1037.
(8) *Corning* v. *Troy etc.*, 34 Barb. (N. Y.) 485,
(9) Spelling on Injunction etc. § 1037.

or dissolution of an injunction, after the coming of the answer, depends upon the sound discretion of the court, according to the nature and circumstances of the case; and its exercise will not be ordinarily interfered with by a higher court, except in a case of palpable error or abuse (1).

Whenever the allegations of the bill are not sufficient to warrant the interference of the court by injunction, the injunction may properly be dissolved. Where the petition is defective for want of equity upon its face it may be dismissed at the hearing of the application for injunction, or upon motion before answer filed (2). And injunction may be conditionally dissolved and retained until the condition is complied with (3). When the injunctive relief sought is not merely auxiliary to the principal relief demanded in the action, but is the relief itself, the court will not dissolve a preliminary injunction, but will continue it to the hearing on the merits, where there is any reasonable possibility that the plaintiff is entitled to the relief demanded (4). An injunction granted should not be dissolved but continued until final hearing where a dissolution will defeat all practical relief under the final decree obtained by plaintiff (5).

A temporary injunction obtained by means of false hood and misrepresentation, or by suppression of material facts, will be dissolved almost as a matter of course as an imposition upon the court and a fraud on the law (6). In *Black* v. *Huggins* (7), the Chancellor observed: "The rule is that if in a motion to dissolve an *ex-parte* injunction it appears that the plaintiff has misstated the case, either by the mis-representation or suppression of material facts, the injunction will be dissolved on that ground alone. *Hilton* v. *Lord Graville* (8); *Cliftan* v. *Robinson* (9); *Hemphill* v. *Mc Kenna* (10); *Endi Cott* v. *Mather* (11). The reason is that the utmost good faith must be required of those who seek to put in motion the power of this court through its extra-ordinary processes (12)." If a plaintiff in applying for an *ex-parte* injunction, suppresses a material fact, it will be ground for dissolving the injunction with costs (13). Injunctive order in possessary suit was set aside on the ground that the plaintiff had not fairly stated his case (14). It is the duty of a party asking for an injunction to bring under the notice of the court all facts material to the determination of his right to an injunction and it is no excuse for him to say that he was not aware of the importance of any facts

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(1) *Ibid* § § 1038, 1040.
(2) Spelling on Injuuction and other Extra-ordinary Remedies § 1067.
(3) H. C. Joyce on injunction § 287.
(4) H. C. Joyce ou Injunction § 288.
(5) *Ibid.*
(6) *Ciancimins* v. *Man*, 20 N. Y. Sup, 702.
(7) 2 Turn. Ch. 780.
(8) 4 Beav. 130,
(9) 16 Beav, 355.
(10) 5 Irish Eq. 57.
(11) 9 N. J. Eq. 110.
(12) See also *Brown* v. *Newall* 2 M & C. p. 570; *Dalglish* v. *Jarvie*, 2 Mac. & G. 231; *Schmithu* v. *Faulks*, (1893) W. N. p. 517.
(13) *Hmphill* v. *McKenna*, 3 Dr. & War. 183.
(14) *Dean* v. *Plunket*, Dr. 255.

which he has omitted to bring forward (1). So when it is apparent upon a motion to dissolve an injunction granted *ex-parte* that complainant has mis-represented his case, either by actual mis-statement, or by a suppression of facts material to a full understanding of the equities involved and that upon a correct statement of the facts the writ would not have been granted such a mis-representation is of itself a sufficient ground for a dissolution (2). But in order to bring a case within the rule as laid down, the degree of mis-representation must have been such as to have influeuced the court in granting the writ, by presenting a case different from that which actually existed (3). And the fact that an injunction granted *ex-parte* has been dissolved because of the suppression of material facts in obtaining it constitutes no bar to a future application for another injunction in the same case (4). But when defendant's answer fully denies the case made by the bill, and the plaintiff has misstated the case, he will not be allowed to avail himself of matters alleged in the answer to maintain his injunction, and a dissolution will be allowed (5). And it would seem that the question as to whether there was mis-representation or suppression of important facts in obtaining an injunction will not be considered on an appeal from an order granting or continuing the writ (6).

Where an injunction has issued irregularly, the defendant is entitled to have the order discharged, but any act of his founded upon it, is a waiver of the irregularity. and an affirmance of the subsistence of a regular injunction (7). But irregularity is not waived by merely moving for time to answer the bill (8). An injunction irregularly obtained must be discharged by a motion to discharge the order for the injunction, and not by a motion to dissolve the injunction, such a motion would be a waiver of the injunction (9). The court will not, upon a motion to discharge an *ex-parte* order of course for irregularity, support or sustain it on the merits, but will discharge the order, giving the party the opportunity of regularly obtaining the order, upon a proper application (10).

Upon an application to dissolve an injunction it is proper for the court to balance the relative convenience and inconvenience which would arise from its continuance or its dissolution; and if, upon weighing such considerations the continuance of the injunction is likely to work more mischief than could

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(1) *Dalglish* v. *Jarvie*, 2 Mac & G. 231; *R.* v. *Kensington Income-Tax*. (1917) 1 K. B. 486; *Sohochurry Dassee* v. *Roy*. 2 Boul 62; *Feeman* v. *Mc Arthur*, 2 Tay & Bell 10.

(2) *Endicott* v. *Mather*, 1 Stolkt, 110; *Strugeon* v. *Hooker*. 1 De G. & Sm. 484; *Greenhalgh* v. *Manchester*, 3 Myl & Cr. 346; High on Injnnction § 1474.

(3) *Brown* v. *Newall*, 2 My & Cr. 558.

(4) *Fitch* v. *Rochfort*. 18 L. J. Ch. 458; see also *Freeman* v. *Mc Arthur*. 2 Tay & Bell R. 26; *Jogjiban* v. *Shridhar*, 2 B. 255.

(5) *Cresy* v. *Beavan*, 13 Sim. 99.

(6) *Bell* v. *Hull & Selby R. Co.*, 1 Ra. Ca. 616; High on Injunction § 1474.

(7) *Travers* v *Stafford* (Lord), 2 Ves. Sn. 19, 22; *Vipan* v. *Mortlock*, 2 Mer. 476.

(8) *Traverse* v. *Stafford* (Lord) 2 Ves. Sn. 20.

(9) *Vipan* v. *Mort lock*, 2 Mer. 476; *Angier* v. *May*, 3 W. R. 330.

(10) *Brooks* v. *Parton*, 4 Beav. 494; *St. Victor* v. *Devereux*, 6 Beav. 584, *Harris* v. *Start*, 4 My & Cr. 261; *Gross* v. *Sausom*, 1 Beav. 297; Joyce on Injunction p. 1269.

result from its dissolution, it is proper to grant the motion to dissolve (1). Nor will an injunction be maintained when it is manifest that its continuance would be useless. Where, therefore, it is shown that the acts, the performance of which it is sought to enjoin were actually performed before the order for the injunction was ma le or served, the injunction will be dissolved (2).

Who can apply for dissolution of injunction.—In exceptional cases a stranger to the suit may proceed to dissolve an injunction ; thus in *Delvin* (Lord) v. *Smyth* (3). *Sir J. Jekyll* upon a motion by a *cestui que trust*, who was no party to the cause, dissolved an injunction against the trustee, who was defendant in the suit, on the ground of collusion between the trustee and the plaintiff in equity, upon the terms of the *cestui que trust* giving security to appear to the original bill, if *Lord Delvin* would make him a party, and abide by the order of the court (3). In British India also an order for injunction may be discharged, or varied, or set aside by the court, on application made thereto by any party dissatisfied with such order (4). If an injunction has been granted against two or more defendants, each of them must move to dissolve ; and as to the party who applies, the injunction will be dissolved, but as to the others who have not so applied, it will not be dissolved (5).

Effect of dissolution upon the main action.—It does not follow, however, that upon the dissolution of an injunction the bill upon which it was granted must be dismissed, since other and further proceedings may be necessary to give the relief sought by the action, and complainant is still entitled to continue his cause as an original suit whenever further proceedings are necessary to give him relief. And the injunction being regarded as collateral to the main object of the bill, the suit still remains after its dissolution, and no motion to retain it is necessary (6).

Injunctions not perpetuated on refusal to dissolve—Upon over ruling a motion to dissolve, the court will not usually make the injunction perpetual, since the defendant still has a right to be heard upon the merits (7).

Defendant's laches a bar to dissolution.—Delay or laches on the part of a defendant in seeking the aid of the court for the dissolution of an injunction may constitute a sufficient ground for refusing the motion. And where there has been long acquiescence under an order for an injunction, the courts are slow to entertain a motion for it dissolution (8). And although complainant was guilty of a suppression of material facts in obtaining the injunction, yet a delay of several months on the part of the defendants, before taking steps for its dissolution, will prevent him from obtaining a dissolution on the ground of

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(1) *Att. Gen.* v. *Mayor of Liverpool*, 1 Myl. & Cr. 171.

(2) High on Injunction § 1495.

(3) Moze 354 ; Joyce on Injunction p. 1270 ; see also *Bourband* v. *Bourband*. 12 W. R. 1024 ; *Jones* v. *Roberts*, 12 Sim 189.

(4) Order XXXIX rule 4 of the C P. Code.

(5) *Bramwell* v. *Halcomb*, 3 M. & C. 737 ; 741 ; Joyce on Injunction p. 1274.

(6) High on Injunction § 1477.

(7) *Ibid* § 1478.

(8) *Feistel* v. *King's College*, 10 Beav. 491 ; *Bickford* v. *Skews*, 4 Myl & Cr. 500; *Bell* v. *Hull & Sil by R. Co.* 1 Ca. Cas. 616 ; *Glascot* v. *Long*, 3 M. & C. 451. *Jennings* v. *Brighton*, 4 De G. J. & S. 747n ; *Cardinal* v. *Molyneux*, 4 De G. F, & J. 117, 123.

deception used in obtaining the writ (1). In *Cardinal* v. *Molyneux* (2) *Lord Chancellor, Westbury* would not disturb an order for an injunction which had been made in a case where the court had no jurisdiction, but allowed the order to stand over on an undertaking of the plaintiff (3).

Modification of temporary Injunction.—Courts of equity may and do freely modify their orders granting preventive relief so as to adapt them to circumstances and conditions as exist or arise (4). Thus where the defendant had driven piles at the shore-line infront of the complainant's several fishery, and was about erecting a platform, with a roof over it, as a landing place, it was held that a preliminary injunction which prohibited the defendant from finishing the landing should be modified so as to allow it to be finished, since the complainant's right to relief, on final hearing, would not be prejudiced thereby (5). But a restraining order should never be modified unless it is made to appear that the complainant will enjoy a complete protection from injury after as before the modification. So also a modification should not be made on a motion long after an injunction was granted, the condition of affairs resulting from the restraint having been long acquiesced in by the defendant and others, where the modification sought would cause a change in the existing relations and conditions (6). An injunction may be partially dissolved in accordance with the case made out by the answer (7).

To whom the application for dissolution is to be made.—The motion to dissolve must be made before the same court as granted the injunction, and no other court has authority to interfere with the order for an injunction (8). When the case has been transferred to a different court an application for the dissolution of the injunction should be made in that court (9).

Grant of Temporary injunction on terms and damages.—It has already been stated (10) that the court may by order grant a temporary injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the court thinks fit (11). There is nothing in the provisions of the Specific Relief Act which can be construed into a prohibition against the grant of a conditional injunction (12). When a court grants a temporary injunction on an undertaking from the plaintiff to compensate the defendant for any loss to be sustained by him, the

(1) *Bell* v. *Hull & Selby R. Co.* 1 Ra. Ca. 616 ; High on Injunction § 1480.
(2) 7 Jur. N. S. 854.
(3) Joyce on Injunction p. 1271.
(4) Spelling on Injunction etc. § 1043 ; Order XXXIX rule 4 of the C. P. Code.
(5) *Hugg* v. *Fate*, 37 N. J. Eq. 46.
(6) Spelling on Injunction etc. § 1044.
(7) *Ibid* § 1045.
(8) *Paredes* v. *Lizarde*, 9 Beav. 490 ; *Mann* v. *Ricketts*, Ib. 4 ; *Bill* v. *Hull & Selby Rail Co*, 1 Rail Cas. 616 ; Joyce on Injunction p. 1273.
(9) *Sturgess* v. *Hooker*, 1 De. G. & S. 481.
(10) Vide pp. 121-125 *supra.*
(11) Order XXXIX, rule 2 (2).
(12) *Hari Singh* v. *Municipal Committee of Pindigheb*, 78 P. R. 1901.

defendant is entitled to recover the damages by making an application under s. 95 of the C. P. Code (1). In a *Calcutta* case it has been held that in the absence of an undertaking a suit for damages is not maintainable (2). In a latest *Lahore* case (3) it has been held that in a case falling under Order 39, rule 1, it is not necessary that the courts should order the petitioner to furnish security to compensate the decree-holder for any loss that may be caused by a temporary injunction against him being granted.

Compensation for obtaining injunction on insufficient grounds— Where in any suit in which a temporary injunction is granted under s. 94 of the C. P. Code and it appears to the court that such injunction was applied for on insufficient grounds, or the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the court, and the court may, upon such application, award against the plaintiff by its orders such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him: Provided that a court shall not award under the section, an amount exceeding the limits of its pecuniary jurisdiction. An order determining any such application shall bar any suit for compensation in respect of such injunction (4). Where a party does not wish to ask for compensation under this section for wrongful injunction, he is allowed by implication to bring a suit for damages (5). So the remedy provided under this section is optional, and the injured defendant is at liberty to institute a regular suit against the plaintiff for compensation for improper injunction.

In *Najappa Chettiar* v. *Ganapathe Gounden* (6) the court observed: "This section in our opinion creates a special jurisdiction in the court trying a suit to award compensation as an incidental relief and limits the amount it may award to Rs. 1,000.....The general rule governing such cases has always been in England that actual malice must be proved. The section allows a limited remedy, without proof of malice, which it is open to a party to avail himself of, if he chooses. It must be noted that the Code makes provision only for some kinds of abuse of the process of courts and does not deal with all kinds of abuse. Section 95 of the Code of Civil Procedure is analogous to section 250 of Criminal Procedure Code which allows a Criminal Court to award compensation not exceeding Rupees 50 to a complainant when it is satisfied that the accusation against him is frivolous or vexatious. That section does not alter the law regulating regular suits for damages for false prosecution where the plaintiff would be bound to prove absence of

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(1) *Varajlal* v. *Kastur*, 22 B. 42.

(2) *Mohini* v. *Surendra*, 18 C. W. N. 1189=42 C. 550; see also *Dharmo* v. *Sreemuty*, 18 W. R. 410.

(3) *Badruddin* v. *Munilal*, A. I. R. 1934 Lah. 20.

(4) S. 95 of the C. P. Code.

(5) *Edward Wilson* v. *Kanhya Sahoo*, 11 W. R. 143.

(6) 35 M. 598=21 M. L. J. 1052=12 Ind. Cas. 507.

reasonable and probable cause and malice while under the section, it is enough for the Criminal Court to find that the complaint was frivolous or vexatious. That section unlike section 95 of the Code of Civil Procedure does not bar a suit for false prosecution, but merely provides that the amount awarded as compensation under it shall be taken into account in decreeing compensation in a subsequent civil suit. The Allahabad High Court in *Gontiere* v. *Robert* (1) held that the corresponding provisions in the Civil Procedure Code of 1859 did not alter the law applicable to suits for damages for arrest or attachment. The Calcutta High Court was apparently of the same opinion in *Raj Chandra Roy* v. *Shama Sundari Debi* (2), though the case was one for improper attachment after decree. There is also a dictum of the judicial committee of the Privy Council in *Kissory Mohan Roy* v. *Hursook Dass* (3). The case was one in which a third party sought to recover damages for wrongful attachment of his property as the property of the defendant in the suit. It was contended that it was necessary to prove malice and absence of reasonable and probable cause in making the attachment. Their Lordships say "that is the rule which obtains between the parties to a suit when the defendant suffers loss through its dependence.' The same view was taken by the Bombay High Court in *Surajmal* v. *Manackad* (4). The absense of reasonable and probable cause was taken to be necessary in *Thakai Hojji* v. *Budruddin Saib* (5) but no reference was made to malice. We must hold that there is no reason for departing. when a suit is filed for damages from the well established rule that when the plaintiff's grievance arises directly from the order of a judicial tribunal though it is moved there—to by a private party, the defendant would not be responsible in damages unless he had acted with malice as well as without reasonable and probable cause .....Malice has been explained to mean any improper or indirect motive *i.e.*, some motive other than the one which should properly actuate the party. No hatred or enmity is required [See *Hicks* v. *Faulkner* (6) also *Quartz Hill Gold Minining Company* v. *Eyre* (7)]."

Section 95 which allows limited damages in the case of an injunction being obtained on insufficient grounds does not bar a suit for damages for injunction obtained in a suit instituted against the plaintiff maliciously and without reasonable and probable cause (8). It is doubtful if an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found there were sufficient grounds for making it. The proper stage for making such an application would be only when the suit is heard and until then, it would be premature (9).

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(1) 2 N. W. P. 353.
(2) 4 C. 583.
(3) 17 I. A. 17 (27).
(4) 6 Bom. L. R. 704.
(5) 29 M. 208.
(6) 8 Q. B. D. 167 (175).
(7) 11 Q. B. D. 674 (681).
(8) *Albert Bonnan* v. *Imperial Tobacco*, 30 C. W. N. 465=A. I. R. 1926 Cal. 757.
(9) *Chintamanini* v. *Venkata Payya*, 71 Ind. Cas. 450=1923 Mad. 352.

Suit for damages for obtaining ad interim injunction wrongfully.—Where the plaintiff sued for damages on the ground that the defendant had in a prior suit *maliciously* and without reasonable cause obtained an *inter im* injunction as against him, the suit having been finally dismissed. *Held* that the plaintiff could recover damages only if he proved that the defendant had acted with malice as well as without reasonable and probable cause (1). The granting of an injunction is a judicial act in the fullest sense ; it is not a ministerial order or an order of course or mesne process or a necessary incident of any particular jurisdiction. It is the duty of a judge before granting an injunction to satisfy himself that the plaintiff is not acting without reasonable and probable cause. Consequently unless the malice of the plaintiff results in some mis-statements or leads the plaintiff to suppress some facts which it was his duty to lay before the Court an action will not lie for the damage done to the defendant's business by the injunction (2). In *Hara Kumar De* v. *Jagat Bandhu De* (3). *B. B. Ghose, J.* observed : "The appeal raises a short question, but with regard to which there seems to be a good deal of controversy. The plaintiff brought the suit for damages against the defendant for obtaining an order of temporary injunction wrongfully on insufficient grounds, by reason of which the plaintiff had suffered damages, inasmuch as he had to pay compensation to a third person on account of breach of a contract for erecting a hut. The defendant had brought a suit for possession of a certain property and, in the course of the suit he had obtained a temporary injunction restraining the present plaintiff from going on with the building operation on the disputed land. The suit was decided in favour of the present plaintiff and thereupon the injunction was dissolved. It is unnecessary for me to state in detail all the facts alleged, having regard to the order that we propose to make in the case.

"The trial Court passed a decree in favour of the plaintiff. On appeal by the defendant, the suit has been dismissed by the Subordinate Judge on the ground that such a suit as this is not maintainable. He relied on the authority of the case of *Mohini Mohan Misser* v. *Surendra Narayan Singh* (4), for holding that the present action for damages is not maintainable.

"The plaintiff appeals against that decision and the point that has been argued before us is that, according to the authorities of this Court, such a suit is maintainable. We have now to consider the question with reference to the cases that have been decided in this Court. There cannot be any doubt whatever that as a general rule an action does not lie for damages against a person for bringing a civil action, however *malicious* and unfounded it may be. The reason is this that the defendant is amply compensated in the costs

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(1) *Rama Rau* v. *Somasundaram*, 51 M. 642=A. I. R 1928 Mad. 679.

(2) *Imperial Tobacco Co.*, v. *Bonnan*, 46 C. L. J. 455=A. I. R. 1928 Cal. 1=106 Ind. Cas. 277 ; on appeal *Bonnan* v. *Imperial Tobacco*, 33 C. W. N. 1034 =50 C. L. J. 351=A. I. R. 1929 P. C. 222.

(3) A. I. R. 1927 Cal. 247=53 C. 1008.

(4) 42 C. 550=18 C. W. N. 1189= =21 C. L. J. 68=26 Ind. Cas. 296.

awarded by the Court and the Court has the authority to mould its decree for costs according to the circumstances of the case. The question is whether under the present circumstances a separate suit for damages lies or not. At the outset I must refer to the case of *Narendra Nath Koer* v. *Bhusan Chandra Pal* (1), which came for consideration before a Full Bench of this Court. But it was held that the question referred to the Full Bench did not arise for decision in that case. In delivering the judgment of the Court, *Mookerjee*, acting *Chief Justice* made the following observations: 'There are two sets of decisions in the reports. In one set it is laid down that a person who unlawfully interferes with the exercise of the property rights of another commits an act in the nature of trespass to property and is liable for damages in an action for trespass. In the other series of cases it is laid down that no suit lies for damages against the defendant for *maliciously* and without reasonable and probable cause instituting a civil action. As an illustration of the former class reference may be made to the case of *Bhuth Nath Mistry* v. *Chandra Binode Pal Chowdhury* (2). As an illustration of the latter class reference may be made to the case of *Bishun Singh* v. A. W. N. *Wyatt* (3) and *Mohini Mohan Misser* v. *Surendra Narayan Singh* (4).

"The learned vakil for the appellant relies upon the case of *Bhutnath Pal Mistry* v. *Chandra Benode Pal Choudhury* (2), cited above, as directly in his favour. I do not find anything distinguishing the present case from that case. In that case it was held that because the defendant had obtained a temporary injunction in a previous suit for possession of property restraining the plaintiff from carrying on a building operation, the plaintiff was entitled to damages, for the act was in the nature of trespass to property. The case of *Bishun Singh* v. *A. W. N. Wyatt* (3), referred to above also supports the contention of the appellant. In that case *Mookerjee, J.* in delivering the judgment of the Court is reported to have observed (at page 520): 'The broad proposition formulated by the learned vakil for the appellant that the suit as framed is not maintainable cannot consequently be supported, and the statement that the institution of an ordinary civil action, however unfounded, vexatious and *malicious* it may be, is not a good cause of action must be qualified when there has been arrest of person or seizure of property.''

"The learned Judge then referred to the provisions of the Civil Procedure Code of 1882 which are now embodied in s. 95 of the present Code, and lower down he referred to a number of cases in this Court which I have examined and found as supporting the proposition that the suit like the present one is maintainable. It is unnecessary for one to enumerate the cases over again. But I may observe that there is the high authority of *Sir Barnes Peacock C. J.* in

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(1) 31 C. L. J. 495=57 Ind. Cas. 375 (F. B.)
(2) 16 C. L. J. 34=16 Ind. Cas. 443.
(3) 16 C. W. N. 540=11 Ind. Cas. 729=14 C. L. J. 515.
(4) 42 C. 550=18 C. W. N. 1189.

the case of *Joykalee Dasee* v. *Chandmalla* (1), in favour of this proposition. The learned *Chief Justice* observed at page 135 that: 'If a plaintiff brings a suit or makes an application, *maliciously* or without probable or reasonable cause, to a Court of competent jurisdiction to seize property of another person as the property of his judgment-debtor, he may be liable to damages for any injury which may be occasioned by reason of the order of the Court. Upon the same principle, a person may be liable to damages for applying for an injunction upon grounds which he knows to be insufficient.

"In the case of *Rajchunder Roy* v. *Shama Sundari Debi* (2), where a suit was brought to recover damages for injuries caused by an arrest in accordance with a decree of a competent Court, *White J.* in giving the judgment of the Court, states the special circumstances under which such a suit is maintainable. One of the grounds is that the injury sustained is something other than an injury which has been or might have been compensated by an award of costs of the suit, e, g., that he has suffered from collateral wrong. It is unnecessary for me to cite other cases on the question. I may only refer to the last case of *Bhusan Chandra Pal* v. *Norendra Nath Koer* (3), the same case which was referred to the Full Bench [*Norendra Nath* v. *Bhusan Chandra Pal* (4)]. This case came up for decision before a Division Bench consisting of *Mookeriee*, Acting Chief Justice and *Fletcher J.* and the learned Judges held that a suit for damages was maintainable for wrongful attachment of property, which was pointed out by defendant as the property of the judgment-debtor. That such a suit is contemplated by the Legislature as capable of being brought would appear by a reference to sub-section 2 of s. 95 Civil Procedure Code. In that section arrest attachment and temporary injunction are placed under the same category. It would also appear to be absolutely wrong to deprive the plaintiff of a right of suit and to say that his only remedy is by an application under s. 95, Civil Procedure Code, if he sufiers damages to the extent of more than Rs. 1000. I may also refer to Article 35, clause (k) of the second schedule of the Provincial Small Cause Courts Act which contemplates that such a suit is maintainable and under which the cognizance of a suit like this is taken out of the jurisdiction of a Small Cause Court. It can, therefore, hardly be said that a suit like the present one is not maintainable (5)."

But in a Lahore case it has been held that where a person has without sufficient or reasonable cause obtained a temporary injunction which has caused loss to his opponent the latter can sue the former for damages without any proof of malice (6).

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(1) 9 W. R. 133.
(2) 4 C. 583.
(3) 32 C. L. J. 236.
(4) 31 C. L. J. 495=57 Ind. Cas. 375 (F. B.)
(5) *Kedarnath* v. *Beharilal*, 49 B. 629 =27 Bom, L. R. 525=87 Ind. Cas. 1024, see also *Manohar* v. *Goburdhan*, 9 Ind. Cas. 60.
(6) *Evans* v. *Arthur Muick*, 45 P. L. R, 1922=(1922) Lah. 303.

According to Hindu Law, so long as there are competent paternal relatives in existence, the maternal relations of a girl have no authority to give her in marriage, but in cases where the paternal relatives refuse to act or have disqualified themselves from acting, the maternal relatives acquired authority to contract marriage on behalf of the girl. After the dismissal of the application of the paternal aunt for guardianship of the minor, the maternal uncle of the girl arranged for the marriage of the girl with a certain person. The paternal aunt then obtained a temporary injunction and got the wedding put off. The marriage, however was accomplished with the person selected by the maternal uncle. The maternal uncle brought a suit to recover damages for the loss caused to him by the wrongful issue of the injunction and the postponement of the wedding. The munsiff tried all the issues excepting the one as to the measure of damages and dismissed the suit. Upon appeal the District Judge finding that the paternal uncle was an out caste and that the aunt had no authority to give the girl away in marriage, remanded the case under Order XLI, r. 23 of the Code of Civil Procedure. *Held* that under the circumstances of the case the maternal uncle was competent to enter into a contract of marriage on behalf of the girl, but that the proper order was one under Order XLI. r. 25 of the Code (1).

In *Mohini Mohan Misser* v. *Surendra Narain Singh* (2) it has been held that no suit lies for damages against a defendant maliciously and without reasonable and probable cause obtaining a perpetual injunction which has been subsequently dissolved on appeal.

Order for compensation under s. 95—Appeal.—An order for compensation under s. 95 of the Civil Procedure Code is an order independent of the decree passed in the case, although the decree passed in the case sets off the amount of compensation against the amount of decree. The right of appeal from such an order is equally independent and is determined by s. 104 of the Code. The valiaity of the order cannot be questioned, in second appeal (3). An appeal lies against an order awarding damages as well as when relief is refused under s. 104 (1) (g) of the C. P. Code (4).

Limitation. – In a suit for damages in respect of the temporary injunction, limitation would run from the date when the temporary injunction was dissolved by the decree granting perpetual injunction (5).

Court fee to be paid on appeal. – One B. L. sued B. D. and others for damages on account of the alleged wrongful cutting and removing of certain trees by the defendants. The plaintiff before hearing obtained an injunction

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(1) *Kasturi* v. *Pannalal*, 38A. 520=35 Ind. Cas. 245=14 A. L. J. 754.

(2) 18 C. W. N. 1189.

(3) *Kannappa* v. *Sambasiva*, 21 Ind. Cas. 756.

(4) *Kandappa* v. *Chinappa*, 21 M. L. J. 460 ; See also *C. V. C. T. Firm* v. *Saya Bya*, 11 Ind. Cas. 917 ; *Narahari* v. *Vaithinatha Ayyar*, 49 Ind. Cas. 86=25 M. L. T. 46.

(5) *Mohini Mohan* v. *Surendra Narain*, 18 C. W. N. 1189 ; see also *Nanda Kumar* v. *Gaur Sankar*, 13 W. R. 305.

against the defendants restraining them from removing certain trees which they had already cut. On the hearing of the suit the court being of opinion that such injunction had been unnecessarily obtained by the plaintiff ordered him under s. 497 of the Civil Procedure Code to pay damages. The plaintiff appealed both against the main decree and as to the award of damages, but paid only the same court-fee which he had paid on his plaint. The memorandum of appeal was reported by the *Munsarim* of the appellate court to be duly stamped ; but at the hearing the court dismissed the appeal in *to to* on the ground of insufficiency of court fee. On these facts it was held that the plaintiff appellant ought to be allowed an opportunity of amending his memorandum of appeal either by relinquishing his claim to relief against the award of damages or by making good the deficiency in the court fee (1).

Duration of temporary injunction.—It is not every order of a Court directing a person to do an act, that is an injunction. In its essence an injunction is a relief consequential upon an infringement of a legal right (2). Where an *interim* injunction was granted against a Hindu widow, in a suit by certain remote reversioners upon certain charges, held it would be, in the circumstances of the case, an abuse of the discretion of the Court not to continue the injunction until the hearing, when the truth or falsity of the charges made by the plaintiff could be investigated on oral evidence (3). A temporary injunction may be granted until the disposal of the suit or until the further order of the Court. An injunction granted *pendente lite*, until the disposal of the suit or until further orders will end in any case on the disposal of the suit or on any earlier date, on which further order may be passed, the reference to further order not applying to anything after the disposal, of the suit (4).

Injunction must be obeyed until dissolved.--An injunction, however erroneously granted or irregularly obtained, is an order of Court, and must be obeyed (5) ; if, therefore the defendant or his attorney is guilty of a breach of the injunction, it is a contempt which the Court will punish (6). The order must be discharged before it can be disobeyed (7). In *Harding* v. *Tingey* (8), *Vice-Chancellor Sir R. T. Kindersley*, after observing that an application to commit for violation of an order of the Court for an injunction, was a matter *stricti serimi juris*, said, it was of the greatest importance, that either an order for an injunction, or an *interim* order, should be implicitly observed, and

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(1) *Missir Behari Lal* v. *Bhagwan Das*, A. W. N, 1893, 220.

(2) *Arjan Suie* v. *Emperor*, 44 Ind. Cas. 737=3 Pat. L. J. 106.

(3) *Gopee Nath Mukherjee* v. *Kally Dass Mullick*, 10 C. 225.

(4) *Ayisa Umma* v. *P. K. Abdulla*, 1924 M. W. N. 636 ; see also *Chalavadi*, v. *Poloari*, 31 M. 74 ; *Madhoo* v. *Draupadi*, 43 A. 383=61 Ind. Cas. 417 ; *Yaminuddin* v. *Ahmad Ali*, 21 C. 561 ; *Gossain* v, *Gour Prosad*, 10 A. 506 ; *Balbahadur* v. *Bala*, A. I. R. 1930 All. 387.

(5) *Wood Ward* v. *King*, 2 Ch. Ca. 203 ; *Wood Ward* v. *Lincoln*, 3 Sw. 626 ; *Devonshive* v. *Lady Sandys*, 6 Ves. 109 ; *Partington* v. *Both*, 3 Mer. 149.

(6) Eden on Injunction 75.

(7) *Robinson* v. *Lord Byron*, 2 DIck 703 ; *Wood Ward* v. *King*, Ib. 794.

(8) 12 W. R. 685.

every diligence should be exercised to observe it; and that where the party served with notice of such order did an act, which, unless prevented would result in that which would create a violation of the order, he was bound to exercise the greatest diligence to prevent such result; but that the parties here, did not do what they could, and thus being bound to act strictly, there could in fact have been a violation. Any party affected by the order irregularly obtained, cannot disregard it, or disobey it, or treat it as nullity, until it is discharged on a proper application (1).

Violation of Temporary Injunction.—Save and except in the three Presidency High Courts, the extent and power of the Courts in British India to punish parties in contempt or violation of injunctive process is limited by the Civil Procedure Code (2). The three Presidency High Courts in their original jurisdiction, can, irrespective of the provision of C. P. Code, enforce a judgment *in personam* by a process *in personam* (3). It was said by *Wright J.* (4): "Courts of equity have, from the time of *Lord Hardwicke's* decision in *Penn* v. *Lord Baltimore* (3), exercised jurisdiction *in personam* with respect to foreign land against persons locally within the jurisdiction of the English Court in cases of contract, fraud, and trust, enforcing their jurisdiction by *writs of ne exeat regus* during the hearing, and by sequestration, commitment, or other personal process after decree." The jurisdiction of the High Court to imprison for contempt, is a jurisdiction that is inherited from the old Supreme Court, and was conferred upon that Court by the Charters of the Crown, which invested it with all the powers and authority of the then Court of King's Bench and of the High Court of Chancery in Great Britain, and this jurisdiction has not been removed or affected by the Civil Procedure Code (5). So under the authority conferred by the charters of the Supreme Courts and continued by their own Letters Patent, the Presidency High Courts in India possess the power of enforcing obedience to their orders by committal for contempt (6). In the above case *West J.* observed: "It has been said indeed 'that the High Courts in India have no inherent jurisdiction of their own as have the Superior Courts of England. But they have the authority conferred on them by the charters of the late supreme courts and continued by their own Letters Patent. This has, by the High Court at Calcutta, been held not to have been cut down by the Code of Civil Procedure: *Martin* v. *Lawrence* (7), and it certainly included the power to commit for contempt." So it is now well settled that the Prisidency High Courts of India possess the power of enforcing obedience to their orders by attachment for contempt. But an order for attachment

(1) *Wood Ward* v. *Lincoln* 3 Sw. 626; *Wood Word* v. *King* 2 Dick. 797; *Fennings* v. *Hemphrey*, 4 Beav. 1; *Blake* v. *Blake*, 7 Beav. 514; *Chuck* v. *Crener*, 2 Ph. 113; *South Staffordshire* v. *Hall*, 16 Jur. 93; Joyce on Injunction p. 1323.

(2) Order XXXIX, rule 2 (3).

(3) *Penn* v. *Lord Baltimore*, 1 Ves. 444.

(4) *British South Africa Co.* v. *Companeoa*, (1892) 2 Q. B. 358 (364); (1893) A. C. 602.

(5) *Martin* v. *Lawrence*, 4 C. 655.

(6) *Hasoonbhoy* v. *Cawasji*, 7 B. 1.

(7) 4 C, 655.

for contempt is not an order in exercise of the High Court's Civil jurisdiction, and therefore, does not come within the provision of s. 591 of the Civil Procedure Code of 1882 (1). So the three presidency High Courts have all the powers of a court of equity in England for enforcing their decrees *in personam* (2).

The granting of injunction being justly regarded as one of the highest prerogatives of courts of equity, the most exact and implicit obedience is required from those against whom the mandate of the court is directed. Within whatever irregularities the proceedings may be affected, or however erroneously the court may have acted in grating the injunction in the first instance, it must be implicitly obeyed so long as it remains in existence, and the fact that it has been granted erroneously affords no justification or excuse for its violation before it has been properly dissolved (3). And the party against whom an injunction issues will not be allowed to violate it on the ground of want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the Court, or upon the equity of the bill, or to question the authority of the Court to grant relief upon the facts stated, except upon application to dissolve the injunction. So if defendant is in doubt as to the scope or extent of the injunction he should not wilfully disregard or violate it with a view of testing such questions, but should apply to the Court for a modification or construction of the order. And upon proceedings for contempt in this class of cases the only legitimate inquiry is whether the Court granting the injunction had jurisdiction of the parties and of the subject-matter, and whether it made the order which has been violated, and the Court will not in such proceedings, consider whether the order was erroneous. And in contempt proceedings, the violation of the injunction is the sole issue involved, and accordingly where a question involving the rights of the parties has been expressly left undecided in the injunctive order, such question cannot be litigated in a contempt proceeding, since the only enquiry before the Court is whether or not the defendant has complied with the terms of the order (4).

Reason of the Rule.—The reason for the rule as here laid down is found in the necessity of preserving the respect and obedience due to the mandate of equity, and of preventing the disastrous confusion which would inevitably result from allowing parties against whom injunctions were issued to be themselves the judge of the propriety of the relief, or the regularity of the

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(1) *Navivahoo* v. *Narotamdas*, 7 B. 5.

(2) *Yashavant Rao* v. *Dadubhai*, 14 B. 353 (359); see also, *In the Matter of Amrita Bazar Patrika*, 17 C. W. N. 1253 (1279).

(3) High on Injunction § 1416; see also *Partington* v. *Booth*, 3 Merv. 148; *Woodward* v. *Earl of Lincoln*, 3 Swanst. 626; *Fennings* v. *Humphrey*, 4 Beav. 1; *Blake* v. *Blake*, 7 Beav. 514; *Chuck* v. *Cremer*, 2 Ph. 113; *Harding* v. *Pigney*, 12 W. R. (Eng.) 684; *Spokes* v. *Banbury*, 35 L. J. Ch. 105; *Eastern Trust* v. *Mc Kenzie*, (1915) A. C. 761=84 L. J. P. C. p. 157; *Rusell* v *East Anglican Ry.*, 3 Mac. & G. p. 117.

(4) High on Injunction § 1416.

proceedings. From the nature of the case, the tribunal granting the relief must itself be the arbiter and its mandates are to be strictly observed until properly revoked. And if the Court granting the relief had jurisdiction of the subject-matter, the fact that its powers were erroneously exercised does not render the injunction void, but only voidable, and until it is set aside or revoked it is entitled to implicit obedience (1). Before proceedings can be taken on account of disobedience of an injunction issued by a Court, it must be ascertained that the Court had jurisdiction over the subject matter in controversy. If the Court had no jurisdiction over or had exceeded its powers in granting an injunction in matters beyond its jurisdiction, the injunction must be treated as absolutely void and the person who had disobyed it cannot be punished for the alleged offence. There is in this respect a clear distinction between an order erroneously made with jurisdiction and order made absolutely without jurisdiction (2). And the fact that the injunction was too broad in its terms, and covered property over which it should not be extended, affords no excuse for its vioiation (3). Nor does the fact that the injunction was broader in its terms than the prayer of the bill warrant a defendant in

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(1) *People* v. *Sturtevant*, 9 N. Y. 263. "Jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. Such jurisdiction naturally divides itself under three broad heads namely, (*i*) with reference to the subject-matter (*ii*) the parties, (*iii*) the particular question which calls for decision. A Court can adjudicate upon a subject-matter which does not fall within its province as defined or limited by law ; this jurisdiction may be regarded to be essential, for jurisdiction over the subject-matter is a condition precedent to the acquisition of authority over the parties ; and if a Court has no jurisdiction over the subject-matter of the controversy, consent of the parties cannot confer such jurisdiction, and a judgment made without jurisdiction in such a case is absolutely null and void ; it may be set aside by review or appeal, or its nullity may be established when it is sought to be relied upon in some other proceedings. As regards the jurisdiction in relation to person, a Court cannot act upon persons, who are not legally before it, upon one who is not a party to the litigation, upon a petitioner who has not invoked the exercise of its powers, or upon a defendant who has never been notified of the proceedings ; but jurisdiction in relation to a person is not essential in the same sense as jurisdiction in relation to the subject-matter, because defect of such jurisdiction may be waived. As regards jurisdiction in relation to the particular question which a Court assumes jurisdiction to decide, it can pass judgment only upon a matter which has been submitted to its determination and which, under the statute, it has authority to decide ; for instance if it has authority to decide a question of possession only, it cannot decide a question of title. Questions of jurisdiction may consequently arise in three ways, that is, either in relation to the subject-matter, or in relation to the parties, or in relation to the question submitted for the decision of the Court. Another class of questions, may, however, arise, namely, whether a Court in the exercise of the jurisdiction which it possesses, has acted according to the mode prescribed by the Statute. If such a question is raised, it obviously relates not to the existence of the jurisdiction, but to the exercise of it in an irregular or an illegal manner. We are not prepared to accept the view that a non-compliance with every rule of procedure destroys the jurisdiction of the Court." *Vide* order of reference in *Sukh Lal* v. *Tara Chand*, 33 C. 68 (F. B.)

(2) *Sahodra Koer* v. *Dhajahari Gosain*, 16 C. W. N. 447.

(3) *Richard* v. *West*, 2 Green. Ch. 456 ; *Eastern Trust Co.* v. *Mc. Kenzie*, 20 C. W. N. 457=35 Ind. Cas. 378 (P. C.)

disregarding it, since although irregular it is not void, and must be obeyed while in existence. But while a Court may properly punish the violation of its injunction, although it was improperly awarded, it should not in such case compel the offender to pay to the plaintiff who obtained the injunction any sum as an indemnity, since the plaintiff was not entitled to relief which he procured (1). An injunction although subsequently discharged because the plaintiff's case failed must be obeyed while it lasts (2). The violation of an injunction constitutes a contempt of the Court from which it issued, and will be punished accordingly. Nor does the question of the motive or intent with which the writ was disobeyed alter or vary the responsibility for the violation, on the contrary, it may be stated as a general rule, that where the order has been duly served on defendants, they are liable for its violation, in whatever capacity or from whatever motive they have acted (3).

An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain (4).

Defendant's guilt must be clearly established.—An injunction must be clear and definite and free from anbiguity (5). An injunctive order is a misleading one is a proper defence (6). Where proceedings in attachment are instituted to punish a defendant for breach of an injunction, the fact of his guilt must be clearly and implicitly established to the satisfaction of the court. But while the injunction must be implicitly obeyed, it is the spirit and not the strict letter of the mandate to which obedience is exacted and complainant failing to prove a violation of this to the satisfaction of the court, the rule for an attachment for contempt will be discharged (7).

Advice of Counsel or others no defence.—As regards rights of persons affected by an injunction, the fact that defendant has violated the mandate of the court under the advice of counsel constitutes no sufficient ground of defence in his favour. Thus where defendant has committed a breach of the injunction, he cannot relieve himself from the responsibility for his conduct by the fact that it was committed under the advice of counsel that the service of the writ was defective (8). So where defendant, who has been served in person with a written notice that an order for an injunction against him has been made, proceeds with the commission of the acts enioined, claiming to act under the advice of counsel that such notice was inaffectual to bind him, he is regarded as violating the injunction (9). It is observed, however, that while the fact of defendant having committed the breach under the advice

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(1) High on Injunction § 1417.
(2) *Eastern Trust Co.* v. *Mc Kenzie*, 20 C. W. N. 457=35 Ind. Cas. 378. (P.C.)
(3) High on Injunction § 1418.
(4) Order XXXIX, rule 5 of C. P. Code.
(5) *Ambica* v. *Benode*, 36 C. W. N. 248.
(6) *Spokes* v. *Banbury*, 35 L. J. Ch. 105.
(7) High on Injunction § 1419.
(8) *Mead* v. *Norris*, 21 Wis. 310.
(9) *Kimpton* v. *Eve*, 2 Ves. & B. 349; see also *Pranjivandas* v. *Mayaram*, 1 B. H. C. R. O. C. J. 148.

of counsel affords no justification for his conduct, yet if such advice be given in good faith it may properly be taken into account in determining the degree of punishment to be inflicted for the breach, and may thus paliate although it cannot justify the violation (1).

Injunction becomes operative from the notice of the order.—In considering the question of a defendant's liability for breach of injunction it is to be borne in mind that the injunction becomes operative from the time of the order being made, and not from the writ itself, or from the time of its being drawn up (2). In the first mentioned case, *Lord Chancellor Cottenham* said: "It was the establshed rule of the court that a party who has notice of an order is bound by it from the time it is pronounced, and if he presumed to disobey it, he was liable to the censure of the court for so doing;" and after stating that the writ bore the date when the order was passed said: "if therefore, the proposition there stated namely, that a motion to commit a party for breach of injunction could not be made without producing the writ, were correct, a party would have all the interval between the making and passing of the order, to commit the act which the injunction was intended to restrain;" and refused a motion to discharge a defendant in custody for breach committed, after he had received notice of the order for an injunction, but before it was drawn up, with costs. So the mandate of the court being effectual upon all parties having notice thereof from the time it is given, to fix defendant's liability for a violation it is only necessary to show that he has actually been apprised of the existence of the order at the time of commiting the acts constituting the violation (3). Where an injunction is ordered against the commission of waste and the sale of crops, and the defendant is served with written notice thereof but proceeds to sell in disregard of the notice, although admitting his belief that the order was made, he is guilty of a violation of the mandate of the court, even though he claims to have acted under the advice of counsel (4). So an injunction is binding on the party

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(1) High on Injunction § 1420.

(2) *Mc Neil* v. *Garrat*, 1 Cr. & Ph. 98; *James* v. *Downes*, 18 Ves. 522; *Mining Co., of Ireland* v. *Delany*, 21 L. R. Ir. 8; *Hearn* v. *Tenant*, 14 Ves. 136; *Rathray* v. *Bishop*, 3 Mad. 220. Now of course no writ is being issued still the principle of the rule is applicable.

(3) *Vasandu* v. *Rox*, 2 Jac. & W. 264; *United Telephone* v. *Dale*, 25 Ch. D. 778; *Gosch* v. *Marshall*, 8 W. R. 410.

(4) *Kimpton* v. *Eve*, 2 Ves. & B. 349. This was an injunction against the commission of waste and the sale of straw and standing crops, defendant having proceeded to a sale after personal service upon him of a written notice that an order for the writ was granted. Defendant, by his affidavit, admitted his belief that the order had been made, but claimed to have acted by the advice of his solicitor, to the effect that a mere notice of the order had no binding force. *Lord Eldon L. C.*, observed: "It is true that before *Lord Hardwicke's* time, the case of a party actually present in Court, hearing the order made, actual service of the injunction was required. *Lord Hardwicke* I suppose, felt the enormous mischief of permitting a man, hearing an order pronounced restraining him from doing an act, to walk out of court and immediately do that act, before service of the injunction. But if that extension of practice was right, the court could not stop short, in other cases affording the same necessity for its application. I have heard some of my

to whom it is issued from the time it is communicated, for there can be no contempt unless the party concerns knows what he is required to do, or abstains from doing, and a court cannot punish a man for doing what he did not know he was forbiddin to do (1).

Any means of information whereby notice of the order is actually brought to the knowledge of the parties enjoined would seem sufficient to meet the requirements of the rule above laid down. And the Courts have uniformly held that it is not requisite that a defendant against whom an injunction had issued, should be officially apprised of its existence, or be served with process in the cause to render him liable to contempt in committing a breach of the injunction. If the defendant is informed of the existence of the order, although not yet served with process, it becomes operative upon him, and he will not be allowed to disregard or violate it. It is enough to show that he has had actual notice of the existence of the order of the court that it should issue (2). Nor is it necessary in such a case that the defendant should have been served with process. And one who has received notice of the order for an injunction may be guilty of a breach of the mandate of the court and may be punished for contempt, even though the writ has not yet issued. Otherwise the opportunity would be afforded of committing with impunity violation of the injunction between the time of ordering the writ and the time of issuing, and thus the very act would be permitted which it is the object of the injunction to prevent (3)-

The rule as to the liability of a defendant for breach of an injunction upon notice of its existence, or of the order of the court, holds good even though there has been great negligence in serving the writ. And even where service has been delayed to such as extent as to constitute ground for a dissolution of the writ, he who violantes it may still be attached for contempt (4) So persons who remain in court during the argument of a motion for an injunction cannot, by leaving the court just before the order for the writ is made, evade

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predecessors in this place treat it as a great abuse of justice and want of consistency the refusal to apply that practice, which is applied to a person present in court and hearing the order to a man standing outside the Court, and informed by some one who heard it that the order was pronounced. In this case the party admitting that he believed the order was made, the principle is the same as if his belief was formed from information short of actual service." See also *Israil* v. *Samser Rahman*, 18 C. W. N. 176=19 C. L. J. 47 ; *Skip* v. *Harwood*, 3 Atk. 564, Anon, 3 Atk. 567 ; *Hall* v. *Trigg*, (1897) 2 Ch 222 ; *D.* v. *A. & Co.*, (1900) 1 Ch. 675 ; *Aberdonia Cars* v. *Brown*, 59 S. J. 598 ; *Suarez In re*, 87 L, J. Ch. 184.

(1) *Nandkishore* v. *Shade Ram*, A. I. R. 1926 All. 457=96 Ind. Cas. 137 ; *Darbari* v. *Ghulam*, A. I. R. 1930 Lah. 858=128 Ind. Cas 304 ; *Carrow* v. *Ferrier*, 17 L. T. N. S. 536.

(2) High on Injunction § 1422 ; see also *Hearn* v. *Tenant*, 14 Ves. 136 ; *McNell* v. *Garret*, 1 Cr. & Ph. 98 ; *Ram Prosad* v. *Benares Bank*, 42 A. 98=58 Ind. Cas. 600.

(3) *McNeil* v. *Garret*, 1 Cr. & Ph. 98.

(4) *Howe* v. *Willard*, 40 Vt. 654 ; but see *Nilmadhub* v. *Mr. W. F. Gillander*, 2 Sevester, 951, 954 citing *Vansandan* v. *Rase*, 2 Jacob & W. 264; *Jones* v. *Downes*, 18 Ves. 522 cited in Woodroffe p. 77.

the consequences of a breach of the injunction, they having known that the writ was actually issued, and they will be punished for contempt for its violation, although they were not present when the order was actually pronounced (1). If a party has, by himself or his attorney, notice in any other way of the fact of an injunction having been granted, thought it should not be regular notice, it is a breach of the injunction to disobey it (2). But in *Jones* v. *Downes* (3), where the plaintiff had been guilty of four months' delay in getting the order drawn up and served, *Lord Chancellor Eldon* refused with costs, a motion to commit the defendant for a breach, although there was a contempt, the defendant being present at the hearing of the motion (4).

But the presence of a defendant's counsel in court without instructions, when an *interim* injunction is continued against him in the absence of and without notice to his solicitor, does not constitute such notice to the defendant as will justify committal for contempt for a subsequent breach of the order (5).

Notice by telegraph.—Notice by telegraph of the granting of the injunction is also deemed sufficient to render the defendant liable for contempt in disregarding it, although not formally served with the writ. Thus a sheriff who proceeded with a sale of property under execution, after having actual knowledge of the proceedings in bankruptcy by the judgment debtor, and being informed of the injunction by the telegraphic despatch, violates the injunction by proceeding with the sale (6). In *Pichu Vayengar* v. *G. T. Oliver* (7), the court observed: "That the first defendant had full knowledge of the injunction may be inferred not only from the fact that his vakil unsuccessfully opposed it and was present when it was ordered, but also from the detailed telegram sent to him by the plaintiff on the 25th September and received by him on the 27th, the day prior to the sale. It was his plain duty to stay the sale."

Court must have jurisdiction—Illustration of the rule—While it is thus seen that courts of equity exact the most implicit obedience to the writ of injunction, and treat its wilful violation as a most flagrant contempt of court, the doctrine is to be understood with the qualification that the court has jurisdiction over the subject matter in controversy. And if the court has no jurisdiction over the matter involved, or if it has exceeded its powers by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as absolutely void, and defendants cannot in such a case be punished for contempt for its alleged violation (8).

Injunction void for uncertainty—no contempt in violating.—A decree for an injunction which is so indefinite and uncertain as to be absolutely void cannot be made the basis for contempt proceedings, and a defendant

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(1) *Hearn* v. *Tennant*, 14 Ves. 136; *Skip* v. *Harwood*, 3 Atk. 564.

(2) *Lawe* v. *Morgan*, 5 Price, 518.

(3) 18 Ves. 522; see also *Bateman* v. *Waitt*, 11 Beav. 587.

(4) Joyce on Injunction p. 1325.

(5) *Carrow* v. *Ferrior*, 37 L.J. Ch. 569;

(6) *In re Bryant*, 4 Ch.D. 98; see also *Ex-parte Langley*, 13 Ch. D. 110; High on Injunction § 1424.

(7) 26 M. 260.

(8) High on Injunction § 1425.

against whom such a decree purports to run cannot be held guilty of contempt of court in disregarding it (1).

Effect of temporary injunction on subsequent transfer of property.—In the case of disobedience of a temporary injunction the court may commit the person guilty thereof to civil prison and order that his property be attached and sold (2). "Under the (Civil Procrdure) Code" says *Rankins C. J.* "permament injunctions are enfoced under a special power which is given to courts in the mofussil as well as to the High Courts notwithstanding that such courts have no inherent rights for arrest for contempt. The provision is contained in rule 2 of Order 39 where it says: 'In case of disobedience, or of breach of any such term, the courts granting an injunction may order the property of the persons guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months. In case of breach of that injunction an order could be made under Order 39. rule 2 directing the arrest and detention of the offender (3)." But the existence of a temporary injunction does not render void an alienation made in contravention of the injunction (4). So a temporary injunction restraining alienation of a house pending decision of a suit for recovery of money does not render the sale void as against a *bona fide* purchaser for a valuable consideration without notice of any fraud or collusion, on the part of the vendor even though it might have been made in defiance of the restraining order (5).

The ordinary rule is that an alienation made pending a temporary injunction is not void (6). An alienation includes every kind of transfer such as mortgage, lease etc, (7). The District Judge in execution of decree fixed a date for the sale of certain properties. Before the date the claimant instituted a suit in the subordinate Judge's court and obtained an injunction restraining the decree holder from selling the property, The District Court refused to stay the sale where upon the sale was held and the purchase money paid into court. On an application to set aside the sale, held by the High Court that though the District court was not personally bound by the order of injunction yet it should in the exercise of its inherent power have directed stay of the sale having regard to the fact that the decree holder was restrained by injunction from executing the decree. In the result the sale was set aside and the money deposited in court was refunded to the purchaser (8). But where an injunction

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(1) High on Injunction § 1431 (a)

(2) C. P. Code. S. 94.

(3) *Salam Chand* v. *Jugal Kishore*, A. I. R. 1928 Cal 462=55 C. 777=107 Ind. Cas. 65 ; see also, In the matter of the petition of *Chandra Kanto De*, 6 C. 445 =7 C. L. R. 350 ; *Wadhawa Singh* v. *Ladha Singh*, 131 Ind. Cas. 340=A. I. R. 1931 Lah. 201.

(4) *Balbhadra* v. *Balla* A. I. R. 1930 All. 387=127 Ind. Cas. 577 ; *Delhi London Bank* v. *Ram Narain*, 9 A. 497 ; *Monohar* v. *Ram Autar*, 25 A. 431 ; *Bali Ram* v. *Ramlal*, 90 Ind. Cas. 937.

(5) *Darbari Ram* v. *Ghulam Farid*, 128 Ind. Cas. 304=A. I. R. 1930 Lah. 858

(6) *Bhagwan Das* v. *Kansi Ram*, 25 Ind. Cas. 180.

(7) *Manohar Das* v. *Ram Autar*, 25 A. 431=A. W. N. (1903) 93.

(8) *Maharaj Bahadur Singh* v. *A. H. Forbes*, (1922) Pat. 225=3 Pat. L. T. 645 =(1922) P. 282.

was granted in favour of third parties who claimed the property as their own, against the decree holder restraining him from executing his decree by sale but no notice of it was given to either the decree-holder or the officer conducting the sale and in consequence the sale took place, *Held* the validity of the sale cannot be questioned and the injunction is ineffective (1), A prohibitory order by way of injunction can be issued so long as a property in dispute is in danger of being wrongfully sold in execution of a decree, but once it is sold no such order can be passed (2). In delivering the judgment the Court observed: "It is contended on the authority of *Hukum Chand Boid* v. *Kamalanand Singh* (3) and *Ramanathan Chetty* v. *Aruna Chalam Chetty* (4), that the sale was *ultra vires*, even though the injunction was not served on the decree-holder, nor the order communicated to the Executing Court before the sale. In the two cases cited it was held that a stay order issued by the Appellate Court suspends the power and jurisdiction of the executing Court to conduct further proceedings from the moment the order of the Superior Court is passed. This view which has been accepted by a later Full Bench of the Madras High Court [*Kasaribada Venkatachelapatirao* v. *Maddi Latla Kameswaramma* (5)] cannot in our opinion, be extended to the case of an injunction passed under Order XXXIX, Rule 1. It is difficult to see how the jurisdiction of a Superior Court, can be taken away by an order of an inferior Court, where as in this instance, an appeal lay from that order to the Court which was requested to stay the sale. As pointed out by *Woodroffe J.* in *Hukum Chand Boid* v. *Kamalanand Singh* (3), a prohibitory order by way of injunction is directed to a party and not to a Court. If the executing Court has notice of the Injunction, it would no doubt compel the decree-holder to do what he is ordered to do by a Court of competent jurisdiction. In other words, it would stay the sale; but after the sale it is no longer in the power of the decree-holder to stay it, and the Court cannot compel him to do what he is legally incompetent to do. If the decree-holder happened to be himself the auction-purchaser with notice of the injunction, he may be treated as a trustee subject to the *ultimate* order of the Court issuing the injunction. This is not the case here. It has been held that an alienation made in contravention of an injunction is not void, such as would be the case where it is made after the attachment has been effected. Such an alienation subjects a party to be finally prescribed by Order XXXIX, Rule 2 (3). *Delhi and London Bank Limited* v. *Ramnarain* (6) and *Monohar Das* v. *Ram Autar Pande* (7). Assuming that a prohibitory order by way of injunction for certain purposes operates from the date when the order is made, as appears to be the opinion of the learned

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(1) *Ramjidas* v. *Lala Chhagal Lal* (1922) All 282.

(2) *Dharmchand* v. *Mitsui Bhusan Kaishae & Co.*, 59 Ind. Cas. 929.

(3) 33 C. 927 (944).

(4) 38 M. 761 = 22 Ind. Cas. 99.

(5) 41 M. 151 = 43 Ind. Cas. 214 = 33 M. L. J. 515.

(6) 9 A. 497 = A. W. N. (1887) 107.

(7) 25 A. 431 = A. W. N. (1903) 92.

Judges of the Calcutta High Court, a sale made in ignorance of the order would at the utmost be only an irregularity (1)".

But in Madras case it was held that execution sale in violation of an injunction would be void (2).

Injunction restraining Karnavan from contracting loans for managing tarward property—Effect of.—In a suit by the members of a *Tarward* to remove the *Karnavan* from office, the Court passed an injunction restraining the latter from contracting *loans* to manage the property. The *Karnavan* nevertheless borrowed money for the necessary purposes of the *Tarward* while the injunction was in force. In a suit by the creditor for repayment of the loan ; *Held* that the effect of the injunction was what was laid down in Order XXXIX of the Civil Procedure Code, and both *Karnavan* and *Tarward* were liable for the debt (3).

Appeal pending—Sale in execution—Injunction.—An appeal was pending in which there was a *bona fide* contention between the parties as to title to the lands in dispute. Decree holder, one of the parties to the appeal, had got an order to sell the property in execution of his decree. *Held* that the sale of the land should be stayed till the disposal of the appeal and the *status ante* should not be disturbed (4).

When Court can punish for breach of injunction.—The object of paragraph (3) is to lay down the mode of enforcing an injunction. It is not assumed that the use of the 'disobedience' in the paragraph entitled the Court to treat a breach of the terms of the injunction as an offence and to punish such offence of its own motion. The Court can act under this section only when set in motion by the party who deems himself aggrieved (5).

Scope of r. 2 (3), Order XXXIX of the C. P. Code.—In *S. Adaikkala Thevan* v. *Imperial Bank, Madura,* (6), the Court observed : "under s. 94, Civil Procedure Code, the Court is empowered to commit a person guilty of disobedience of an injunction to the civil prison and to direct that his property shall be attached and sold. Order 39, Rule 2(3), prescribes the punishment and under it, the person in default may be detained in the civil prison for a term not exceeding six months, and his property may be attached. The drafting of this rule, as has been pointed out in *Ramprasad Singh* v. *Benares Bank Ltd.* (7), is somewhat inartistic, but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. Order XXXIX Rule 2(3) applies not only to disobedience of an order issued under clauses (1)

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(1) See also *Dayabhai* v. *Bapalal,* 3 Bom. L. R. 564 ; *Jamsetji* v. *Haridayal,* 32 B. 181 ; *Nand Kishore* v. *Shadi Ram,* A. I. R. 1926 All. 457.

(2) *Picku Vayagar* v. *G. T. Oliver* 26 M. 260.

(3) *Puznakhal Eldom* v. *Mahadeva Pattar,* 47 Ind. Cas. 778=35 M. L. J. 96.

(4) *Badruddin* v. *Munila,l* A. I. R. 1934 Lah. 26 ; see also *Nawal Kishore* v. *Santosh Singh,* A. I. R. 1930 Lah. 108 ; *Bagga Mal* v. *Basheshar Lal,* A. I. R. 1930 Lah. 793 ; *Abdullah* v. *Banke,* 33 A. 79.

(5) *Maung Tha* v. *Lutchaman Chetty,* 14 Bur. L. T. 276 ; *Kochappa* v. *Sachi Devi,* 26 M. 494.

(6) A. I. R. 1926 Mad. 574=50 M. L. J. 401=95 Ind. Cas. 196.

(7) 42 A. 98=17 A. L. J. 1127.

and (2) of that rule but has a more general application, it applies alike to disobedience of all injunctions issued under s. 94, see also *Vidyapurna Tirtha Swami* v. *Vicar of Surilkal Church* (1). "But in *Balhadur* v. *Balla* (2), *Dalal J.* said: "Through some inadvertence no penalty appears to be provided in Order XXXIX for the breach of injunction. It seems likely that the provisions of Rule 2(3), Order XXXIX were intended to be applied to a breach of injunction under Rule 1 also, but as Cl. 3 is included under Rule 2, it would follow that the provisions of that clause will not apply to rule 1. The Registrar shall be requested to bring this matter to the notice of the Rules Committee so that cl. (3), Rule 2 may be turned into a separate rule applicable both to breaches of injunctions issued under rule 1 and under rule 2." Where a party to an appeal disobeys an injunctive order restraining him from alienating certain property pending decision of the appeal the Court can punish the party in comtempt under Order XXXIX, Rule 2(3) (3). But before a Court commits a party to prison for alleged disobedience to an order for injunction in a case where the party contends that he received no notice of the order, the party should be given an opportunity of establishing his case (4). An order prohibiting a judgment debtor from transferring his property when passed in the presence of counsel for both parties takes effect from the date of its delivery just as much as a permanent injunction embodied in a judgment, and the judgment-debtor is not absolved from liability simply because it is not served upon him personally (5). The provision as to punishment for disobedience to orders of Court is not confined to suits of the nature contemplated by rule 2 of Order XXXXIX. Order XXXIX has to be read along with s. 94. Clause 3 of rule 2 of Order XXXIX applies to cases of disobedience to an order to do or abstain from doing a single act (6).

An order making the injunction conditional is also proper (7). The subsequent dismissal of a suit does not affect the power of a Court to deal with an application for commitment for breach of a temporary injunction presented while the suit was pending. An order for attachment of properties is not a condition precedent to the validy of an order of committal for breach of a temporary injunction (8).

In case of breach or disobedience of a temporary injunction, the court which actually granted the injunction may punish the contempt under order XXXIX, r. 2 (3). There is nothing in section 24 of the Civil Procedure Code or in Ch. IV of the Civil Courts Act authorising, either expressly or by necessary implication, a court to which 'the suit may be transferred but

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(1) 7 L. W. 328=44 Ind. Cas. 56.
(2) A- I. R. 1930 A. 387=127 Ind. Cas. 577.
(3) *Wadava Singh* v. *Ladha Singh*, 12 Lah. L. J. 309=131 Ind. Cas. 343= A. I. R. 1931 Lah. 201.
(4) *Basanta* v. *Nagendra*, A. I. R. 1932 Cal. 719=137 Ind. Cas. 425.
(5) *Ramprosad* v. *Benares Bank*, 17 A. L. J. 1127.
(6) *Vidyapurna* v. *Vicar of Sarat Kal*, 2 L. W. 328=44 Ind. Cas. 56.
(7) *Rajani* v. *Haji Lal*, 21 C. W. N. 628=41 Ind. Cas. 242.
(8) *Suppi* v. *Sayid Hurihi*, 39 M. 907 (F. B.)=34 Ind. Cas. 588.

which did not grant the injunction, to exercise the special jurisdiction under Order XXXIX, rule 2 (3) (1). Before proceedings can be taken on account of disobedience of an injunction issued by court, it must be ascertained that the court had jurisdiction over the subject matter in controversy. If the court has no jurisdiction over the matter or if it has exceeded its powers by granting an injunction in matters beyond its jurisdiction, the injunction is absolutely void and the person who has disobeyed it cannot be punished for the alleged offence. There is a distinction berween an order erroneously made within jurisdiction and an order made absolutely without jurisdiction (2). When the order of injunction is granted till the disposal of the suit and the party alienates property while the execution proceeding is pending, there is no disobedience (3) An injunction although subsequently discharged because the Plaintiff's case failed must be obeyed while it lasts (4).

An order for the arrest of a certain person was made by the High Court on the original side for contempt of court in the shape of not making over certain books to a Receiver, but the warrant directed to the sheriff failed to take effect as it was found that the man was living in *Nadia* out side the original jurisdiction of the High Court. Thereupon an application was made to the same Judge for an order either under s. 136 C. P. C. or in exercise of the inherent jurisdiction on the District Judge of Nadia to execute the said warrant. It was refused, on appeal. *Held* that an order for arrest for contempt of court may be made by the High Court either under some statutory provision or in the exercise of its inherent jurisdiction. It is eminently desirable to proceed regularly under the Code as far as possible. The appointment of a Receiver, so far as regards the parties bo ~ nd by the order, operates as an injunction and under Order XXXIX of the Civil Procedur ~ Code, temporary injunctions are enforced under a special power given thereby to the High Court as well as Mofussil Courts. In the present case, the better course would be to apply first for an injunction in express terms and in case of a breach thereof the High Court would have a statutory right under Order XXXIX, r. 2, to order arrest and there would be no difficulty in utilising section 136 for execution outside the Original Civil Jurisdiction. It is doubtful whether in exercise of its inherent jurisdiction, the High Court on the original side can direct execution of an order for arrest for contempt out side the local limits of Calcutta. In a case from the Mofussil the High Court, on the Appellate side, can make an order for the arrest of a person outside the limits of its original Civil Jurisdiction (5). By section 493 of the Code of Civil Procedure (Act XIV of

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(1) *Shekh Jaharuddin* v. *Hari Charan Podder*, 18 C. W. N. 470=22 Ind. Cas. 499 ; *Mathura* v. *Venkata*, 8 Ind. Cas. 7 =21 M. L. J. 829 ; but see *Manngа Guru Swami* v. *Mahammadan*, 16 L. W. 748= 48 M. L. J. 719=1922 M. W. N. 743.

(2) *Subhadra Koer* v. *Dhajadhari Goswami*, 15 C. L. J. 147=14 Ind. Cas. 380.

(3) *Poras Ram* v. *Hargo Lal*, 79 Ind. Cas. 444.

(4) *The Eastern Trust Co.* v. *McKnzie*, 20 C. W. N. 457=35 Ind. Cas. 378 (P. C.)

(5) *Salamchand* v. *Jogul Kishore* 32 C. W, N. 114=55 C. 777 ; see also *Mathura* v. *Venkata*, 21 M. L. J. 829.

1882) the Legislature indicated that such imprisonment should not extend beyond six months. Where the defendant had been in jail for 20 months for criminal breach of trust regarding the same subject matter as well as for contempt of court, the court would not be justified in indirectly adding to its duration (1).

Where order of appellate Court is disobeyed.—Where an order by the High Court in its appellate jurisdiction is disobeyed and there is some difficulty as to the application of section 136 due to the fact that though the person against whom the order is made is out side the limits of its appellate jurisdiction, there is nothing to prevent the High Court from adopting the procedure laid down in s. 136 and sending to the appropriate District Court the warrant of arrest and the order of attachment for necessary action being taken. The District courts, their officers and staff are undoubtedly subject to the jurisdiction of the High Court and there is no difficulty in directing this mode of execution (2).

Injunction against guardian's disobedience.—The Guardians and Wards Act of 1890 is not exhaustive or self contained and that so far as it is deficient in procedure it has to be supplemented by the Civil Procedure Code because s. 141 C. P. Code expressly permits such a course (3). A court having the power to issue an order has inherent power also to enforce it, Under section 12 (1) of the Act, the court has got the power to pass *interim* orders for the protection of the person. An *interim* order by way of injunctions for the protection of the person of female minor against the threatened injury to her life long welfare by an unsuitable marriage must in the absence of any special procedure to that effect in the Act itself, necessarily issue under order XXXIX, rule 2 (1), read with s. 141 C. P. Code and wilful disobedience thereof is punishable under sub-rule (3), rule 2. The words "or other injury of any kind" and "or injury complained of" in rule 2, clearly indicate injuries of all sort even other than those arising out of a breach of a contract. It is competent for the court to restrain by an injunction an unsuitable marriage of an infant whether he or she be a ward of court or not. And there can be no greater injury to an infant than that he or she should be tied down to an unsuitable partner in life specially in the case of an infant whose law declares her marriage as indissoluble except by death (4).

By section 43 (4) of the Guardians and Wards Act, 1890, in case of disobedience to an order passed under sub-sections (1) and (2) of that section, in relation to the conduct or proceedings of guardians, the order may be enforced in the same manner as an injunction granted under section 492 or section 439 of the Code of Civil Procedure, 1882 (5). But in *Basanta Kumar Das* v.

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(1) *Advocate General of Bombay* v. *Gangi Akpai*, 19 B. 153.

(2) *Adaikala Thevan* v. *Imperial Bank*, A. I. R. 1926 Mad. 574=50 M. L. J. 401.

(3) *Thakur Prosad* v. *Fakirultah*, 17A. 106=22 I. A. 44 ; *Deo Keshan* v. *Asaram*, A. I. R. 1933 Nag. 62.

(4) *Deo keshan* v. *Asaram*, A.I.R. 1933 Nag. 62 ; see also *Harendranath Chowdhury* v. *Brinda Rani*, 2 C. W. N. 521 ; *Murarilal* v. *Saraswati*, A. I. R. 1925 Lah. 358 ; *Premji Kanji* v. *Mt. Junibai*, A. I. R. 1928 Sind. 121.

(5) *Abdul Rahima* v. *Ganapathi*, 23 M. 517.

Nogendra Nath Pal (1) it was doubted whether a proceeding for the application of a guardian can be treated as a suit or a proceeding to restrain the other party from committing a breach of contract or other injury within the meaning of Order XXXIX, rule 2 of the C. P. Code so as to confer jurisdiction on the court to commit the other party for alleged disobedience to an order for temporary injunction passed therein.

Attachment of property.—Attachment of property is not a suitable form of remedy except where a person is ordered to do something and he does not do it (2).

Servants and agents of firm—Injunction against firm—contempt proceedings.—When injunction was issued restraining the defendant firm from disposing, selling or dealing in any manner with certain goods, in the absence of any mention of A or of servants and agents in the order. A, an assistant in the firm, not named in the order, cannot be punished for contempt of court (3). A person is also not responsible if the breach is made by his agent (4) or his wife (5).

Abetters whether could be punished.—Clause (3), rule 2 of Order XXXIX of the C. P. Code is not intended to give the court power to punish for contempt of court people against whom no order is made or terms imposed and therefore abettors of contempt of court cannot be punished (6).

Temporary Injunction against person not to get girl married-Disobedience of.—Where a temporary injunction was obtained against a person directing him not to get the girl who had gone to his house married and when the person was not responsible in promoting or bringing about the marriage but did not do all that he could do to prevent it, it cannot be said that he actually disobeyed the order as it was passed and so an order for his detention if prison is incompetent (7).

Undertaking by defendant whether injunction.—On an application for an interlocutory injunction the defendant gave an undertaking which was duly recorded in the order of the court, that he would not alienate the property pending the disposal of the suit. In breach of that undertaking, the defendant sold the property and the plaintiff thereupon applied for proceedings for contempt of court. The lower Court refused the application : *Held* that the undertaking given by the defendant read in conjunction with the order of the Court recording it amounted to the grant of an injunction, that an appeal lay from an order declining to direct arrest or attachment for dis-

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(1) 137 Ind. Cas. 425=A. I. R. 1932 Cal. 719.

(2) *Mawazzan Ali* v. *Shebash Chandra Pakrasi*, 31 C. W. N. 814=A. I. R. 1927 Cal. 598.

(3) *John Innes Marshll* v. *Grandhi Venkata*, 21 C. L. J. 578=42 C. 1169=30 Ind. Cas. 4 ; see also *Ramtzen* v. *Roths child*, 14 W. R. 96.

(4) *Langley Exparte*, 13 Ch. D. 121.

(5) *Hope* v. *Carrugie*, 7 Eq. 254.

(6) *Mawazzam Ali* v. *Shebash Chandra Pahari*, 31 C. W. N. 814=A. I. R. 1927 Cal. 598.

(7) *Mahomed Wazir* v. *Mahomed Abdul*, 111 Ind. Cas. 675=A. I.R. 1929 Nag. 273.

obedience of the interl ocutory injunction (1). In the case of minor for whom a personal guardian has been appointed and who undertook not to marry the minor without the court's permission the marriage or connivance at marriage with the ward is contempt of Court liable to be severely punished. These powers of the District Judge however are limited to the actual guardian in respect of whom the order is made and cannot be exercised as against persons indirectly committing the breach by assisting the guardian in the act (2).

Injunction conditional on Furnishing security.—A person applying for *interim* injunction to postpone sale cannot be put on terms by making the grant of injunction conditional on furnishing security on principles analogous to Order 21, rule 29. Principles of rule 29 have no application to the granting of an injunction, as it is matter to which the applicant is entitled independent of the considerations in Order 21, rule 29 (3). In a case falling under Order 39, rule 1, it is not necessary that the courts should order the petitioner to furnish security to compensate the decree holder for any loss that may be caused by temporary injunction against him being granted (4).

The District Court is competent to require the guardian of a female infant to furnish security 'to prevent his giving the infant' in marriage to any person without the consent of the proper male relation of the girl. On the application of a person the guardian was ordered to furnish security. The order was appealed against but before judgment was passed on appeal, the person on whose application security was demanded, and who was respondent on appeal died. *Held* that the order did not abate on the death of the respondent (5). Where on the plaintiff's application for the issue of temporary injunction restraining the defendant from working mica mines on the property in suit, the court passed order directing the defendants to furnish security to the extent of Rs. 5.000 and submit accounts of the minerals appropriated every week from the date of the application: *Held* that the order was not one passed under r. 1, Oider XXXIX of the Code, and was not apealable under cl. (r) of r. 1 of Order XLIII. That the order was an interlocutory order made under cl. (e) of section 94 of the Code, to prevent the ends of justice from being defeated and should not be set aside in revision (6).

Sureties in cases of Temporary Injunction.—In may be assumed that s. 94, cls (c) and (e) of the Civil Procedure Code authorise the court to exercise powers outside the order and rules in exceptional cases (7) Where

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(1) *Chaturbhujdas* v. *Natverlal*, 33 Bom. L. R. 1109=A. I. R. 1931 Bom. 509=134 Ind. Cas. 1165.

(2) *Bai Moni* v. *Bhailal*, 31 Bom. L. R. 1120=A. I. R. 1929 Bom. 417; see also *Mawazam Ali* v. *Sebash Chandra*, 31 C. W. N. 814; see also 42 C. 351.

(3) *Trimbakrao* v. *Sampatrao*, A. I. R. 1933 Nag. 153.

(4) *Badruddin* v. *Munnilal*, A. I. R. 1934 Lah. 26.

(5) *Ganda Mall* v. *Ramji Das*, 20 P. L. R. 1914=12 P. W. R. 1914=23 Ind. Cas. 351.

(6) *Sito Mahtoon* v. *F. F. Christian*. 17 C. W. N. 318=17 Ind. Cas. 361.

(7) *Md. Inamullah* v. *Narain Das*, 37 A. 432=29 Ind. Cas. 601=13 A. L. J. 565.

the plaintiff asks for an interlocutory injunction against the defendant, pending the suit, the court may ask the defendant to furnish security under s. 94 (e) of the Civil Procedure Code to prevent the ends of justice being defeated (1). The liabilities and obligation, of sureties upon such bonds are governed by the general law of contracts and are usually akin to those incurred by sureties upon other like obligations. It is to be observed that the undertaking of a surety in an injunction bond is one which is strictly construed, and his liability will not be extended by construction beyond the terms of the instrument (2).

Injunction granted pending decision of an application for leave to sue in forma pauperies.—Where a judgment debtor had filed an application for leave to bring a suit for maintenance in *forma pauperies* against the decree-holder, and before any order was passed on that application, applied for an injunction to restrain the decree-holder from executing his decree until the suit for maintenance had been decided, which injunction was granted; *held*, that such injunction fell within the provisions of ss. 492 and 493 of the Code of Civil Procedure and was therefore appealable (3).

Disobedience to an injunction issued by a Civil Court, if punishable under s. 188 of the Penal Code.—The word 'promulgated' in s. 188 of the Penal Code, refers to orders passed under the Code of Criminal Procedure, and disobedience to an injunction issued by a Civil Court is not punishable under that section (4). In a suit to cancel an instrument of sale of paddy, the court issued an injunction restraining the defendant from selling the paddy specified in the document. The injunction was served on the defendant and afterwards the suit was decided in favour of the plaintiff, who afterwards presented a petition complaining that, while the injunction remained in force, the defendants had sold some of the paddy and asked for sanction under s. 195 Cr. Pro. Code, to prosecute defendant under s. 188 of the Penal Code. The Judge caused a preliminary enquiry to be made and thus called the defendant to show cause why he should not be committed under s. 493 Civ. Pro. Code, and he committed the defendant to the criminal jail for four months, the order being passed explicitly as a punishment for disobeying the injunction. *Held* that the application for sanction to prosecute the defendant did not give the court authority to act under cl. (3) s. 493 of the Civil Procedure Code of 1882 (5).

Suit against Secretary of State.—Notice under s. 424 C. P. Code of 1882, is not confined only to suits for damages; but also applies to suits for

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(1) *Sito Mahton* v. *F. F. Christian*, 17 C. W. N. 318; see also *Att. Gen.* v. *Birmingham*, (1910) 1 Ch. 60.

(2) High on Injunction § 1635.

(3) *Beni Prosad* v. *Gomta Kuar*, A. W. N. 1890, 167.

(4) *Pommani Chinta Kath* v. *Thazhithatta*, *Kutle*, 2 L. W. 410=17 M. L. T 391=16 Cr. L. J. 592=30 Ind. Cas. 144.

(5) *Maung Tha* v. *Lutchaman*, 14 Bur. L. R. 276.

injunctions against the Secretary of State (1). In *Naginlal* v. *The official Assignee* (2) the Bombay High Court has held that a suit against a public officer to restrain him by injunction from doing certain acts as such officer can not be brought in absence of notice required by s. 80 of the C. P. Code.

Suits for injunction as well as for damages.—In a proper case damages may be awarded in a suit for injunction (3). In a case of infringement of trade mark, the court may award damages for part infringement and grant injunction for preventing future infringement (4) In some cases damages are awarded in lieu of injunction (5). In such a case the Court can award damages even in the absence of any prayer to that effect (6).

Form of decree.—The forms of decree to be passed in suits for perpetual injunction are given in Forms No. 13, 14, 15 and 16 of Appendix D of the First Schedule of the C. P. Code. Where the plaintiffs had the exclusive right to sing or recite, the proper form of decree would be injunction restraining defendants from interfering with the plaintiff's right in their singing and reciting (7).

Execution of decree for perpetual inunction.—(1). Where the party against whom a decree for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison or by the attachment of his property or by both. (2) Where the party against whom a decree for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in civil prison of the directors or other principal officers thereof, or by both attachment and detention (3). Where any attachment under sub-rule (1) or sub-rule (2) has remained inforce for one year, if the judgment debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold ; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application. (4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of the one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease. (5) Where a decree for an injunction has not been obeyed, the

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(1) *Secretary of State* v. *Kalikhan*, (1912) M. W. N. 786.

(2) 14 Bom. L. R. 1148.

(3) *The Land Mortgage Bank* v. *Ahmedbhoy*, 8 B. 77, 91.

(4) *Madhabji* v. *Central India Spining*, 41 B. 49=18 Bom L. R. 206=34 Ind. Cas. 529 ; *Gilling* v. *Grey*, 27 T. L. R 40.

(5) *Dhunjibhoy* v. *Lisboa*, 13 B. 252 ; *Ekram Elahi* v. *Abdul Aziz*, 127 P. L. R. 1909 ; *Tejumal* v. *Chabilimal*, 2 S. L. R. 65.

(6) *Tejumal* v. *Chabilimal*, 2 S. L. R. 65 ; *Callianji* v. *Narsi Trimum*, 19 B. 764, 770 ; *Cotton* v. *Wild*, 32 Beav. 266 ; *Stanly* v. *Strewsbury*, 19 Eq. 616 ; *Bett* v. *Nelson*, 3 Ch. D. 441.

(7) *K. Sishadri Ayanger* v. *Aryar Srinivasa*, 8 M. L. T. 379=7 Ind. Cas. 558.

Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree (1). Sub-rule (1), is applicable both to prohibitory as well as mandatory injunctions (2). But the Court is not bound to pass order for imprisonment or attachment without serving a notice on the judgment-debtor to carry on the order (3). A judgment-debtor who disobeys such notice is guilty of contempt of Court and in such a case the judgment may be enforced by imprisonment or attachment and it is not necessary to give the judgment-debtor opportunity to clear and purge his contempt (4). But service of notice upon the judgment-debtor is not obligatory on the Court. It is merely discretionary (5). Even a temporary disobedience of an injunction decree passed by a Civil Court is punishable under Order XXI, rule 32, C. P. Code and the fact that the party guilty of disobedience has subsequently obeyed it is no bar to its execution under the provisions of that rule. A Court has no power under Order XXI, rule 32, to order the party who disobeys a decree for injunction to execute a security bond for its obedience (6). Where a decree for injunction has been obtained against the father, the son not being joined as a party and the father dies during the pendency of the execution proceedings, the decree can be enforced under s. 50 against the son as his legal representative by proceeding under Order 21, rule 32 (7). Where in a suit relating to a right of easement the Court passed a compromise decree by which it was provided that certain things should be done and certain other things are not to be done, *held* that the decree can be enforced under this Rule (8).

The provisions of Order 21, rule 32 (5) apply only where a decree for an injunction has not been obeyed consequently where a decree for the demolition of a particular way has been excuted and the wall demolised accordingly, the decree cannot be put in execution again so as to require the demolition of a new wall subsequently erected. The remedy of the decree-holder is by a fresh suit (9). This rule is not confined in its operation to cases where the imprisonment or attachment can be continued until the decree has been

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(1) Order XXI, rule 32 of the Civil Procedure Code.

(2) *Sachi Prosad* v. *Amar nath*, 46 C. 103=45 Ind. Cas. 864=22 C. W. N. 851.

(3) *Durga Das* v. *Dewraj*, 10 C. W. 297 ; *Mahatsang* v. *Kesri Sing*, 9 Bom. L. R. 301 (*n*)

(4) *Durga Das* v. *Dewraj*, 33 C. 306=10 C. W. N. 297 ; see also *Protap* v. *Pyari*, 8 C. 174 ; *Bhoobun* v. *Nobin*, 18 W. R. 282.

(5) *Durga Das* v. *Dewraj*, 10 C. W. N. 297 ; *Bhagwan* v. *Sukdei*, 28 A. 300.

(6) *Aiyana chariar* v. *Yathiar Ramanuja*, 3 L. W. 161=19 M. L. T. 132=32 Ind. Cas. 698.

(7) *Manilal* v. *Kekabai*, 134 Ind. Cas. 968=A. I. R. 1931 Bom. 482=33 Bom. L. R. 1118 ; see also *Ganesh* v, *Narain*, 55 B. 709=A. I. R. 1931 B. 484.

(8) *Sompathy* v. *Sankara*, 1930 M. W. N. 809.

(9) *Malaka* v. *Sunder Singh*, 5 Lah. L. J. 70.

executed, but also to casas where the injunction restrains persons from doing certain acts in perpetuity (1). Where an agent purchases outside India in excess of his power mandatory injunction can be issued against him asking him to execute a conveyance (2). This rule is applicable where a party is directed to carry out something, as well as to cases where he is directed to abstain from doing an act (3).

Where a plaintiff has once sued for and obtained a perpetual injunction directing the defendant to refrain from certain acts, it is not necessary for the plaintiff, if in future the defendant ignores such injunction, to sue again for a similar relief : in fact, such a suit would be barred by the principle of *res judicata*. When a court issues an order to a party in a suit for obstruction from any particular act, and when the person to whom the order has been issued disobeys that order, he is guilty of contempt of court, and the court can take proceedings to enforce its authority notwithstanding anything contained in article 182 of the Limitation Act (4).

Decree for perpetuai Injunction—Breach—Limitation—Where a perpetual injunction has been granted on each successive breach of it the decree may be enforced by an application made within 3 years of such breach. Cultivation of land is an infringement of the right of grazing and every successive season in which the land has been cultivated is the occasion of a fresh breach of the injuuction (5).

An application to a court to exercise its powers under Order XXI, rule 32 of the Code of Civil Procedure is an application for the execution of a decree, and as regards limitation is governed by Art. 182 of the Limitation Act (IX of 1908) (6).

No time limit for execution of decree for injunction.—Under section 48 of the Civil Procedure Code the operation of twelve years rule is extented to all decrees except decrees granting an injunction.

Against whom a decree for injunction can be executed.—As a decree for injunction does not run with the land it cannot be executed against the transferee of a judgment debtor (7). In such a case the remedy of a decree-holder lies in a fresh suit (8). But in case of a judgments debtor's death such a decree can be executed against his son who is his legal representative (9).

Appeal.—Perpetual injunction is always granted in the shape of a decree. A decree means the formal expression of an adjudication which, so far as regards

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(1) *Aiyana chariar* v. *Vathiar*, 32 Ind. Cas. 698=(1916) M. W. N. 147.

(2) *Ramasami* v. *Karuppan*, 29 M. L. J. 551.

(3) *Yelu Manikaram* v. *Pakarvoo*, 6 Ind. Cas. 289=18 M. L. J. 465 ; *Sakarlal Parbatibai*, 14 B 283 ; *Nanum* v. *Uttam Chand*, 107 P. R. 1889 ; *Kattachalam* v. *Veerappa*, 29 M. 314.

(4) *Ram Saran* v. *Chator Singh*, 23 A. 465.

(5) *Udmi* v. *Sohan Lal*, 66 Ind. Cas. 166.

(6) *Haji Ahmed* v. *Poker Mull*, 15 Ind. Cas. 945=6 I. B. R. 85 ; see also *Venkatachalan* v *Veerappa*, 29 M. 314

(7) *Dayabhai* v. *Bapalal*, 26 B. 140 ; *Vithal* v. *Sakharam*, 1 Bom L. R. 85.

(8) *Jamsetji* v. *Hari Dayal*, 32 B. 181.

(9) *Sakarlal* v. *Parvathibai*, 26 B. 283 ; *Ganesh* v. *Narayan*, 55 B. 709=A. I. R. 1931 B. 484 ; *Manilal* v. *Kikabhai*, 134 Ind. Cas. 968=A. I. R. 1931 Bom. 482=33 Bom. L. R. 1118 ; see also 51 B. 37 ; 33 Bom. L. R. 266.

the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final (1) Save as otherwise provided in the Civil Procedure Code the general rule is that an appeal shall lie from every decree passed by the Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such court (2). So a decree granting or refusing a perpetual injunction is always appealable.

The adjudication of a court may be either decree or order. An adjudication granting or refusing a temporary injunction under Order XXXIX is not a decree. Such adjudications fall under orders. Some orders are appealable. The others are not appellable. The general rule is that no appeal lies from an order as is not enumerated in the list of orders mentioned in s. 104 or in the list given in Order 43, rule 1. These orders are only appealable. An appeal shall lie from an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX of the C. P. Code (3). An appeal lies from an order granting or refusing an injunction under Order XXXIX, rule 1 of the Civil Procedure Code (4). Where a temporary injunction has been granted and would remain in force till cancelled, an appeal is competent from the order granting it and makes no difference that consequent to the order a notice was issued to show cause against the injunction (5) Where the Code specifically gives a right of appeal against an order passed under Order 39, rule 2, a person cannot be deprived of his right of appeal merely because the lower Court acts under Order 39, rule 2 by virtue of s. 141 (6). And order granting or refusing an application for interlocutory application is an order under rule 1 and as such is appealable (7). An appeal also lies from an order granting a conditional temporary injunction under Order 39, rule 1 (8). A appeal lies from an order refusing to grant a temporary injunction under Order 39, rule 2 read with Order 43, Rule 1 (r) (9). But where the order purports to be passed under Order 151 and it does not appear that the court considered at all the provisions of Order 39, rule 2 an appeal from such order is incompetent (10). An order refusing to discharge an injunction issued under order 39, rule 2 is appealable (11).

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(1) C. P. Code s. 2.
(2) C. P. Code s. 96.
(3) C. P. Code Order 43. rule 1 (r).
(4) *Lachmi Narain* v. *Ram Charan*, 35 A. 425 ; *Harilal*, v. *Prayag Ram*, 18 C. L. J 39=17 C. W. N. 996=19 Ind. Cas. 553 ; *Rahivian* v. *Ganapathi*. 23 M. 513
(5) *Balabha Das* v. *Muhammad Ishaq*, A. I. R 1933 Lah 282
(6) *Mahomed* v. *Mahomed*, 118 Ind. Cas 675=A I. R. 1929 Nag. 273.
(7) *Shambehari* v. *Bisseswardayal*, 83 Ind. Cas. 48=1924 Pat. 169.
(8) *Ganesh Prosad* v. *Dukh Haran*, 66 Ind Cas. 509.
(9) *District Board* v. *Ikhlaque*, A. I. R. 1933 A. 86 ; *Syam Behari* v. *Bisseswar*, 83 Ind. Cas. 48 ; *Mahomed Wazir Aga* v. *Mahomed Gafur*, 118 Ind. Cas. 675=A. I. R. 1929 Nag 273.
(10) *New Delhi Theatres* v *Kailash chand*, A. I. R. 1933 Lah. 73 ; *Hari chand* v. *Durga Devi*, A. I. R. 1934 Lah. 79 ; see also *Monohar* v. *Jainarayan*, A. I. R. 1920 Lah. 436=55 Ind. Cas. 403.
(11) *N. W Ry. Administration* v. *N. W. Ry. Union*, A. I. R. 1933. Lah. 203 ; *Zabadajan* v. *Mahammad*, 15A. 8.

An order staying delivery of property in execution was passed under Order 39, rule 1 after notice. The applicant without filing an appeal applied for dissolution of the order under Order 39, rule 4, and the court appointed a receiver ; *held* that the lower Court had not really varied his original injunction staying delivery though he purported to do so by appointing a receiver. The original order staying delivery remained in full force and was reiterated in the reversed order. Whatever be the scope of Order 39, rule 4, it cannot be that A can appeal against a new reiteration of the original order of injunction when he has failed to appeal against the original order (1). An appeal lies from an order refusing to take action under Order XXXIX, rule 2 (3) for alleged breach of temporary injunction (2). An appeal also lies from an order refusing to set aside an injunction under rule 4 of Order XXXIX (3). But no appeal is competent when order is passed refusing to grant an injunction without serving notice on the defendant (4). Where a Court takes an undertaking from the defendant, it amounts to a temporary injunction, and as such and order refusing to commit the defendant under Order XXXIX, rule 2 (3) for breach of it is appealable (5). An order purported under Order XXXIX, rule 1 is appealable (6). But no second appeal is maintainable against an appellate order (7).

Power of appellate court to interfere with the discretion of the lower court.—Where the discretion exercised by the lower court has been judicially exercised and the facts in the case appear to have been correctly appreciated and are such as demand due consideration, an appeal against the granting of the *interim* injunction should not be entertained (8). Where a court, granting or refusing to grant an *ad interim* injunction, has exercised its discretion judicially, the mere fact that the judge of the appellate court might come to a different conclusion is not sufficient ground for interference (9). But in case of arbitrary exercise of discretion the court can interfere even in second appeal (10).

Revision—The High court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies, thereto and if such subordinate court appears – (*a*) to have exercised a jurisdiction not vested in it by law or (*b*) to have failed to exercise a jurisdiction so vested, or (*c*) to have acted in the exercise of its jurisdiction illegall

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(1) *Gopendra Ramanuja* v. *Vijiarama raju*, A. I. R. 1929 Mad. 803.

(2) *Suppi* v. *Sayid* 39 M. 907 (F. B.) =34 Ind. Cas. 588 ; *Ottaperakhal* v. *Alati*, 27 Ind Cas. 131 ; *Dewan chand* v. *Jhoria Coal*, 66 Ind. Cas. 9=5 Lah. L. J. 142.

(3) *Zabadajan* v. *Muhammad Torib*, 15A 8.

(4) *Luis* v. *Luis*, 12 M. 186.

(5) *Charturbhujdas* v. *Natobar lal*, 134 Ind. Cas. 1165=33 Bom. L. R. 1103.

(6) *Abdul Rahim* v. *Gana path Bhatta*, 23 M. 517.

(7) *Ram chandra* v. *Zanardan* 4 Bom. L. R. 138.

(8) *Trimbakrao* v. *Sampatrao*, A. I. R. 1933 Nag 153.

(9) *Daily Gazette* v *Karachi Municipality*. A. I. R 1930 Sind. 287 ; see also *Jaipal Kumar* v. *Inder*, 26 A. 238 ; *Gobinda* v. *Vijiaramaraju*, A. I. R. 1929 Mad. 803 ; *Umesh* v. *Nibaran*, 19 C. L. J. 710.

(10) *Rambhadra* v. *Ram Sankar*, 27 A. 688.

or with material irregularity, the High Court may make such order in the case as it thinks fit (1). So the High Court can exercise its revisionai jurisdiction only in such cases in which no appeal lies. The word appeal includes the second appeal as well (2). So a High Court can in its revisional jurisdiction revise an order granting a temporary injunction restraining a Hindu from making an adoption (3). In that case pending a suit, the trial court at first gave a temporary injunction, but later on dissolved it. On appeal, the District Judge granted the temporary injunction restraining the defendant from adopting pending the decision of the suit. The defendant having applied to the High Court against the order, a preliminary objection was raised that the application was not competent under s. 115 of C. P. Code, *Held* overruling the objection that the application to the High Court against the order granting the temporary injunction was competent under s. 115 of the C. P. Code, since the order was a "case decided in which no appeal lies" within the meaning of the section.

Cost.—According to section 35 of the C. P. Code the costs of all suits and applications shall be in the discretion of the court. So no hard and fast rule can be laid down as to costs. But the discretion to be exercised by the court must be judicial discretion and must not be exercised arbitrarily (4). Where a plaintiff comes to enforce a legal right and there has been no neglect or misconduct on his part, the court will not as a general rule take away his right to costs (7). The costs of an injunctive order await the event of the cause, and are taxed with the costs of the cause (6). The course of the courts provide for the cost of motions for injunctions in a way most just, by leaving the party moving, if his suit fails, to pay the costs ; and if his suit succeeds, providing for his costs effectually (7). The application for injunction having partly failed and partly succeeded, no costs were given on either side (8). If parties applying for an injunction *ex parte* do not state their case fully and fairly they will have to pay the cost even if successful (9). Where the general merits of a plaintiff's bill, praying an injunction to restrain an infringement to the plaintiff's copy right, have not been displaced by the defence, the plaintiff will be entitled to his costs for bringing such cause to a hearing to obtain a perpetual injunction after an *interim* injunction has been obtained to such cause (10). Where the plaintiff is entitled to have the injunction made perpetual, the defendant will have to pay the costs of the suits, howewer trivial the subject matter may be, unless, after the interlocutory injunction was granted, he tendered the costs up to that time (11). But a plaintiff may be deprived of his cost by his mis-

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(1) S. 115 of the C. P. Code.
(2) *Tirupati* v. *Vissam*, 20 M. 155 ; *Mathura* v. *Umesh*, I. C, W. N. 626, 631.
(3) *Bai Atarani* v. *Deepsing* 40 B. 86=17 Bom. L. R. 1047.
(4) *Bhogobati* v. *Mahomed Ali*, 7 C. W. N. 647.
(5) *Cooper* v. *Wittingham*, 15 Ch. D. 504 Jessel M. R ; cited in Kerr on Injunction p, 36.
(6) Anon, 2 Moll. 327.
(7) *G. W, Ry.* y. *Oxford etc. Ry.*, 5 De G & Sm. 437.
(8) *Rochdale Canal Co.* v. *King*, 22 L. J. Ch. 604.
(9) *Holden* v. *Waterlow*, 15 W. R. 139.
(10) *Mayhew* v. *Maxwell*, 3 L. T. 847.
(11) *Fredilia* v, *Weller*, 2 Russ. & M. 247.

conduct (1). A party guilty of breach of an injunction through mistake will not be committed, but will have to pay the cost of the application bringing that breach under the notice of the court (2) A defendant, whose servant has committed a breach of an injunction of the court, but to whom personally no blame attaches, is liable to pay the costs of a motion for committal (3).

Where on a suit for injunction, the plaintiff is only entitled to damages, but no damage was awarded by the lower court, the Appellate court passed a decree against the defendant and awarded the plaintiff a nominal damage with costs of appeal (4). The plaintiffs sued alleging certain windows in their house to be ancient windows and complaining that a building in course of erection by the defendant would, when completed according to the building plan, obstruct light through the said windows. In his written statement the defendant denied that the plaintiff's windows were ancient and the plaintiffs were entitled to the light and air as an easement. At the time of filing his written statement the defendant paid into court the sum of Rs. 200, which in his writen statement he stated was more than sufficient to compensate the plaintiffs for any damages they might sustain and which he (defendant) paid in without prejudice to the contentions but for the sake of peace and to avoid litigation. At the hearing the plaintiffs abandoned their claim for injunction, but insisted that they were entitled to more than Rs. 200 as damages. The court found that the plaintiff's windows were ancient, but the Rs. 200, paid into court was sufficient damages. It, therefore, ordered that the defendant should pay all the plaintiff's costs up to the date at which the Rs. 200 were paid into court, and as to their subsequent costs that the defendant should pay three-fourths of the plaintiff's subsequent costs and the plaintiff should pay the defendant one-fourth of the defendant's subsequent costs. The court offered to simplify its order by directing that the defendant to pay all the costs of the plaintiffs up to the date of paying Rs. 200 into court and half the plaintiff's taxed costs subsequent to that date. The defendant appealed, contending that under Order 24, r. 4 of the Civil Procedure Code, the plaintiffs should have been ordered to pay all the defendant's costs subsequent to the payment into court. *Held* that the suit was not one to recover a debt or damages, and therefore, Order 24, rule 4 did not apply. That being so the Judge had full discretion under s. 35 of the C. P. Code to apportion the costs, and the court of appeal would not interfere with that discretion (5).

Court fees.—In a suit to obtain an injunction, the plaintiff shall state the amount at whioh he values the relief sought (6). But relief should not be arbitrarily valued (7). In the above case the court observed: "It was

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(1) *Fielden* v. *Cox*, 22 T, L. R. 411; *King* & *Co.* v. *Gillow*, (1905) 2 Ch. 7, *Rush* v. *Lucas*, 79 L. J Ch. 174.

(2) *Newman* v. *Rothschild*, 13 L. T. 399.

(3) *Rant zen* v. *Rothschild*, 13 L. T. 399.

(4) *Collianji* v. *Narsi Tricum*, 19 B. 764.

(5) *Luxumonana* v *Moroba*, 21 B. 502.

(6) Court fees Act (VII of 1870) s. 7 (iv).

(7) *Rajkrishna* v. *Bepinbehary*, 40 C. 245 see also *Harichand* v. *Jiwan Mal*, 65 P. L. R. 1903.

pointed out by this court in the case of *Umatul Batul* v. *Nanji Koer* (1), that in cases falling under section 7 (iv) of the Court fees Act, although the plaintiff is to state the amount at which he values the relief sought, the Legislature never intended that the plaintiff should be at liberty to assign any arbitrary value and thus be free to choose capriciously the *forum* of trial or appeal. The same view was taken in *Dayaram Jugjivan* v. *Gordhan Das Dayaram* (2), and is implied in *Boidya Nath Adya* v. *Makhanlal Adya* (3). In the case before us, there is no room for controversy that the prayer for injunction has been arbitrarily undervalued. The plaintiff contends that he is the sole shebait of the idol *Lakhi Barahu Jiu*, and is entitled, as such, to exclusive possession of the disputed properties, on behalf of the idol. He further contends that the principal defendant has been improperly placed in joint possession of the endowed properties under an erroneous order of the Revenue authorities made on the 6th May 1908. If he succeeds in these contentions, he will obtain exclusive possession of the endowed properties, of which according to his allegation he was in joint possession at the date of the commencement of the suit. The value of the prayer for injunction, therefore, is the value of the relief claimed by the plaintiff, and upon the facts stated that value, as estimated by the plaintiff himself, is Rs. 11,005. The plaintiff is, therefore, bound to pay *ad valorem* court-fees upon the plaint and memorandum of appeal, on the basis of the value of the relief claimed of Rs. 11,005. The court fees payable upon Rs. 11,005 is Rs. 520 ; but the plaintiif has paid only Rs. 75 ; he is!thus liable to pay the difference of Rs. 445, both upon the plaint and the memorandum of appeal ; he is a accordingly directed to pay court fees to the extent of Rs. 890 within three weeks from this date. If the amount is paid, the appeal will be heard." But in some cases it has been held that in a case like this it is not the duty nor is within the power of the court to ascertain the value of the property for the purpose of jurisdiction, but it should accept the value of the relief stated in the plaint, both for the purposes of court fee and for determining the jurisdiction (4). In a later case of the Calcutta High Court (5), the court observed : "The claim for an injunction must be treated as a payer for consequential relief. This is amply supported by authority : See *Fulkumar* v. *Ghaneshyam Misser* (6), *Harishanker* v. *Kali Kumer* (7), *Mufti Jelaluddin* v. *Shaharoolla* (8), *Manohor* v. *Bawa* (9), *Raghunath* v. *Gangadhar* (10), *Sardar Singji* v. *Ganapat Singii* (11), *Golab Singji* v. *Lakshman Singji* (12). The case of *Zinnat-unnessa* v. *Girindranath* (13)

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(1) 11 C, W. N. 705=6 C. L. J. 427.
(2) 31 B. 73.
(3) 17 C. 680.
(4) *Hari Sanker* v. *Kali Kumar*, 9 C. W. N. 690=32 C. 734 , see also *Sardar Singji* v. *Gunpat Singji*, 17 B. 56, *Bai Varunda* v. *Bai Managavi*, 18 B. 207, *Golab Bai* v. *Jiwani Ram*, 2A. 320 ; *Sheo Devi* v. *Tulsi Ram*, 15 A. 378 ; *Velu Goundan* v. *Kamar Velu*, 20 M. 289.
(5) *Bibi Umatul* v. *Nanji Kouer* 11 C. W. N. 705.
(6) 31 C. 511.
(7) 32 C. 734.
(8) 15 B. L. R, Ap. 1=22 W. R. 422.
(9) 2 B. 219.
(10) 10 B. 60.
(11) 17 B. 56.
(12) 18 B. 100.
(13) 30 C, 788.

is not really approved to this view, as the only prayer in the suit was for a declaration that a certain decree was ineffectual and inoperative against the plaintiffs ; the plaintiffs asked for a declaratory deeree and did not ask for any consequential relief. As at this stage the case was brought on appeal to this court, no question could be raised as to whether a suit for mere declaration without consequential relief could be maintained under the provisions of section 42 of the Specific Relief Act.....In *Baidyanath* v. *Makhanlal* (1) it was lasd down by *Sir Comer Petharam C. J.* and *Mr. Justice Banerji* that in cases falling under section 7, subsection iv of the Court Fees Act, although the plaintiff is to state the amount at which he values the relief sought, the legislature never intended that the plaintiff should be at liberty to assign any arbitrary value and thus be free to choose the court in which he should bring his suit. ... In our opinion this view is unquestionably well founded and, as has been shown above, it is supported by the history of the section. The same view has been adopted in the case of *Hari Chand* v. *Jiwan Mall*, (2)." It is difficult to reconcile the two sets of authorities (3). In a suit brought for the purpose of obtaining a declaration of title regarding certain land and a perpetual injunction restraining the defendant from interfering in any way with the construction which the plaintiff desired to erect on his land, the court fee payable for the relief by way of injunction is regulated by s. 7 (4) (d) of the Court Fees Act read along with s. 8 of the Suits Valuation Act, according to which the value for Court Fees and value for jurisdiction shall be the same (4). A suit for injunction was valued at Rs. 4000 for purposes of jurisdiction and at Rs. 110 for court fees. The suit was dismissed with cost. On a question arising as to the pleader's fee payable, held that the valuation for the purposes of Court Fees should under s. 8 of the Court Fees Act determine the valuation for purposes of jurisdiction, that the court below ought to have asked the plaintiff to restate his value and as he did not do so it must be taken to have accepted the valuation of Rs. 110 as correct. Consequently pleader's fee was allowed on Rs. 110 only (5). If the plaintiff makes an absurd and outrageous misrepresentation as to the value of his suit under s. 7 (4) (c) (d) of the Act in order to have it tried by some particular court, the court can interfere with his valuations by invoking its powers under s. 15, C. P. Code (6). According to s. 7, Cl. 4 (c) and (d), the amount of the fee is to be computed according to the amount at which the relief sought is valued in the plant, provided valuation is not arbitrary—not under valued or evades payment of proper court fees—

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(1) 17 C. 680.

(2) 4 P. L. R. 255 ; but see, *Rai Charan* v. *Kunja Behari*, 46 Ind. Cas. 884 ; *Gobinda* v *Hemaya*, 22 Bom. L. R. 1450 ; *Dongersi* v. *Municipal Committee*, 116 Ind. Cas. 908=A. I. R. 1929 Lah. 566 ; *Rajendra Baksh* v. *Bahu Rani*, 107 Ind. Cas. 330=A. I. R. 1928 Oudh. 260 ; *Lakhmi* v. *Dropti*, 19 Ind. Cas. 859=232 P. L. R. 1913.

(3) *Sarat Chandra* v. *Sarnomoyee*, 36 Ind. Cas. 615.

(4) *Bachhan* v. *The Municipal Board of Mirzapur*, 48 A. 412=94 Ind. Cas. 951=22 A. L. J. 478=A. I. R. 1926 A. 423.

(5) *Amirchand* v. *Hakim Ali* 69 Ind. Cas. 577.

(6) *Rajendra Baksh* v. *Mt. Bahu Rani*, 107 Ind. Cas. 330=A. I. R. 1928 oudh. 260.

and it is for that purpose necessary to look to the substance of the allegations made and of the reliefs sought for. The value of the relief is its value to the plaintiff and not the value of the property involved, and therefore, the value of the injunction to the plaintiffs is really the value at which the injury to the plaintiff should be assessed (1).

Limitation.—The period of three years is fixed for a suit to restrain waste (2). Such suits must be instituted within three years from the time when the waste begins (3). The period of limitation applicable to a suit for damages for infringing a trade-name or a trade-mark—a trade-name or mark being exclusive privilege—is contained in article 40 of Schedule I to the Limitation Act. In a suit for an injunction to restrain the defendant from using a trade-name and from infringing the plaintiff's trade-mark, it appeared that the plaintiff had taken no action beyond sending a notice to the defendant and that he had stood by for five years before coming forward with a suit: *Held*, that, in the circumstances, the plaintiff was not entitled to the injunction, vide section 56 (h) of the Specific Relief Act (4). In a suit for perpetual injunction to restrain the defendant from preventing the plaintiff from entering a certain house it was alleged that the defendant had been in exclusive possession for more than six years before the suit: *Held*, that Limitation Act, Sch. II, art. 120, applied to the suit which was therefore barred (5). A suit for a perpetual injunction against the defendant to remove the water spout from its position and restraining them from keeping it in the same place in future is clearly governed by Art. 120 and in such a case there is a fresh cause of action accruing from day to day (6). Where the plaintiff sued the defendants for a mandatory injunction directing the latter to remove an encroachment alleged to have been made by him on a public road in a village by erecting *thara* thereon, *Held* that the suit was governed by Art. 120 and not by Art. 32 of the Limitation Act (7). The notion that article 32 applied only to cases *ex-contractu* cannot be regarded as correct. When a proprietor in a village sued another for an injunction to compel the removal of various constructions on a part of the village land, held that the case is governed by Article 32 and not by Art 120 of the Limitation Act (8). The mere fact that the owner allowed a person for some years to discharge water on a vacant site is not a ground for refusing him the relief of an injunction against that person restraining him from discharging water (after the plaintiff has built a house) over that site unless a right of easement has been acquired. In a case where a person discharges water over the land, a fresh cause of action accrues from day to day and a suit brought more than

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(1) *Girish Chandra* v. *Secretary of State*. A. I. R. 1928 Cal. 55.
(2) Limitation Act, Schedule I art. 41.
(3) *Ibid.*
(4) *C. G. Varcudos* v. *D. C. Mc Leod*, 51 Ind. Cas. 434.
(5) *Kanakashabai* v. *Muthu*, 13 M. 445; see aiso *Waziran* v. *Babulal*, 26 A. 391.
(6) *Haru Ram* v, *Katyan Ram*, 109 Ind. Cas. 638=10 Lah. L. J. 395.
(7) *Gurdit Singh* v. *Hari Singh*, 29 P. L. R. 308=110 Ind. Cas. 517=A. I. R. 1928 Lah. 792.
(8) *Bhagwana* v. *Bhanwana*, 31 P. L. R. 141=121 Ind. Cas. 186=A. I. R. 1930 Lah. 283.

six years after the construction of *parnala* by the person is not barred (1). Art. 120 does not apply to a suit for an injunction to restrain defendant from using common land for any other purpose than common use (2). In a suit for perpetual injunction directing defendants to remove encroachment made on common land, it is for the plaintiff to prove that the encroachment was made within six years before the suit (3). A suit for injunction directing the defendants to close the windows opend in a new party wall is governed by Art. 120 and must be brought within 6 years of the opening (4). Art. 120 applies to a suit for demolition of construction made on occupancy lands (5).

Where defendant put up beams against plaintiff's wall more than 6 years ago a suit for removal of the beams is barred by limitation (6). Plaintiff claimed to be joint owners of a certain court yard, and alleged that the defendants had erected certain *chappars* or thatched sheds in front of their house and asked for a perpetual injunction to issue to them directing them to remove the said *chappars* or thatched sheds and to restore the court yard to its former condition. *Held* that the suit was governed by Art. 120 and not by Art. 144. Section 23 was inapplicable in as much as the moment the *chappars* were erected the injury complained of and sought to be removed by the issue of injunction was complete and there was no continuing injury within the meaning of the statute (7). Article 120 of the Limitation Act being the residuary article prescribes the period of limitation for a suit for injunction but a *terminus a quo* is the date when the right to sue accrues (8). A suit for injunction to prevent the discharge of water on to the plaintiff's roof is governed by art. 120 and the starting point is the date when the water was last discharged on to the plaintiff's roof (9). A suit by a landlord for the removal of trees planted by a person who had no right to plant them is governed by Art. 120 of the Limitation Act. The suit must be confined to those trees which were planted within six years immediately preceding the institution of the suit (10). A suit for a mandatory injunction to remove the stair case which overhang the land in dispute is governed by Article 120 (11). Where a perpetual injunction has been granted, on each successive breach of it, the decree may be enforced under Art 178 of the Limitation Act, 1877 (12).

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(1) *Haru Ram* v. *Katyana*, A. I. R. (1929) Lah. 88=10 Lah. L. J 395= 109 Ind. Cas. 638.

(2) *Ghulam Mahomed* v. *Abdul Satar*, 89 Ind. Cas. 450=A. I. R. 1925 Lah. 653.

(3) *Chandu* v. *Gajju*, 26 P. L. R. 283=7 Lah. L. J. 228=88 Ind. Cas. 176 =A. I. R. 1925 Lah. 455.

(4) *Imambhai* v. *Rahimbhai*, 49 B. 586=27 Bom. L. R. 503=87 Ind. Cas. 977=A. I. R. 1925 Bom. 373.

(5) A. I. R. 1924 All 814=78 Ind. Cas. 849.

(6) *Kokla* v. *Kalian*, 1923 All. 452 =76 Ind. Cas. 585.

(7) *Lal Singh* v *Hira Singh*, 3 Lah. L. J. 128=60 Ind. Cas. 20.

(8) *Nur Mahomed* v. *Gauri Sankar*, 2 Lah. L. J. 468=56 Ind. Cas. 1003.

(9) *Ibid.*

(10) *Badal* v. *Nageswar*, 52 Ind. Cas. 858.

(11) *Hari Ram* v. *Shivakas*, 42 Bom. 333=20 Bom. L R. 327=45 Ind. Cas. 582.

(12) *Venkatachellan* v. *Veerappa Pillai*, 29 M. 314; *Bhagwan* v. *Sukdai*, 28 A. 300; see also *Haji Ahmed* v. *Pooker Mall*, 15 Ind. Cas. 945=6 L. B. R. 85; *Sadagopa* v. *Krishnamachari*, 12 M. 364.

In a suit for damages in respect of temporary injunction, limitation would run from the date when the temporary injunction was dissolved by the decree granting the perpetual injunction, and such suits are governed by Article 42 of the Limitation Act, Sch. I (1).

The holder of a mortgage decree having applied for execution thereof, the judgment debtor's son claiming a share in the mortgaged property, obtained an injunction restraining the sale of such share in execution. The suit of the son having since been withdrawn, the decree-holder applied, more than three years from the date of the first application for execution, to execute the decree by sale of the whole property. *Held* that the latter application was a continuation of the first application for execution and that consequently, it is not barred by limitation (2). In execution of a decree certain property was attached by the decree-holder by means of an application made on July 8, 1904. Objection was taken to the attachment which was disallowed on March 10, 1905. This was followed up to April 5, 1905, by a declaratory suit againt a decree-holder. An injunction was also granted on April 6, 1905, whereby the sale of the property in suit was stayed. The suit terminated on June 29, 1907, but the injunction lasted until January 29, 1909. The next application for execution was made on April, 14, 1910. *Held*, if the Limitation Act, 1877 applied, the application for execution was within time, it being governed by Art. 178 (3).

But the Bombay and Madras High Courts have held in some later cases that section 15 of the Limitation Act relates to injunction which stay the institution of suits, and the word suit does not include an application. Therefore the section does not authorise the deduction of time during which an injunction against the execution of a decree was in force, in computing the period of limitation within which an application may he made for the execution of the decree after the removal of the injunction (4). Application more than three years from last application excluding period of injunction restraining execution is barred (5). Where a decree-holder is restrained by injunction from executing the decree or where the decree has ceased to exist having been set aside in a separate suit, the time of injunction or the period for which the decree ceased to exist should be excluded (6).

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(1) *Mohini Mohan* v. *Surendra Narayan*, 18 C. W. N. 1189.

(2) *Guru Deo Narayan* v. *Amrit Narayan*, 33 C. 689; see also *Basanta Lal* v. *Batul Bibi*, 6 A. 23; *Lakmichand* v. *Balam Chandi*, 17 A. 425.

(3) *Ghulam Nasiruddin* v. *Hardeo Prasad*, 9 A. L. J. 540=14 Ind. Cas. 343=34 A 436; see also *Jira Bibi* v. *Majiruddin*, 35 C. L. J. 135=64 Ind. Cas. 849; *Gobinda Nath* v. *Basiruddin*, 34 C. L. J. 163.

(4) *Kalyan Bhai* v. *Ghansham*, 5 B. 29; see also *Rajarathnam* v. *Shevalayammal*, 11 B. 103; but see *Kalepalli* v. *Kalepalli*, 80 Ind. 103=47 M. 641; *Rangarani* v. *Tangavelu*, 42 M. 687=50 Ind. Cas. 38.

(5) *Lal Pasi* v. *Ramsaran Lal*, A. I. R. 1925 Pat. 298; see also *Balwant* v. *Budh Singh*, 42 A. 564=56 Ind. Cas. 1006=18 A. L. J. 642.

(6) *Gulam* v. *Rajkumar*, 6 Pat. 635=102 Ind. Cas. 327=8 Pat. L. T. 770.

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